Golden Fleece Maritime Inc v ST Shipping & Transport Inc [2007] Int.Com.L.R. 08/02

JUDGMENT : Mr Justice Cooke : Commercial Court. 2nd August 2007

Introduction

1. The Claimants are respectively the owners of the vessels Elli and Frixos, which are managed by Liquimar Tanker Management Inc. (Liquimar). At any one time Liquimar manages about 15 oil tankers for the companies which own them, including the Claimants (the Owners).

2. By two time charters on the Shelltime 4 form, as later amended and extended, the Owners chartered their respective vessels to the Defendant (ST) which is a subsidiary of Glencore International AG and part of the Glencore Group. Although originally formed as a chartering company to service Glencore's business, ST now has a much wider presence in the market, and currently operates approximately 140 vessels which are time chartered to it by their Owners. It compares itself to an "oil major" such as Shell or BP in the chartering context and participates in the oil major approval system of tankers, where information is shared amongst participants about the vessels inspected.

3. As expressed by the Owners, the essential issue in this action is which of the two parties, the Owners or ST, should bear the commercial risk of a change in international regulations, the effect of which was to restrict the cargoes that the Elli and Frixos could carry. The regulations in question are Regulations 13F, 13G and 13H, the effect of which, on adoption on 4 December 2003, was to set out requirements for the carriage of fuel oil which were effective as from 5 April 2005, a date which fell some 19-20 months before the end of the two charter periods.

4. The Owners claimed additional hire and declarations of entitlement whilst ST counterclaimed for damages for breach of the charter.

The Charter Parties

5. The Owners let the two tankers, the Elli and Frixos, to ST on 30 May 2003 and 10 August 2004. The two charters are, for material purposes, on the same terms, albeit that the duration, rates of hire and detail of profit share agreements differed. The Elli was initially chartered for a period of six months, with an option to ST to extend for a further six months, exercised on 31 October 2003. By Addendum No. 1, dated 1 June 2004, the Elli charter was extended for a further period, with re-delivery in December 2004 and a profit share agreement was made with a minimum basic rate of hire. By Addendum No. 2, on 10 August 2004, that charter was further extended to *"30 September 2006 plus up to 90 days in chopt declarable latest 31 January 2006"*. On the same day, the Frixos charter was concluded for a period of two years plus thirty days in ST's option. This contained a minimum daily hire rate combined with a profit share in the same form as the Elli charter.

6. By Addendum No 3 dated 27 May 2005 (no copy of which was available), the profit sharing agreement on the Elli was altered to an 80/20 split in Owners' favour, in respect of earnings over $18,000 per day, in consequence of ST entering into a sub charter with Tianbao (Hong Kong) Energy Co. until 15 September 2006 plus or minus 15 days in Tianbao's option. The cargo description clause was on identical terms to that in the head charter, (thus expressly including fuel oil).

7. The Elli was built in 1986, and the Frixos in 1987. The Deadweight Tonnage of each was just over 94,000 tonnes and both had an overall length of 229.732 metres. Each of the vessels was described in its charter party as including a "double-side" which, without anticipating the issue which later arose in that connection, broadly means that each of the cargo tanks was protected on the outside by wing ballast tanks which formed a "double-side", thus protecting those tanks in the event of any collision and reducing the possibility of a breach of those tanks and consequent spillage of their contents. Each vessel had seven such cargo tanks between frames 85-49. The cargo tanks were covered by wing ballast tanks extending along the same frames, but aft of the cargo tanks were two slop tanks, used to carry cargo or to receive and retain cargo residues before being pumped ashore. These slop tanks were also protected by ballast tanks at the side for the vast majority of their length, but a small part, in the aftmost section of each of the two tanks, amounting to about 2.6 metres of the vessel's overall length of just under 230 metres, was protected on the outside by bunker fuel oil tanks. It is common ground that the vessels were not "double-hulled" but it appears that everyone involved in the Owners' and ST's camps regarded them as being "double-sided", despite the small overlap where there was a bunker tank protecting the slop tank, as opposed to a ballast tank doing so.

8. The essential terms of the charters were as follows:-

"1. At the date of delivery of the vessel under this charter

(a) ….

(b) she shall be in every way fit to carry crude petroleum and/or its products; crude and/or dirty petroleum products always within vessels natural segregation, excluding lubes/casingheads/cbfs

(c) she shall be tight, staunch, strong, in good order and condition, and in every way fit for the service, with her machinery, boilers, hull and other equipment (including but not limited to hull stress calculator and radar) in a good and efficient state …

…

(g) she shall have on board all certificates, documents and equipment required from time to time by any applicable law to enable her to perform the charter service without delay

(h) she shall comply with the description in Form B appended hereto, provided however that if there is any conflict between the provisions of Form B and any other provision, including this Clause 1, of this charter such other provision shall govern …

3. (i) Throughout the charter service Owners shall, whenever the passage of time, wear and tear or any event (whether or not coming within Clause 27 hereof) requires steps to be taken to maintain or restore the conditions stipulated in Clauses 1 and 2(a), exercise due diligence so to maintain and restore the vessel.

…

(iii) If the Owners are in breach of their obligations under Clause 3(i) Charterers may so notify Owners in writing: and if, after the expiry of 30 days following the receipt by Owners of any such notice, Owners have failed to demonstrate to Charterers' reasonable satisfaction the exercise of due diligence as required in Clause 3(i), the vessel shall be off-hire, and no further hire payments shall be due, until Owners have so demonstrated that they are exercising such due diligence.

4. Owners agree to let and Charterers agree to hire the vessel for a period of 6 months in Charterers option further 6 months +/- 15 days Charterers option applicable to final period. Option for the second period to be declared by the Charterers 45 days prior to expiry of previous charter period. commencing from the time and date of delivery of the vessel, for the purpose of carrying all lawful merchandise crude and/or dirty petroleum products including fuel oil, lswr, cbfs, condensate, etc, maximum three grades within vessels natural segregation. In case of heat cargoes vessel to maintain loaded temperature maximum 135 deg f max loading temp 165 deg f. (subject always to Clause 28) including in particular in any part of the world, as Charterers shall direct, subject to the limits of the current British Institute Warranties limits and any subsequent amendments thereof. Notwithstanding the foregoing, but subject to Clause 35.

….

39. Owners warrant they are member of ITOPF.

SPECIAL PROVISIONS:
1. LOA: 229.732 M
SLOPS: 3465 CBM
DOUBLE SIDE: YES
SBT: YES

…

4. TRADING: WORLDWIDE ALWAYS WITHIN BRITISH INSTITUTE WARRANTY LIMITS INCLUDING US…

…

52. <u>ELIGIBILITY & COMPLIANCE</u>

Owners warrant that the vessel is in all respects eligible under application conventions, laws and regulations for trading to and from the ports and places specified in Clause 4 of the Charter Party and that she shall have on board for inspection by the authorities all certificates, records, compliance letters and other documents required for such services, including, but not limited to, a U.S. Coast Guard Certificate of Financial Responsibility (Oil Pollution) and a certificate required by Article VII of International Convention on Civil Liability for Oil Pollution Damage of 1969, as amended.

Owners further warrant that the vessel does, and will, fully comply with all applicable convention, laws, regulations and ordinances of any international, national, state or local government entity having jurisdiction including, but not limited to, the U.S. Port and Tanker Safety Act, as amended, the U.S. Federal Water Pollution Control Act, as amended, MARPOL 1973/1978 as amended and extended and SOLAS 1974/1978/1983 as amended and extended and OPA 1990.

In the interest of safety, the Owners will recommend that the Master observes the recommendations as to traffic separation which are issued from time to time by the International Maritime Organisation (IMO) or as promulgated by the state of the flag of the vessel or the state in which the effective management of the vessel is exercised.

Any delays, losses, expenses or damages arising as a result of failure to comply with this Clause shall be for the Owners' account and the Charterers shall not be liable for any delay caused by the vessel's failure to comply with the foregoing warranties.

…

<u>FORM B</u>

Shelltime 4 – Form B to be included in this Charter Party.

The Owner shall arrange to deliver the following documents twenty one (21) ~~days prior to delivery~~ as soon as possible after fixtures concluded:

Form B (latest edition)

General Arrangement and Capacity Plans including Deadweight Scale."

9. Addendum No. 2 to the Elli Charter contained a new provision for a minimum rate of hire of $18,000 to be payable monthly in advance, with an additional profit sharing arrangement. Profit share was to be payable monthly in arrears on a 50/50 basis but if ST failed to use all of the original 90 days following 30 September 2006, then for each day less than that, ST was to pay the $3,000 per day. The relevant wording was as follows:-

"Profit share to be based on PLATTS average monthly rates for the following routes….

(a) 80,000 MTS NHC Rastan/Singapore 60% (PLATTS 80 AG/FE)

(b) 80,000 MTS NHC Singapore/Chiba 40% (PLATTS 80 Indo/Japan)."

10. It was common ground that this provision was based on the Shell charters of the two vessels prior to their entry into the charters with ST. The addendum referred to a profit share calculation between Shell and the owners, as being provided to ST. The Frixos charter contained a profit-sharing agreement in the same terms.

11. The parties agreed at the trial that profit share calculations should be made on the basis of the charter party provisions for speed and consumption calculations, at specified bunker prices, with a 5% allowance for steaming time and four days in total for loading and discharging.

12. It was again common ground between the parties that the two routes from the Arabian Gulf (AG) to the Far East (FE) and the Indo/Japan route were chosen because this was the area in which the ships were expected to operate. Whilst there was no exclusion of trading to the USA or to Europe it was Mr Papadimitriou's contention that, so far as he was concerned, the vessels were chartered for business East of Suez. ST's evidence was that the primary intention was to trade out of the Arabian Gulf to the Far East, and there to seek some element of "backhaul" cargo to get back to the Arabian Gulf by, for example, fixing the vessel for voyages from Vietnam to Singapore or Malaysia to India.

13. The Frixos was redelivered out of its charter at 2200 hrs on 15 December 2006 and ST maintained that the Elli was redelivered at 0900 hrs on 30 September 2006, but this was disputed by the Owners who contended that it was redelivered on or about 5 October 2006. The dispute on this issue has been referred, along with some other issues, to arbitration.

The Regulations

14. The appropriate Class description of these vessels was "SBT/PL" (Segregated Ballast Tanks – Protected Location). They were considered as "double-sided" by the market although, as appears later, the overlap between the bunker tanks and the slop tanks resulted in Lloyd's Classification Society's ("Lloyds") determination that they were *"partially double-sided"* and not double-sided along the whole length of the cargo spaces. As a result of the Regulations, this was a matter of significance.

15. The history prior to the imposition of MARPOL Regulation 13(H) was set out in the report of Mr Jarman, the owner's expert who had spent 33 years with Shell in shipping related activities, including 17 years with direct involvement in the chartering/trading of ships of the Elli and Frixos type, known as Aframaxes. His report included a convenient summary of the history as follows:

"4.1 It has always been recognised that the best way of improving safety at sea is by developing international regulations that are followed by all shipping nations and from the mid-19th century onwards a number of such treaties were adopted. Several countries proposed that a permanent international body should be established to promote maritime safety more effectively, but it was not until the establishment of the United Nations itself that this was realised. In 1948 an international conference in Geneva adopted a convention formally establishing IMO (the original name was the Inter-Governmental Maritime Consultative Organization, or IMCO, but the name was changed in 1982 to IMO).

4.1.1 Under the auspices of IMO, the MARPOL Convention is the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes. It is a combination of two treaties adopted in 1973 and 1978 respectively and updated by amendments through the years.

4.1.2 Until the 1970's, most oil tankers were constructed such that the cargo tanks were an integral part of the vessel's hull, and, furthermore, when the vessel was empty, water ballast was carried in the same tanks that were also used for oil cargoes. The result of such design was that there was a risk of pollution of the sea from "operational" reasons (water washing the tanks in between oil and ballast water carriage) and "accidental" reasons through rupturing of the vessel's hull from either a collision or grounding when the vessel was laden. Such vessels would have been regarded as "single-skinned" or "single-hulled".

4.1.3 To reduce these risks regulations were introduced to cover operational risks for existing tankers ("load on top" and "crude oil washing") and, more relevant to this dispute, new tanker design. Initially new tankers were required to have dedicated separate water ballast tanks (which were never used for oil carriage). The 1973 MARPOL Convention (Annex I) Regulation 13 required segregated ballast tanks on new tankers over 70,000 deadweight tonnes and the 1978 Convention extended this to new crude oil ships over 20,000 tonnes. Such tankers were referred to as SBT (Segregated Ballast Tanks) vessels. The dedicated ballast tanks were spread throughout the vessel to maintain trim/stability. Such designs greatly assisted the reduction of pollution from "operational" reasons but did not address the collision and grounding pollution risks.

4.1.4 A development in design followed and the "segregated ballast tanks" were placed along each side of the vessel such that the oil cargo was carried in tanks in the centre of the vessel and ballast was carried in tanks at the side of the vessel, so-called "wing tanks". Such vessels were described as "double-sided" vessels and the FRIXOS/ELLI are examples of such a design. In the 1980's Shell also built 5 ships of a similar design. This design meant that when the vessel was carrying an oil cargo the wing ballast tanks were empty and therefore in the event of a collision it was more likely that only the wing tanks would be holed and the centre tanks, containing the oil, would stay intact. Such a design was like having a double wall around the oil cargo. It was usual for these ships to have their class description as SBT/PL (Segregated Ballast Tanks-Protected Location).

4.1.5 Finally, the logical step was taken in tanker design in the late 1980's when vessels were built such that the oil cargo tanks did not form any part of the ship's hull and were completely protected from the sea on both sides and the bottom. Such vessels were referred to as "double-hulled" vessels and could withstand collision or grounding with a considerable reduction in the pollution risk. The amendments to 1973/1978 MARPOL

Conventions introducing double hulls were contained in Regulation 13F – prevention of oil pollution in the event of collision or stranding. The amendments were adopted in March 1992 and entered into force in July 1993. Regulation 13F applied to new tankers – defined as delivered on or after 6 July 1996 – while existing tankers must comply with the requirements of 13F not later than 30 years after their date of delivery.

4.1.6 Of course it is well known in the Shipping Industry that, following the Exxon Valdez disaster in Alaska in 1989, the USA unilaterally sought to ban single hulled tankers. The Oil Pollution Act 1990 (OPA1990) addressed this by promoting the use of double hulled tankers in US waters although this legislation allowed for the phase out of single hull.

4.2 On 12 December 1999 the 37,238-dwt tanker "Erika" broke in two in heavy seas off the coast of Brittany, France, while carrying approximately 30,000 tonnes of heavy fuel oil. Although the crew were saved, some 14,000 tonnes of oil were spilled and more than 100 miles of Atlantic coastline were polluted. Following this accident there was strong feeling within the EU that such cargoes should only be carried in double-hulled ships even though such a policy would be stricter than MARPOL, which most EU countries were signatories to. After considerable industry/government discussion and lobbying the EU view prevailed. From 21 October 2003 there was an absolute bar on carriage of heavy grades of oil within EU ports or terminals on vessels that did not have a complete double hull as defined by MARPOL 73/78, Annex 1, Regulation 13F or 13G(1)(c) or 13H(1)(b) except for certain ice-Class strengthened vessels. This was pursuant to EU Regulation 417/2002 dated the 18 February 2002, amended by Regulation 1726/2003 dated 22 July 2003, which took effect on 21 October 2003 (see Appendix 7 to this report for full texts of Regulations and Journal).

4.3 Of course, concurrent with the EU actions, the IMO were working to unify the MARPOL regulations with the EU ones. Following the "Erika" disaster, proposals were submitted to the Marine Environment Protection Committee (MEPC) to accelerate the phase-out of single-hull tankers contained in the 1992 MARPOL amendments. The amendments to Regulation 13G in Annex 1 of MARPOL 73/78 were adopted by the MEPC's 46th session in April 2001. The "Prestige" tanker incident in November 2002 gave impetus for implementation of EU Regulations and further calls for changes to MARPOL 73/78. The MEPC, at its 49th session in July 2003, agreed to an extra session of the Committee, to be convened in December 2003, to consider the adoption of proposals for an accelerated phase-out scheme for single hull tankers, along with other measures including an extended application of the Condition Assessment Scheme (CAS) for tankers. The MEPC – 50th session: 1 and 4 December 2003 adopted Regulation 13(H) to enter into force on the 5 April 2005."

16. Regulation 13H applied to all oil tankers of 600 tonnes deadweight and above, which carried "heavy grade oil" as cargo. "Heavy grade oil" was defined to include both crude oils and fuel oils which had a density at 15°C higher than 900 kg/m^3, or, in the case of fuel oils only, a kinematic viscosity at 50°C higher than 180 mm^2/s. Also included were bitumen, tar and their emulsions. The effect was to exclude most crude oil from the definition but to include all kinds of commercially traded fuel oil. It was common ground between the parties and their experts that the effect of Regulation 13H, when read with the requirements of Regulation 13F, was that fuel oil cargoes could only be carried in double-hulled vessels after 5 April 2005, subject only to the exemptions which arose as a result of Regulation 13H (5), (6) and (7).

17. Regulation 13H (5) and (6) read as follows:-

"(5) In the case of an oil tanker of 5,000 tons deadweight and above, carrying heavy grade oil as cargo fitted with only double bottoms or double-sides not used for the carriage of oil and extending to the entire cargo tank length or double hull spaces which are not used for the carriage of oil and extend to the entire cargo tank length, but does not fulfil conditions for being exempted from the provisions of paragraph (1)(b) of this regulation, the Administration may allow continued operation of such a ship beyond the date specified in paragraph (4) of this regulation, provided that:

(a) the ship was in service on 4 December 2003;

(b) the Administration is satisfied by verification of the official records that the ship complied with the conditions specified above;

(c) the conditions of the ship specified above remain unchanged; and

(d) such continued operation does not go beyond the date on which the ship reaches 25 years after the date of its delivery.

(6) (a) The Administration may allow continued operation of an oil tanker of 5,000 tons deadweight and above, carrying crude oil having a density at 15°C higher than 900 kg/m^3 but lower than 945 kg/m^3, beyond the date specified in paragraph (4)(a) of this regulation, if satisfactory results of the Condition Assessment Scheme referred to in Regulation 13G(6) warrant that, in the opinion of the Administration, the ship is fit to continue such operation, having regard to the size, age, operational area and structural conditions of the ship and provided that the operation shall not go beyond the date on which the ship reaches 25 years after the date of its delivery."

18. Even if exemptions applied, Regulation 13H(8)(b) allowed a party to the Convention to deny entry of oil tankers, operated in accordance with the exemptions of paragraphs 5 or 6 of the Regulations, into the ports or onshore terminals under its jurisdiction. Whilst, in the period leading up to the Regulations, there was uncertainty as to how the Regulations would operate and what attitude different states might have to them, the general feeling appears to have been that most countries east of Suez would not deny entry of oil tankers, to which the

exemptions of Regulation 13H(5) and (6) had been applied by the "Administration" of the State of the Flag of the vessel in question. In the case of the Elli and the Frixos, the relevant flag state was Liberia.

19. It can be seen that the problem with the Elli and the Frixos, with regard to the Regulation 13H(5) exemption, was that they were fitted with "*double-sides not used for the carriage of oil",* but not *"extending to the entire cargo tank length"*. Although only a small part of the slop tanks were protected by bunker tanks on the outside, as opposed to ballast tanks, and bunker tanks per se did not give rise to a problem under the Regulations, the wording of the rule, if strictly applied, required any cargo tank (including slop tanks) to be surrounded by spaces "*not used for the carriage of oil"*. The presence of the bunker tanks therefore meant that the vessels did not fully comply with the requirements of the Rule. They did not have double bottoms.

20. On 3 May 2005, following various exchanges with the Owners, ST sublet the Elli to Tianbao (Hong Kong) Energy Co Limited for the period up to 15 September 2006 plus or minus 15 days in Tiambao's option. In consequence of the exchanges between the Owners and ST in relation to the impact of such a sub charter on the profit sharing agreement, addendum number 3 to the Elli charter party was concluded, dated 27 May 2005, although apparently concluded prior to the sub charter. Because of the state of the market at the time, ST wanted the profit share arrangement to be altered and to be based on the actual proposed sub time charter rate, rather than the market rate in accordance with the Platts provision in addendum 2. After negotiation, agreement was reached to vary the existing profit share arrangement on the Platts basis, so that the Owners took 80% of profits and ST 20%.

21. A copy of this charter was sent by ST to the Owners and on two occasions after 5 April 2005, when the new MARPOL regulations came into force, the Frixos, to the knowledge of the Owners, but not of ST (and apparently not of the Master), unlawfully carried fuel oil under that sub- charter. (So also did the Elli.) A further loading of fuel oil on the Frixos then took place at Bourgas and the Owners obtained a one voyage dispensation for that carriage from the Administration of the state of the vessel's flag, on the basis that work would be done to the vessel at the end of the voyage to comply with the new Regulations for the carriage of such a cargo. It was at Bourgas that ST (and, it appears, the Master) became aware of the inability of the two vessels to carry fuel oil under the new MARPOL Regulations.

22. During this period under the sub charter, the Owners sent various messages to ST for onward communication to sub-charterers, or directly to the latter's agents at the loading ports or disports, which were misleading in their content, with either express or implied assurances of the vessel's ability to load and carry Heavy Grade Oil or fuel oil under MARPOL and particularly under Regulation 13H(5). Whilst copies of the Liberian certificates were sent to ST with emails, which, if carefully studied would have revealed the true situation, the messages were couched in terms which did not alert ST to any problem and did not make it obvious that there was no authorisation from the state of the flag to carry fuel oil. No one at ST discovered this until the vessel arrived at Bourgas. Whilst Captain Apostolou of the Owners was doubtless convinced in his own mind that the vessels should be regarded as double sided, he knew that Lloyds did not agree and that the Administration of the state of the vessels' flag was following Lloyds' views. I find that he did not therefore alert ST to the true position, hoping that he could persuade Lloyds of the error of its ways.

23. Such conduct, whilst it does no credit to the Owners, is not relevant for the purposes of construction of the charter. The inability of the Elli to carry fuel oil led, however to the termination of the sub-charter by Tianbao. It put the vessel off hire from 1730 on 30 August 2005 and redelivered the vessel on 9 September 2005 to ST.

Construction of the charters

24. There was no disagreement as to the principles of construction to be applied to the charter documents. The task of the court is to ascertain what a reasonable person in the position of the Owners and ST would have understood the parties to mean by using the language of the documents against all the admissible and relevant background knowledge which was available to them at the time - see ***Investors Compensation Scheme Limited v West Bromwich Building Society*** [1998] 1 WLR 896 at 912-913. The primary source for understanding what the parties meant by the language which they employed is that language, interpreted in accordance with conventional usage, but without excessive literalism. The same background material that is admissible and relevant in aid of construction of the express terms of the charters may also be admitted in aid of the determination of the existence of an implied term.

25. With regard to implied terms it was common ground that there are essentially two tests - the "officious bystander" test and the "*business efficacy*" test. As to the first the question is whether the implied term contended for is so obvious that it goes without saying, such that any officious bystander would say "of course". The second test amounts to asking whether the contract would be unworkable without the term being implied. The ultimate question is whether the proposed implication is necessary, if the reasonable expectations of the parties are not to be defeated.

26. It is clear, in the context of construction, that evidence of subjective intent and evidence of negotiations is inadmissible.

27. I heard a body of evidence relating to the parties' understanding of the Regulations over the period of the two charters and the way in which this affected their actions. There was evidence, inadmissible for the purposes of construction, of subjective intent and of negotiations. There was also evidence of the background to the conclusion of the charters and the addenda, which I take into account.

28. The relevant background to Addenda 2 and 3 to the Elli charter party dated 1 June and 10 August 2004 and to the Frixos charter of 10 August 2004, I find to be, on the evidence, as follows:-

    i) Both parties appreciated that fuel oil was one of the two main cargoes to be carried under the charter party. The charter provided for the carriage of crude oil and dirty petroleum products. The trading of fuel oil constituted over 80% of the trade in dirty petroleum products.

    ii) Both parties knew that ST had no intention of seeking to trade the vessel to the USA because of the restrictions operating there and the lack of commercial opportunity in respect of single hulled vessels during the phase out period when their use was still permissible.

    iii) Both the Owners and ST knew that, following the oil spill incidents, regulation (EC) No 1726/2003 dated 22 July 2003 had come into effect, accelerating the phasing out of single hull tankers and providing that they could not carry heavy grades of oil within EU waters after 21 October 2003.

    iv) Both parties intended that the vessel be traded East of Suez.

    v) The Arabian Gulf is the main lifting area for crude and fuel oil cargoes in the East of Suez market, as both parties were aware.

    vi) Each knew that the ability to carry fuel oil was central to the vessel's ability to operate out of the Arabian Gulf, East of Suez on the core trade to the Far East.

    vii) Each knew that the vessels were, by reason of their length, suitable for loading at Bandar Mahshahr. Only a small minority of Aframax tankers were capable of so doing and in consequence these vessels had a competitive advantage and would attract a premium for a voyage commencing there. Fuel oil was the prime cargo loaded at that port.

    viii) The ability to carry fuel oil was therefore critical to their ability to operate in the premium fuel oil trade from Bandar Mahshahr.

    ix) Both parties were aware that an inability to carry fuel oil would result in the loss of a significant proportion of available cargo possibilities, would restrict the vessels' trading opportunities and relegate the vessels to a position where they competed with the lower end of the tanker market.

    x) Both parties knew that the IMO had adopted regulation 13H in December 2003, which was to come into force on 5 April 2005.

    xi) Both parties knew that Regulation 13H prima facie had the effect of restricting the types of oil which single hull tankers such as Elli and Frixos could carry. They would not be able to carry the vast majority of commercially traded fuel oils without obtaining a dispensation from their flag state administration.

    xii) Both parties regarded the two vessels as being "double-sided".

    xiii) There was considerable uncertainty as to the way in which the new regulations would be interpreted but there was a common view, espoused by Captain Apostolou of the Owners and Mr Andersen and Captain Sawant of ST, that double-sided vessels would largely be unaffected by the Regulations and would obtain the necessary dispensation. Captain Apostolou was the head of the Fleet Operations Division, the Designated Person Ashore and Environmental Manager of the Owners, whose responsibilities involved ensuring that the vessels' statutory, survey and classification certificates were kept up to date. Mr Andersen was the head of Shipping at ST's office in London, having previously worked in Singapore. He had overall commercial responsibility for the chartering decisions made by ST. Captain Sawant was an operator with ST and was responsible for the day to day operations of a number of chartered vessels, including the Frixos.

    xiv) There was a general view which, again, I find to have been shared by these three people, that the majority of states east of Suez would take a more relaxed approach to the new MARPOL Regulations as they had historically done in the past or would accept any dispensation granted by the Flag State Administration. Some, such as Saudi Arabia, were not party to MARPOL at all.

    xv) The Profit Share Agreement was modelled on the Shell charters of these two vessels, which had preceded ST's charters.

    xvi) Profit Share Agreements of this "closed book" variety, provide for a basic rate of hire which is below market rate and an additional profit sharing arrangement, where the Charterer hopes he can do better than the Platts rate.

29. There was a dispute between the parties as to whether any discussion took place between Mr Andersen and Mr Liddell of the brokers, Capital Shipbrokers LLP, prior to the conclusion of the August addendum to the Elli charter party and the conclusion of the Frixos charter. Mr Liddell saw himself as, not simply the broker for the owners, but as an intermediate broker. There is no doubt however that his primary loyalty was to the Owners since Capital had been their brokers for 15-20 years. The evidence about any such conversation was unsatisfactory.

30. Mr Liddell's evidence, in his statement, was that, at some point prior to the lifting of the "subjects" of the charter of the Frixos in August 2004, on a date he could not identify, he had a conversation with Mr Andersen. In two separate sections of his statement he referred to one or more conversations with Mr Andersen, without being specific as to date. In one part of the statement he said that he "probably" had a telephone conversation with Mr Andersen in which he told him what he had told a representative of Stentex, namely that Shell had been seeking, when negotiating a re-charter of the vessels, a 3 month cancellation clause. Shell wanted this in case its higher management should introduce a blanket policy that single skin ships could not carry fuel oil. In his statement Mr Liddell, in parenthesis, pointed out that the vessels were double-sided. Owners, he said, were unwilling to agree to such a cancellation clause. In a later paragraph Mr Liddell said that he had a short telephone call with Mr

Andersen, in which the latter asked him whether the ships would be able to carry fuel oil after April 2005. Mr Liddell said he did not know and would have to speak to Owners. Having spoken to Mr Papadimitriou, he reverted, telling Mr Andersen that the Owners did not know the answer to the question; to which Mr Andersen responded "OK".

31. Mr Papadimitriou had no recollection of any such conversation with Mr Liddell and said that he would refer such matters to Captain Apostolou. In cross-examination Mr Liddell said, for the first time, that this conversation about the carriage of fuel oil took place the day before the subjects were lifted, although he did not know at what time of day. He took no note of the conversations. It was not, he said, a big point, but it was discussed.

32. In his statement Mr Liddell also mentioned that in January, February or March 2006, he had a heated conversation with Mr Andersen in which the latter told him that he thought Mr Liddell ought to know what he (Mr Andersen) was going to tell ST's lawyers about the negotiations in the summer of 2004. He was going to say that there had been discussions about whether the vessels could carry fuel oil after the new MARPOL Regulations came into force and that Mr Liddell had confirmed that they could. It was on that basis that ST went ahead with the fixtures of the vessels. Mr Liddell had angrily responded to say that this was not what had occurred. He had, the following morning, then told Mr Summerell, a colleague, of this conversation. Mr Summerell's statement confirmed that Mr Liddell had told him of some such conversation with Mr Andersen but in cross-examination he said he could not recall what he had been told about it.

33. In his first witness statement, Mr Andersen said that, at the time of the negotiations in 2004, he would have expected the Owners to have mentioned it, if they considered it likely that the vessel's trading would be restricted under the new regulations. There had been discussion of dry docking within the charter party periods but he did not believe that the new MARPOL Regulation 13H had been discussed or whether the vessels would be able to carry fuel oil after 5 April 2005. In his second statement he referred only to the conversation alleged to have taken place in 2006. He said that he recalled calling Mr Liddell at some point, but could not recall exactly when, and that he could not recall precisely what was said. At that time, in early 2006, he was frustrated because it appeared that a commercial solution to the parties' dispute was not possible and he could not understand why the Owners did not want to do the modifications necessary to gain exemption under regulation 13H(5). He felt let down by Mr Liddell who, in his view, had done little to help solve the problem. He accepted that it was conceivable that, in the heat of the moment, he did suggest to Mr Liddell that the latter had told him that the vessels could carry fuel oil after April 2005 and that he would inform his lawyers about this. It had always been his understanding that the vessels could do so, though he could not now recall whether that had been discussed in 2004.

34. In cross-examination Mr Andersen accepted that he or his team might, at some stage, have asked the question about carriage of fuel oil after April 2005, but could not put any date on it.

35. Both Mr Liddell's and Mr Andersen's evidence should be seen alongside the view expressed in a later email from Mr Liddell to Mr Andersen of 30 March 2005, at a time when the sub-charterers of the Frixos were looking for some documentation showing the status of the vessel for the carriage of fuel oil. In an email of that date, Mr Liddell stated that Liquimar's current view (not guaranteed) was that, from 6 April onwards, the vessels would be able to continue under the exemptions given by Regulation 13G and H, provided that the CAS (Condition Assessment Scheme) work was done to Lloyds' satisfaction at the next intermediate or special survey. Mr Liddell said, in cross-examination, that he wrote this email following a discussion with Captain Apostolou.

36. As I have already found, the view of Captain Apostolou, (and Mr Papadimitriou said that he had no view on the subject and would have referred such an issue to Captain Apostolou) was that, as the vessels were double-sided, the exemption should apply. The view given on 30 March 2005 was expressed in the context of sub charterer's enquiries but, more significantly, following an exchange of emails with Lloyds. Captain Apostolou had sought clarification from Lloyds of Regulation 13H(5), to which Lloyds had responded, on 15 February 2005, to say that the Elli and the Frixos were single hulled tankers provided with Protectively Located Segregated Ballast and that they would be prohibited from carrying heavy grade oil after 5 April 2005. Lloyds drew attention to the need for a vessel to have complete double-sides to be eligible for Regulation 13H(5) exemption. Lloyds distinguished such vessels with complete double-sides from ships which had fuel oil tanks or slop tanks which interfered with the double-sided effect, stating that re-designation of such tanks as void spaces ought to achieve the desired result but that structural modification should not be undertaken (without reference to them).

37. In these circumstances it appears to me to be inevitable that, if any question had been put to the Owners in 2004 about the future carriage of fuel oil after April 2005, the answer which would inevitably have been given would have been along the lines of that given at the end of March 2005. The vessels were seen as double-sided and therefore likely to gain exemption. At the time of negotiations in the summer of 2004, there had been no negative comment from Lloyds and, whilst there was obviously huge uncertainty about how the Regulations would be interpreted and implemented, if the vessels could be seen as double-sided, they would appear to fall within Regulation 13H(5), with the likelihood of a dispensation from the Administration of the state where the ships were registered. If asked the question about the future carriage of fuel oil after 5 April, the likelihood must be, and I so find, that the Owners, with this underlying view would, at the very least, give some intimation of it. I consider it likely that the Owners would not have given any definitive answer and would have said that they did not know (and could not know with any certainty) what the position would be after 5 April 2005 but they considered that the Regulation 13H(5) exemption would apply, because the vessels were double-sided.

38. I find also that some conversation did take place in 2006 between Mr Liddell and Mr Andersen and that Mr Andersen probably said what Mr Liddell set out in his statement. Given the sort of conversation which I find would have taken place in 2004 and/or 2005, it would not be surprising for Mr Andersen to say something of the kind to Mr Liddell.

39. I do not, however, find any of these conversations to be of any assistance as background to construing the charters, nor of any assistance in determining any implication of a term into those charters. There was, as I have found, considerable uncertainty about the interpretation and application of the Regulation. Both parties considered the vessel to be double-sided and likely to gain an exemption under Regulation 13H(5) but this does not affect the nature or the content of the obligations undertaken in the charters, which must be construed upon their own terms. Equally this can have no impact on the "*officious bystander*" or "*business efficacy"* tests. I turn then to the terms of the charters and their construction.

The Language of the Charter Parties

Clause 3

40. The starting point in construing clause 3 of the charters must be to ascertain the meaning of clause 1 to which it refers and which provides that the vessels are to be "in every way fit to carry crude and/or dirty petroleum products". It is common ground that the phrase "dirty petroleum products" in clause 1(b) includes fuel oil, since fuel oil represents at least 80% of the total of such tradable products. Clause 1(c) provides that the vessel shall be "in every way fit for the service" and that service is set out in clause 4, where the purpose of the charter is set forth as the carriage of all lawful merchandise including "crude and/or dirty petroleum products including fuel oil", in any part of the world, as the charter shall direct, "subject to Institute Warranties Limits". By special provision 4 the vessel is to trade world wide, always within such limits but specifically including the US and subject to specific excluded countries.

41. By clause 1(g) the vessel is also to have on board all certificates and documents *"required from time to time by any applicable law to enable her to perform the charter service without delay"*. Once again, this sub-clause is informed by clause 4, which sets out the charter service. Additionally the vessel is to comply with the description set out in Form B, as replaced by the special provisions clause 1, which describes the vessel as double-sided.

42. All of these provisions relate to the condition or status of each of the vessels on delivery under the charter or addendum in question. Furthermore, clause 52 contains, in the first paragraph, another warranty that the vessel is, at the date of the charter "*in all respects eligible*" under applicable conventions, laws and regulations "*for trading to and from the ports and places specified in clause 4 of the charter party and that she shall have on board for inspection by the authorities all certificates…and other documents required for such services"*. That self-evidently refers to the trading of the vessel in carrying the permitted cargoes, including fuel oil.

43. Clause 3 provides for the Owners, in the circumstances there set out, to exercise due diligence to maintain or restore the vessel to the stipulated delivery conditions set out in clause 1. The obligation imposed is specifically, therefore, related to clause 1 and the "fitness", the class status, the certificate status and the description to which that clause refers. Furthermore, the second paragraph of clause 52 provides a continuing warranty on the part of the Owners of full compliance with all applicable conventions, laws and regulations of any international, national, state or local government entity having jurisdiction, specifically including MARPOL 1973/1978 as amended and extended (and the US OPA 1990).

44. In my judgment, if, as at the date of delivery of the Elli or the Frixos under the addendum and charter party of 10 August 2004 respectively, either vessel had, by virtue of MARPOL regulations, been unable to carry fuel oil to any of the places permitted by clause 4 and special condition 4, the vessel would not have been "in every way fit", either for the service defined in clause 4 or for the carriage of fuel oil as a dirty petroleum product. There would then have been a breach of clause 1(b) and 1(c). Equally, if she did not have on board the relevant documents to enable her to load, discharge and carry cargo to such places, there would be a breach of clause 1(g) and if the vessel had not been, on such delivery, truly "double-sided" there would be a breach of clause 1(h).

45. The point is reinforced by the terms of the first paragraph of clause 52 which sets out a warranty for the vessels' eligibility for trading to the ports and places set out in clause 4 (and special condition 4) and the need for the relevant documentation to enable her to do so. Whether that clause applies as at delivery or as at the date of the charter is irrelevant for present purposes but the ambit of the obligation informs the continuing obligation set out in the second paragraph of that clause.

46. A vessel which is not *"legally fit"* to carry a permitted cargo (here fuel oil) cannot properly be described as being *"in every way fit*" to do so. Nor can a vessel be *"in every way fit for the service*", if she is not legally fit to carry a cargo of fuel oil which is part of the specified service. The width of the expression "in every way" is apparent and is not susceptible of restriction without express words elsewhere. The words must mean that the ship, on her delivery, is to be "*seaworthy"* in the widest sense of the word and capable of performing that which she is required to perform under the terms of the charter. The words "*in every way*" in both sub clause (b) and (c) cannot be restricted to the vessel's physical state, as is shown by the terms of the clause itself and a number of authorities relating to the requirement that the ship should have documents on board which are necessary for its performance of the charter service. Legal fitness is just as important as physical fitness and the line between the two is not always easy to draw, especially where the legal incapacity results from the physical characteristics of the vessel.

47. Clause 1(a) of the charter does not relate to the physical condition of the vessel as such but to her classification status. Clause 1(f) requires the vessel to comply with the regulations in force to enable her to pass through the Suez Canal. Whilst the status of the vessel is plainly linked with its condition, the requirements of clause 1 are not solely limited to the physical condition of the vessel as such. Clause 1(g) requires the vessel to have appropriate certificates and documents on board at delivery and clause 52 once again relates to the status of the vessel and its eligibility to trade under applicable laws and regulations. It is therefore impossible to say that clause 3, which cross-refers to clause 1, is limited to the maintenance or restoration of the vessel as a physical entity alone.

48. ***The Madeleine*** [1967] 2 LLR 224, per Roskill J, in particular at page 241, establishes that the lack of necessary certification constitutes a lack of fitness for ordinary cargo service. To the like effect is ***The Derby*** [1985] 2 LLR 325, in which the Court of Appeal found that the absence of an ITF card did not constitute unseaworthiness, but that the words "*in every way fitted for the service*" did involve the requirement that the vessel must carry certain kinds of documents which bear upon her seaworthiness or fitness to perform the service for which the charter provides (see page 331). The nature of the certificates which may be required depends upon the circumstances but includes documents which may be required by the law of the vessel's flag or by the laws, regulations or lawful administrative practices or governmental or lawful authorities at the vessel's ports of call.

49. Here, if the vessel had not, at delivery, complied with MARPOL 73/78 requirements for the carriage of fuel oil to the permitted ports and places, the vessel could not be "in every way fit for the service" nor "in every way fit to carry" the particular form of dirty petroleum product, the carriage of which ST was entitled to require the vessel to effect. Seaworthiness, classically, includes cargo worthiness and a vessel which is not capable of loading a specified charter party cargo would be unseaworthy for the purpose of the charter. Unlike the position in ***The Derby,*** [1984] 1 LLR 635, where, at first instance, Hobhouse J (as he then was), at page 641, found that the trading options of a vessel had to be restricted by her physical characteristics, here the Owners warranted the fitness of the vessel, at delivery to carry fuel oil to most of the world.

50. Additionally, clause 1(g) and clause 52 specifically require that the vessel should have on board such certificates and documents as are needed to carry permitted cargo, including fuel oil. As at the date of delivery, the vessel is to have on board all certificates and documents required from time to time by any applicable law to enable her to perform the charter service and to have available for inspection all such certificates which are required for that service. If, therefore, the vessels did not have appropriate documentation at delivery, to show compliance with MARPOL requirements for the carriage of fuel oil, there would inevitably be a breach of charter.

51. The Owners' argument that clause 1(b) and 1(c) relate only to physical condition of the vessel has therefore to be rejected, as does the argument that clause 1(g) only refers to certificates and documents which relate solely to the physical condition of the vessel.

52. It is in this context that the terms of clause 3 of the charters falls to be construed. This requires the owners to *"exercise due diligence to maintain or restore the vessel*" to the condition stipulated in clause 1, whenever "*any event",* whether or not it is an event which gives rise to an exception to Owners' liability under clause 27, requires steps to be taken for that purpose. That obligation is not in any way limited to the physical condition of the vessel but also covers the documentary position. The words "*any event"* undoubtedly covers a change in MARPOL regulations and the second paragraph of clause 52 constitutes a continuing warranty of compliance with MARPOL 1973/1978 as amended and extended. Absent a frustrating event, the obligations of clause 3(i) and clause 52 require steps to be taken to ensure compliance with MARPOL and fitness, both legal and physical, to carry fuel oil to and from places within the charters' trading limits.

53. The Owners argued that the charters could not be read as requiring them to rebuild the vessel in any way, which was, they said, what was essentially required by Lloyds in order to render the vessel fully double-sided, either by the creation of a void space in the foremost part of the bunker tanks or a void space in the aft part of the slop tanks, so that there was no part of any tank used for the carriage of oil which was unprotected by void of ballast space on the outside. The Owners submitted that the obligation to maintain or restore could not require them to make any alterations to the vessel. The Owners accept that, had the vessel been fully double-sided, it would have been incumbent upon them to exercise due diligence to obtain dispensation certificates under Regulation 13H(5). Thus the Owners accept that the clause requires steps to be taken, as a result of the Regulations, which would previously have been unnecessary. In my judgment, the condition to which the vessel has to be restored, under clause 3, is that of fitness to carry fuel oil or fitness for the service. It is not just the physical state of the vessel as such which has to be restored but restoration of the vessel to the conditions stipulated in clause 1, including fitness to carry fuel oil. I am therefore unable to accept this argument of the Owners.

54. The argument proceeded further, in saying that ST was at all times aware of the physical characteristics of the vessels it chartered and knew of the overlapping slop tanks and bunker tanks. It was vessels with that characteristic that ST hired and no complaint could lie in respect of that feature. The charters could not be construed as requiring alteration of that and the trading options, allowing the carriage of fuel oil to the permitted ports and places, had to be circumscribed by the physical limits of the vessels themselves. In that regard I do not find that ST were aware of the overlap – Captain Morris' evidence was that he did not notice it when inspecting the ships and there was no evidence that anyone picked up on the point on any of the plans which were sent to them. The evidence was that ST's personnel considered the vessel to be double sided, as she was so described in the charter and appeared to all outward appearances to be. There was no obvious feature of which ST, as charterers, should have been aware, to gainsay the charter description which ST was entitled to take at face

value, especially when it is seen that the Owners themselves, with a much more detailed knowledge of their vessels, considered them to be double sided for the purpose of the new MARPOL Regulations.

55. This is not a case of limiting a vessel with known and given characteristics in the carriage of a particular cargo to a particular port (a matter which would probably be catered for by the safe ports provisions in the charter), but a restriction on the total carriage of one of the 2 types of cargo provided in clause 1 of the charter, by reason of MARPOL Regulations and a hidden or unnoticed feature, when the vessel was described in the charter in such a way ("double sides") as to give rise to the expectation of a MARPOL exemption which would enable her to carry that cargo. Because Liberia is a party to MARPOL, no single hulled vessel carrying her flag could lawfully carry fuel oil without a dispensation/exemption granted by her Administration on the basis of Regulation 13H(5).

56. The Owners further argued that the trading options conferred on the charterers in clause 4 were circumscribed by reference to the lawfulness of the cargoes as there described. The nature of the permitted cargoes was, it was submitted, governed by the antecedent adjective "lawful". Thus the only cargoes which the charters could require the vessels to load were those which were lawfully handled under the law of the vessel's flag, the local law of the port of loading and the local law of the port of discharge. Once it became unlawful to carry fuel oil by reason of Regulation 13G and H, the Owners submitted, they were not bound to carry that cargo at all.

57. In my judgment this is turning the obligations of the charter on their head. "*Lawful merchandise*" in clause 4 is directed at cargoes which have characteristics which make them unlawful in themselves. There is no suggestion that fuel oil is, in itself, an unlawful cargo. It is a cargo which may be carried in certain types of ships and the Owners, in clause 1(b) and 1(c) warranted that, at the date of delivery, the vessel was fit to carry fuel oil between the places permitted by the charter. It is to that condition that the Owners must exercise due diligence to restore the vessel in accordance with clause 3(i). Where the unlawfulness in any carriage of a cargo arises from the characteristics of the ship, not the cargo, there is no question of "*unlawful merchandise*". The point is made clear when regard is had to clause 1, testing the argument by reference to a situation where the new Regulations applied at the date of delivery. At that point the warranty of fitness in every way to carry fuel oil and for the service could not be negated by the argument that fuel oil was "*unlawful merchandise",* because this ship was not permitted to carry it (cf Hobhouse J at page 141 in ***The Derby***). Once this is recognised, the obligation in clause 3(i) becomes plain - namely an obligation to take due diligence to restore the vessel to a condition where it is fit to carry fuel oil, whether physically or legally fit.

58. The Owners, as part of their argument that there was no obligation to alter the structure of the vessel, prayed in aid the cost of the modification work which was actually done to the Frixos in December 2006/January 2007, following the redelivery of the vessel under the ST charter party. There was considerable room for debate as to the proper cost which the Owners claim was about $700,000 with detention costs of nearly $440,000. ST maintained that these figures were grossly exaggerated but nonetheless accepted that the cost involved was about $500,000 but with no loss of time, since the work could be done at the same time as other works required, as part of the vessel's classification requirements. The fact that considerable expense was involved does not help the Owners, once it is seen that the obligation to *"maintain*" or "*restore*" is one which relates to the fitness of the vessel and not to its specific physical structure.

59. If the argument is utilised in the context of "*due diligence*", the argument is again ill founded. Whilst the absolute obligation set out in clause 1 is replaced by the qualified obligation in clause 3, "*due diligence*" is equivalent to the common law duty of care and contains no limit on the expense involved in exercising that duty. Due diligence requires the exercising of reasonable care and skill so that, once the Owners become aware of a deficiency or, more accurately, once they should have become aware of a deficiency, the duty to exercise reasonable skill and care to remedy the position arises. There may be some element of latitude about when, where and how the work is done but there cannot be a financial limit to the obligation, unless issues of frustration arise, which is not here suggested. There are many situations where a vessel may suffer a serious breakdown which necessitates substantial repairs or replacement of major parts which can run into millions of dollars. Reasonable steps must be taken within a reasonable time, using reasonable skill and care to put right any deficiency which is identified or which ought to be identified - see ***Snia v Suzuki*** (1924) 17 LLR 78 at page 88, per Greer J. No question of "*proportionality in terms of financial expenditure arises*".

60. I was referred to two US arbitration decisions, the ***Stolt Lion*** 1977 SMA 1188 and the ***Ultramar*** 1981 AMC 1831 which are in conflict. The reasoning in neither is full and the relevant clauses different. The decision in the latter however appears to me to be correct. There, during the course of a time charter for an OBO (a ship which carries ore/bulk cargoes/oil) the US Port and Tanker Safety Act came into force, with the result that oil cargoes could only be carried upon US flag vessels if there was an inert gas system and a segregated ballast tank arrangement or crude oil washing system. The estimated cost of installing these items was $4.8 million in 1981 and the arbitrators held that the Owners were obliged to carry out the work required since otherwise the vessel would not have been an OBO, able to carry oil. I can see no reason why the amount to be spent in restoring the vessel to the condition required by clause 1 is of any relevance, unless issues of frustration are involved.

61. In the context of a charter which requires fitness to carry fuel oil, there is ultimately no question of any improvement of the vessel for charter purposes. The obligation is that of maintaining or restoring the fitness which was required on delivery by virtue of the warranty given in clause 1.

62. Any argument that the Owners did exercise due diligence in seeking to obtain an exemption from Lloyds and the Administration of the state of the vessels' flag, is doomed to failure. The obligation is to maintain or restore the vessel's fitness to carry fuel oil, not simply to obtain an exemption. There is no difference in principle from the situation where ordinary classification work or CAS work has to be done to restore fitness, or certificates have to be obtained for that purpose. The Owners must take steps to do what is required to restore that fitness, and, having failed to obtain the exemption here, by arguing that the vessels were for all practical purposes double sided, they were bound to do the physical work necessary to make them double sided to enable them to carry fuel oil. This, they failed to do during the course of the charters of either vessel, doing the necessary work only to the Frixos at the end of her charter. When they did so, the Owners got the benefit of being able to hire out a tanker capable of carrying fuel oil and crude oil, at a rate which was higher than that which would obtain for a vessel capable of carrying crude oil only. It was that of which ST was deprived in the course of its charters.

Clause 52 and the description of the vessel as having "double sides"

63. The Owners' argument on clause 52 is that the clause was a ST clause incorporated in the charter at its insistence and that it is to be read in a limited manner. The second paragraph is said to contain a continuing warranty of compliance with all applicable conventions, laws, regulations and ordinances including MARPOL 1973/1978 as amended and extended but that this must be read and understood in the context in which it appears and does not amount to a warranty by the Owners that, throughout the charter period, the vessel is to be permitted by MARPOL to carry fuel oil. It is submitted that the Elli and the Frixos comply with MARPOL albeit that they are unable to carry fuel oil cargoes. A tanker is fully compliant with MARPOL, it is said, so long as it complies with all contemporaneous regulations that apply to her, even if its ability to carry particular cargoes has been restricted by MARPOL. This is said to be consistent with the overall scheme of the charter party and the interpretation of clause 4 advanced in relation to "*lawful merchandise*". It is said that the Owners did not promise that it would be lawful for the vessels to load, carry and discharge all cargoes to which the MARPOL convention applied; only that they would comply with the MARPOL requirements that applied to their vessels. Thus, given the vessels' characteristics, the Owners were warranting that they would comply with relevant MARPOL requirements, in not loading fuel oil, but not that the vessels would, under MARPOL regulations, be able to continue to carry fuel oil.

64. This is once again turning the charter obligations on their head. The second paragraph of clause 52 cannot be read in a vacuum. The Owners warranted the ability of the vessels to carry fuel oil as at the date of delivery of the charter (see the reference to "trading"). Clause 3(i) requires restoration to that state. Similarly the first paragraph of clause 52 warrants eligibility under MARPOL for the carriage of fuel oil to the permitted locations set out in the charter, with appropriate documentation to establish that eligibility, whilst the second paragraph of clause 52 warrants the continued compliance with applicable conventions and regulations, including MARPOL 1973/1978 as amended and extended, in the context of the services which the vessel is to perform. Because that service includes the carriage of fuel oil, the second paragraph of clause 52 must be construed as a continuing warranty that the vessel would be able to trade as specified in the charter and that the Owners would comply with any amendments or extensions to MARPOL which might affect such trading, in order to enable the charter services to continue as before.

65. As ST put it in its skeleton argument, *"what matters is not that the vessel is unable to carry all cargoes permitted by MARPOL. What matters is that the vessel is unable to carry all cargoes specifically mentioned in the charter itself. Compliance with MARPOL is in itself a meaningless concept unless it relates to compliance whilst performing the charter party services which include the carriage of fuel oil.*"

66. Furthermore, although the Owners say that the structure and configuration of the vessels were known to ST, when they entered into the charter and relevant addendum, this is nothing to the point even if it had been true. Whilst Lloyds may have regarded the vessels as single skinned for the purposes of Regulation 13H(5), because of the overlap of the bunker tanks with the slop tanks, the vessels were in fact described in the charter as double-sided and it was as such, that compliance with MARPOL was required.

67. This leads on to the description of the vessel as having double-sides, as set out in clause 1 of the special provisions. Here, the Owners have a logical difficulty. If the vessels could properly be described as double-sided, then there was no breach of description in the charter, but it is not open to the Owners to say that all they had to do was, as single skinned vessels, to comply with MARPOL requirements in not carrying fuel oil. It is, however, ultimately the requirement to carry fuel oil, as set out in the warranty of condition on delivery which governs both clause 3(i) and the construction of clause 52. Compliance with MARPOL in the first paragraph of clause 52 relates to the services to be performed, as can be seen from the obligation to have available for inspection "documents required for such services" as well as eligibility for trading (in the permitted cargoes) to and from the ports and places specified in clause 4. Thus the second paragraph of clause 52 must be read in the light of the first and the warranty of continuing compliance must be seen in that context. There can be no compliance with MARPOL where compliance is with the minimum standards which are applicable to a different ship or a different charter party service.

68. In my judgment there was no breach of the description of the vessels as being double-sided in the charter parties which were concluded prior to the entry into force of Regulation 13H(5) on 5 April 2005. A reasonable person in the business of chartering vessels would have understood the vessels to be double-sided before that date, or at least before Lloyds had given any indication that a vessel such as the Elli or Frixos would not be so regarded for the purpose of that regulation.

69. Mr Jarman, a former manager of Shell's Shipping Portfolio Department which was responsible for purchasing vessels and effecting demise and time charters of Shell's world wide oil fleet of some 80 ships, gave evidence to the effect that the two vessels, previously on charter to Shell, were generally regarded in the tanker market as double-sided until MARPOL Regulation 13H came into force. At paragraph 4.1.4 of his report, set out earlier in this judgment, he described the development in design following the 1978 MARPOL Convention whereby segregated ballast tanks were placed alongside each side of the vessel to protect the cargo tanks. The Class description was SBT/PL which, in his view, was a clear indication that the vessels were double-sided. In his experience, the terms "*single-hull/skin", "double-side*" and "*double-hulled*" were widely used in the tanker market without full reference to their specific technical or regulatory meaning, but simply as a general description. He himself regularly used the term "*double-sided*" in referring to the Elli, the Frixos and similar Shell ships. It is also clear that at all times until the effect of Regulation 13H(5) was known, both Owners and ST would use this terminology in relation to these two ships. Although the term did not appear in Lloyds Register of Shipping entries for these two vessels in the years 2003-2004, I conclude that the vessels were regarded, from a practical perspective, as being double-sided and when Captain Morris, on behalf of ST, inspected both vessels in dry dock in December 2004 and March 2005, he specifically described them as having "double-sides", after noting that they were both described as single skinned in the Lloyds Register. Whilst he said he did not notice the overlap between the bunker tanks and the slop tanks, a close examination of the plans which were available to ST would have revealed that overlap. As the extent of that overlap was so small, it appears that no one paid any attention to it and the generic description was considered applicable.

70. Moreover, the evidence is that, even when Captain Apostolou's attention was drawn to the overlap by Lloyds, he found it difficult to accept that this could be a genuine reason for not considering the ships double-sided. He did not, prior to the Lloyds ruling, which he then contested, consider that the small overlap would prevent the operation of Regulation 13H(5).

71. Once Lloyds had made its ruling on these vessels and similar vessels and these rulings became known, there might well be doubt as to whether the vessels, without modification, could be referred to as "*double-sided*" but, prior to that, I do not consider that there was any breach of description in referring to them in that way. It is noteable that ST not only referred to the ships in this way when sub-chartering but only took the point in this action at a very late stage. I take it that this was done for forensic reasons in the context of pointing out the illogicality of Owners position with regard to the argument on clause 52, which was essentially how ST's counsel chose to argue the matter.

Conclusion on Liability

72. I therefore conclude that, once the Lloyds' ruling was known, the Owners were bound to exercise due diligence to restore the vessels to a condition where they could both carry cargoes of fuel oil and to obtain the necessary documentation to enable them to trade in fuel oil between the ports and places permitted by the charter. This they failed to do after being given notice by ST requiring them to do so. They chose to do so, only after the end of the charter in the case of the Frixos and never did so for the Elli. I find that the Owners were thus in breach of both charters.

73. ST have never complained about the problems in trading the vessels to the USA or Europe where the relevant regulations had the commercial effect of rendering use of double-sided vessels to the USA impracticable and prohibiting single hull vessels from carrying fuel oil in Europe at all. Whilst Mr Papadimitriou gave evidence that he thought he had excluded the USA from the charters, there was nothing in the charters themselves which prevented shipments to and from Europe or the USA. In practical terms however, ST was not interested in shipping cargoes to or from such areas and never intended to do so, as revealed by the evidence from both sides and the choice of the two Platts Far East routes for calculation of the profit share agreement. Whilst, therefore, the Owners were technically in breach on delivery of the vessels into the Charters, in failing to provide a vessel which could trade to Europe and possibly to the USA (absent any waiver by ST), no damages were caused thereby and no complaint was made in respect of it.

The Alleged Implied Term

74. This issue only arises on ST's submissions, in the event that the Owners are found not to have been under any obligation to restore the vessels' ability to carry fuel oil. As I have held that the Owners were obliged to do so, this point does not arise. The point argued by ST was that the vessels' ability to carry fuel oil was fundamental to its agreement to enter into the charters of the vessels and to their intended trading of them. In particular ST submitted that its agreement to a profit sharing arrangement and the basis of such profit sharing was conditional upon the vessels' ability to carry fuel oil, without which there would be no commercial basis for the sharing arrangement. In this context ST relied upon the description of the vessels as "*double-sided*", the terms of the charter which included fuel oil as a permitted cargo, the limits of trading clause and the profit share agreement itself, with the specified routes and the Platts formula relating thereto, which included a significant fuel oil element, as accepted by the Owners' expert. The Ras Tanura - Singapore route is an Arabian Gulf - Far East route where a greater percentage (some 70%) of the fixtures in Platts relate to fuel oil carriage rather than crude oil. It was common ground that the voyages chosen for a Profit Share agreement of this kind, would ordinarily tally with the parties' expectations of the general location where the chartered vessel would trade, but not necessarily the specific expected routes.

75. Nonetheless, whilst it was plainly important for ST to be able to trade fuel oil, and, as I have found, the Owners were in breach of clause 3 in failing to maintain or restore the vessels to do so, so that damages are claimable, it is hard to see how there could be an implied term that the profit share arrangement within the charter was conditional upon such carriage, whether or not there was an obligation under clause 3 or clause 52 to put the vessel into a condition for such carriage.

76. As the Owners submitted, there is no need to imply such a term to make the contract work. A restriction on the type of cargoes to be carried, whether or not it gave rise to a breach by the Owners of some other obligation, would not make the charters ineffective, since they could still be performed, as they in fact were. Hire would be payable of something known to be below the market rate, with no room for any profit share, if ST was right. Nor could it be said that the putative implied term is so obvious that it goes without saying, whether or not there was any other relevant breach. An officious bystander would not necessarily say that it was obviously the intention of the parties that the obligation to pay a profit share was conditional upon the vessels being able to carry fuel oil.

77. If I had not found for ST in relation to the breach of charter, I would not have found any implied term of the type for which ST contended. It is even harder to see any basis for an implied term if Owners were, contrary to my conclusions, not bound to put the vessel in a condition to carry fuel oil after the new MARPOL Regulations came into force. I was referred to the decisions in ***Liverpool City Council v Irwin [***1977] AC 239 and ***Phillips Electronique Grand Public SA v British Sky Broadcasting*** [1995] EMLR 472 and the requirement that it must be necessary for such a term to be implied. In ***Phillips*** the Court of Appeal treated the two tests referred to above as cumulative rather than alternative but, however they are regarded, I see no basis for implication here. As I have already held that the Owners were in breach of contract, there is no need, as a matter of business efficacy for any such implication. An officious bystander would say that there was no need for it, as ST had a remedy in damages. If however Owners had not been in breach and not bound to restore the vessels, how could the profit share be negated? There would have been a number of possible solutions, in such circumstances, should it have been suggested, at conclusions of the charters, that some provision should be included to cater for the emergence of a Regulation which precluded the ships from carrying fuel oil to various destinations. On that basis no one solution could be found by the court as an implied term (see ***Phillips Electronique*** at pages 141-143), which is a sufficient basis for rejection of such an implication.

Damages

78. The owners claim their profit share under the two charters, based on the profit sharing agreements. ST sets off its counterclaims for loss of profits which it would have earned if the vessels had been able to carry fuel oil throughout the balance of the charters, from the point at which the vessels could no longer effect such carriage. In circumstances which I need not further detail (to which passing reference has been made earlier in this judgment), but which do not reflect well on Owners, who knew that ST continued to use the vessels to carry fuel oil when they (the Owners) knew that there was no clause 13H(5) exemption, it is accepted that the relevant dates from which any loss of profits claims run are 23 August 2005, in the case of the Frixos, and 30 August 2005 in the case of the Elli. The Frixos was redelivered on 15 December 2006 and there is a dispute about the re-delivery date of the Elli. ST maintain that the Elli was re-delivered at 0900 hours on 30 September 2006 when the Owners took back the vessel and directed her to sail to Singapore, but the Owners maintain that the Elli remained on hire until 5 October 2006. I was unable to see any basis upon which Owners maintained that submission but cannot determine the issue, which has been referred to arbitration. The relevant period, on this basis, for the Frixos is 479.16 days and the relevant period for the Elli, on ST's submission is 395.64583 days. For the purpose of assessing loss I shall assume that ST is correct on the Elli re-delivery date, but an adjustment will have to be made, should this not be the case.

The Elli

79. The Elli, as mentioned earlier in this judgment, had been sub-let and the rate of hire under the Tianbao sub-charter was $28,275 per day. That charter came to an end by reason of the Elli's inability to carry fuel oil so that, as was agreed between the parties, the hire payable under the balance of that charter represented the earnings which ST lost in consequence of what I have held to be the Owners' breach. The figure for such lost earnings under the sub- charter is $11,186,885.84 up to 30 September 2006, plus off hire bunker consumption of $22,803.88. From this has to be deducted the basic hire payable under the charter, which has already been paid and the profit share which is due to Owners by reason of the profit share agreement.

80. The Owners advanced an argument that the charterers had failed to mitigate their loss in relation to the Elli because, when the market fell in January 2006, ST decided to have the vessel cleaned with the consequent loss of time that this involved. The reasons for this were explained in Mr Andersen's and Mr MacLeod's supplementary witness statements.

81. From the beginning of December 2005, Elli was open for fixing on the market for loading in late December. She discharged her previous cargo at Karachi on 4 January 2006 but had no fixture at that date, and so ballasted back to the Arabian Gulf. At the end of December, there were 3 vessels listed as being available to load in the Arabian Gulf on a prompt basis on 28 December 2005 and a further 10-12 vessels coming free in the next 10 days, also looking for their next fixture. This included a number of younger vessels with double hulls which rendered it very difficult for Elli to obtain any fixture in the dirty trade.

82. The problem which faced ST was that, on arrival back in the Arabian Gulf, it was unable to obtain dirty petroleum cargoes to load. The market slumped by about 30% at the end of December 2005 and without the

flexibility to load fuel oil (which would have been a breach of MARPOL, to which Liberia was a party) there was likely to be a considerable wait before any cargo became available. The market not only fell very fast at the end of December 2005, but this turned out to be the start of a 3 month fall in the market, including a 20% fall between mid January and early February. The fall did not bottom out until about May 2006. ST was therefore paying the hire of $126,000 a week for an idle vessel, quite apart from non existent profits under the profit share agreement. Mr Andersen, Mr MacLeod and those they consulted at ST, did not take the view that the market would strengthen and Elli had been on the market since early December as open for loading at the end of the year. No fixture had been concluded by the time of the decision in January to fix her to carry a clean cargo, which required her to be cleaned. The decision was taken to clean the vessel, the tanks of which were coated, in order to switch to trade in clean cargoes as opposed to dirty petroleum products. This decision to switch was a last resort to find employment for the Elli in circumstances where Mr MacLeod already had obtained an indication from several charterers that there were clean cargoes to load.

83. On arrival in the Arabian Gulf, there were only 3 options - to wait for the market to improve, to ballast the vessel to reposition her elsewhere or to clean her for the purpose of switching to the clean cargo trade. As efforts had been made for almost a month to get a fixture to load crude oil in the Arabian Gulf without success and the possibility arose of a fixture for clean petroleum products loading there in early February, the decision was taken to clean her before lay time commenced.

84. The Owners were consulted about this because ST wished to know whether the owners would charge additional sums for the cleaning. A message was sent to the master on 12 January 2006 asking for his comments on the proposal to clean up the vessel to load gasoil. On 12 January a message was sent by Captain Apostolou which stated that he thought the proposal to clean up the vessel was *"a good idea based on the indication of the next 6 month oil market"*.

85. Mr Jarman, the Owners' expert criticised this decision, pointing to the lost time taken in cleaning and the limited number of clean cargoes which were carried thereafter before the vessel reverted to the dirty trade. The reasonableness of the decision however was scarcely challenged in cross-examination of Mr Andersen or Mr MacLeod, if at all. However the position might appear to Mr Jarman, in hindsight, the view taken both by Owners and ST at the time was that this was a reasonable and sensible course to adopt.

86. The burden is on the Owners to show that the decision taken was so unreasonable as to break the chain of causation between their breach and the losses incurred by ST. There was no issue about the relevant law. In ***Banco de Portugal v Waterlow*** [1932] AC 452 at 506, the following dictum appears:-

"The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken".

87. I have no reason to doubt the evidence of Mr MacLeod or Mr Andersen that ST could not get a fixture for Elli in the dirty trade. ST is well known for its commercial acumen and, on the evidence of its own representatives, this was a last resort decision. Notwithstanding criticism made of ST's voyage estimate for the first voyage after cleaning, which took account of the cleaning time, I can see no basis for finding that ST's decision was unreasonable. The argument that ST failed to mitigate their loss and damage therefore cannot succeed.

88. The effect of this in financial terms is as follows:-

i) Hire that ST would have earned under the Tianbao sub-charter from 1730 hrs on 30 August 2005 until re-delivery on 30 September 2006 - 395.64583 days x $28,275 =	$11,186,885.84
ii) Plus off hire bunker consumption between 30 August 2005 and 9 September 2005=	$22,803.88
Less hire payable by ST to the Owners from 1730 hrs on 30 August 2005 until re-delivery at 0900 hrs on 30 September 2006 - 395.64583 days x $17,775 =	$7,032,604.63
Less profit share payable to the Owners =	$3,206,313.75
Less actual earnings achieved from employment of the Elli until 0900 hrs on 30 September 2006 =	$489,463.40
Total lost profits =	**$481,307.94**

89. There was an issue between the parties as to date of re-delivery of the vessel which, if the Owners were right, would increase the hire and profit share payable to them and thus reduce ST's lost earnings figure, though whether any hire from Tianbao would also fall to be taken into account, I do not know. As this dispute is apparently the subject of arbitration, I can come to no final conclusion on the actual sum payable, and the parties can address me on the handing down of judgment as to the appropriate payment to make at this stage, taking account of the issue which has yet to be resolved.

The Frixos

90. The parties each adduced expert evidence on the earnings which the Frixos would have made, had she been able to carry fuel oil up to 15 December 2006. I have already referred to Mr Jarman who had worked for 33 years with Shell in shipping related activities, including 17 years with direct involvement in chartering/trading of Aframaxes. For reasons which I set out later in this judgment, I did not find his evidence to be of any great assistance in relation to the putative earnings of the Frixos. Mr Kearsey gave evidence on behalf of ST. He was the Head of Research and Executive Director of Simpson Spence & Young Limited (SSY). His function as Head of Research at one of the world's largest ship broking groups was to co-ordinate analysis of the shipping markets where SSY specialised in the tanker and dry bulk carrier sectors. In the tankers market, SSY Consultancy & Research is an established source of primary freight rate and fixture information to the oil industry and advises a range of tanker owning and chartering companies.

91. In the Joint Memorandum of experts, both experts agreed that World Scale (WS) 206/207 was a fair representation of the market for modern double hulled vessels as an average for the period August 2005 to December 2006. Both worked on the basis that the route Arabian Gulf to Singapore was the key route for determining the state of the market. That rate of WS 206/207, for double hulled modern Aframaxes able to carry both crude oil and fuel oil, therefore represented, in their view the market rate available to Owners of such vessels.

92. The experts agreed that the main market for Aframaxes was East of Suez which tallied with the mutual intention of the Owners and ST for the trading of the Elli and the Frixos under the charters. It was recognised that this was the most likely trade for the vessels if they were considered to be, as the parties considered them to be, Regulation 13H(5) compliant. The main trading route or, at the very least one of the main trading routes was from the Arabian Gulf to the Far East, whether to Singapore or beyond, to China or Australia. The Arabian Gulf was the major loading area for cargoes to the Far East, to India and to East Africa but the preferred route was to the Far East. This was because rates were lower for voyages to India and East Africa and this part of the market was largely inhabited by older less desirable poor quality single hull vessels. Additionally there was no, or a very limited, possibility of backhaul cargoes from those destinations whereas it was possible to pick up backhaul cargoes from China to Malaysia or Vietnam to Singapore, with the additional possibility of some intra Far East trading, should the rates be attractive and the timing right when the vessel was there.

93. It was agreed that one of the aims of operators is to achieve backhaul cargoes to improve on the 50/50 laden/ballast ratio for a vessel. Timing is, however, the key to backhaul cargo profitability. When the market is high, backhaul cargoes are less attractive because it is generally considered better to get back as soon as possible to the main loading area to achieve and fulfil longer and more profitable voyages. If there is any delay in picking up backhaul cargoes, it may not then turn out to be more profitable to effect such voyages. The stronger the market, the less attractive the backhaul cargoes may appear.

94. The experts agreed that about 70% of the cargoes coming out of the Arabian Gulf for the Far East are fuel oil cargoes and the balance crude oil. The proportions are reversed when considering cargoes from the Arabian Gulf travelling to world wide destinations. If therefore a tanker operator is looking for voyages from the Arabian Gulf to the Far East, the operator will have in mind the greater likelihood of finding a fuel oil cargo than a crude oil cargo. Whilst the predominance of crude oil cargoes for world wide destinations is apparent, the routes other than those to the Far East are, for the reasons set out earlier, less profitable and less attractive since the competition is with the lowest tier of the tanker market (as to which, see below).

95. Operating flexibility between cargoes is important for operators of tankers. To have the option of trading in both crude oil and dirty petroleum products which include fuel oil (the dirty trade) is a great benefit in obtaining fixtures and avoiding idle time. If one option is lost, cargo opportunities are more limited, fixtures are more hard to come by and more idle time will be spent waiting for such fixtures. Flexibility is even more important when the market has fallen.

96. The Elli and the Frixos had a competitive advantage as compared with other Aframaxes because of their length, their broad beam and their shallow draft. Only about 5% of Aframaxes could go to the older berths at places such as Bandar Mahshahr since the berths there were built for 55,000 DWT ships. Bandar Mahshahr therefore commands a premium rate, the extent of which is difficult to state but, according to Mr Jarman, was about 10% at World Scale 206/7 and probably worth 20 points on World Scale when the market was at its lowest during the period in question, at about 120-130 WS.

97. The evidence of Mr Andersen and Mr MacLeod, which I accept, was that, if the Elli had only been fit to carry crude oil as at 10 August 2004, ST would not have chartered those vessels for the period until December 2006. Mr Summerell, of Capital Shipbrokers, also said that he would not have expected the ships to be fixed with ST if that had been the case. It was common ground between all those who gave evidence that, if a vessel was only fit to carry crude oil, not fuel oil, a lower rate of hire would be available.

98. The Elli and the Frixos were well maintained highly regarded vessels, kept in good condition and approved by more than one oil major. The system which the oil majors adopted is known as the SIRE system to which all oil majors have access. ST was part of this system. Inspections, which are carried out on behalf of oil majors, where approval is given by that oil major to the ship in question, are reported and the reports filed on the SIRE system. Both vessels were generally regarded in the trade as being double-sided and, until April 2005, suitable to carry

crude oil and fuel oil. In addition the Elli had coated tanks which meant that she could also carry clean petroleum products as well as crude oil and dirty petroleum products, provided that the necessary cleaning was carried out before participating in the clean trade.

99. In his first report, Mr Jarman suggested that the vessels should have traded in the Far East rather than focusing on voyages out of the Arabian Gulf, but this point was not pursued, whether as a failure to mitigate or otherwise. The evidence of Mr Andersen and Mr MacLeod was clear in saying that they took the view that it was better to get back to the Arabian Gulf where there were far more loadings, than to seek intra-Asia business where there was too much waiting time and not enough cargo. The intra-Asia trade was a small market which was enough only for 5 or 6 vessels at any one time, despite the fact that, prior to August 2005, the 2 vessels had been engaged in such trading. In order to make that trade pay in the period after August 2005, it would be necessary to have a regular cycle of short voyages. Without flexibility between cargoes, delay was inevitable with greater idle time. It was the Arabian Gulf to Far East voyage which was the primary target for fixing the vessels and it was that upon which the experts agreed that the vessels' freight earning capability should be assessed in the period in issue.

100. Before August 2005 the Elli had traded from the Arabian Gulf or Red Sea to the Far East on 11 occasions (including 5 liftings from Bandar Mahshahr) but only once from the Arabian Gulf to East Africa and not at all to India. After the Regulations came into force, she traded to East Africa on 4 occasions and to India on 6 occasions, but not at all to the Far East. The Frixos, before August 2005, traded from the Arabian Gulf/Red Sea/Mediterranean to the Far East on 5 occasions (including 2 liftings from Bandar Mahshahr) but not at all to East Africa or India. After the Regulations came into force, she traded to East Africa on 4 occasions, to India on 9 occasions and to the Far East on 4 occasions only. Prior to August 2005, between them, the Elli and the Frixos had lifted 21 fuel oil cargoes and 25 crude oil cargoes. With the broad expectation of an approximately equal split between these types of cargo, the effect of the restriction imposed by the Regulations was to deprive ST of nearly half of the available cargo opportunities in the overall East of Suez market and a greater proportion of the available cargoes from the Arabian Gulf to the Far East.

101. It was further common ground between the parties that, prior to the Regulations coming into force in April 2005, there was a two tier market for Aframax tankers *"East of Suez"*. The lower tier consisted of poor quality old tankers which could find employment there with charterers who had lower standards or who could not afford to pay for quality tonnage. The upper tier consisted essentially of good quality vessels, less than 20 years old, double hulled, double bottomed or double sided. It was common ground that the Frixos and the Elli were always highly regarded in the industry due to their flexible design and because they were generally regarded as double sided, as well as being well maintained and in good condition, with the added advantage of being able to access Bandar Mahshahr. They therefore formed part of the upper tier. After the Regulations came into force, the experts agreed that there was effectively a 3 tier market. The top tier consisted of double hull vessels; the second of MARPOL 13H(5) compliant double-sided vessels; and the third of single hull vessels. Frixos would have been in tier 2 if she had been MARPOL 13H(5) compliant but, because she was not, she found herself in the bottom tier of the market, alongside those vessels which had previously represented the bottom tier of the previous 2 tier market.

102. In his first report, Mr Jarman reached conclusions as to the appropriate discount to be given for vessels in the second tier, as compared with double hulled vessels in the top tier after the Regulations came into force. He arrived at his conclusions by utilising a daily report from Capital Shipbrokers at the end of each of the relevant months between August 2005 and December 2006. These reports, in reporting market rates, divided the tonnage into 3 tiers: "*old", "single"* and *"double"*. The last named group represented double hulled vessels in what everybody regarded as the top tier of new modern vessels which fully satisfied the MARPOL Regulations for the carriage of fuel oil, without qualification. The bottom tier, described as "old" consisted of single hulled vessels older than 20 years without any approval from any oil major. The intermediate tier labelled "single" included all single hulled vessels, less than 20 years old with approval of at least one oil major (and therefore part of the SIRE system). This intermediate tier however was not dedicated to double sided vessels which were MARPOL 13H(5) compliant. Those vessels were put into the same intermediate tier as single hull vessels which could not carry fuel oil at all. When the author of these reports, Mr Summerell gave evidence, he said that there should have been a fourth tier in Capital Shipbrokers' categorisation, consisting of double-sided, single hulled vessels which were MARPOL 13H(5) compliant and which carried the approval of more than one oil major, the class into which Elli and Frixos would have fitted, had they been fully double-sided.

103. When Mr Jarman therefore referred to the average figures in Capital's second tier as setting out the appropriate figures for the Elli and the Frixos, had they been Regulation 13H(5) compliant, and for assessing the discount from the average double hull rate of WS 206/207, he obtained a distorted view because of the presence, in that tier, of vessels which were unable to carry fuel oil at all and which would therefore have reduced the average level of earnings in that tier. His conclusion was that the Elli and Frixos would obtain an average of WS 166 – equivalent to a time charter equivalent (TCE) of $24,900 per day.

104. In his second report, Mr Jarman took into account figures for 3 months from SSY reported fixtures and selectively changed his own figures in respect of 2 months, which had the effect of upping the rate to WS 179 or $27,700 per day. He otherwise had regard to more daily reports from Capital when he came to give oral evidence, but did not rely on any other specific fixtures in support of his view, saying that there were few reported fixtures for

Regulation 13H(5) compliant double sided vessels. In addition, however, Mr Jarman relied upon his own experience in stating that there would be a 15% discount in chartering a double-sided MARPOL 13H(5) compliant vessel from the rates achieved by double hulled vessels. Since he was not operating in the market at the relevant time, and since neither the generality of reported fixtures of double-sided vessels which did comply with Regulation 13H(5) nor reports of specific fixtures, in the period in question, supported this, I was not able to accept his evidence as to an appropriate daily figure for the TCE for the Elli and Frixos, if compliant with the Regulations.

105. His figure of $27,700 does, in any event, seem very low compared to the Frixos profit share TCE figure for the same period of $34,252 per day, but that is not my reason for rejecting his evidence, which did not appear to be based adequately on the fixtures which were reported at the time. The profit share agreements were negotiated on the basis of the parties' respective views as to the future performance of the market, at a time when the market was firming up in 2004, but on the basis of Platts figures which would reflect what actually happened in the market thereafter and in circumstances where ST were known to be commercially astute charterers who were capable, by reason in part of the many Glencore cargoes available to it, to outperform the market.

106. Mr Kearsey researched the position to establish the fixtures which had been reported to SSY for the relevant period of August 2005 to December 2006. These were scheduled in an appendix to his report. He concluded, based upon that research, that double-sided vessels which were MARPOL 13H(5) compliant attracted a discount of 5.1% from the $35,245 figure for double hulled vessels (i.e. $34,109). He accepted however that he had not used the charter party figures for consumption of bunkers to obtain this TCE figure and in his later report carried out a further calculation which had the effect of allowing for further expenditure of $350 per day because the Frixos used MDO, as opposed to solely IFO which is used by modern tankers and on which his earlier calculations had been based.

107. Argument centred upon the appropriate discount from the double hulled rate in the light of various reported fixtures, including a batch which was produced in the middle of the trial by the Owners, emanating from Capital Shipbrokers, in circumstances where neither of the experts had offered a view on them and where Mr Kearsey had not previously seen them or had the opportunity to take them into account. Thereafter various competing schedules were produced and put to the experts in cross-examination.

108. The schedule which I found most helpful in this respect was schedule K1 which went through various versions and amendments in the course of the last 2 days of the trial. The final version produced by ST in the course of Mr Nicholas Hamblen QC's closing speech took account of the evidence which had been given and of the new material which had been produced during the course of the trial. This schedule set out fixtures reported for both double hulled and double-sided Aframaxes for voyages from the Arabian Gulf to the Far East, where the fixtures were made within 3 days of each other. This provided a good comparison to establish the appropriate discount in a time window when market fluctuations were unlikely to be sufficiently severe to distort the picture. The overall effect of this, with 20 instances between September 2005 and November 2006 showed that double hulled vessels obtained an average WS 206 whilst Regulation 13H(5) complaint double-sided vessels obtained an average WS 199. That amounted to a 3.5% differential on a World Scale basis and a 5% differential on a TCE footing. Another schedule was produced which set out, on a monthly basis, a comparison between double hulled fixtures and double-sided fixtures, on a TCE basis, where, in that month, there were at least 4 reported fixtures for double-sided vessels - a criteria set by Mr Jarman. It was the limited nature of the number of such fixtures which presented some difficulty in establishing the appropriate discount and Mr Jarman, in particular, was keen to avoid the use of isolated fixtures which could give a distorted position. The final version of this schedule (K2B) showed a differential of 7% or 7.6%, depending upon the inclusion or exclusion of some reported fixtures which Mr Jarman considered dubious.

109. A further schedule (K6) set out all the fixtures reported for double-sided Aframaxes by SSY and Capital Shipbrokers in the relevant period, giving rise to WS 190 or WS 191, again depending upon the inclusion or exclusion of particular fixtures which were thought, by Mr Jarman, to be in doubt. That compared with WS 204 for double hulled vessels, giving rise to a differential of 6.5-7% on a World Scale basis, equivalent to approximately 10% on a TCE differential.

110. I found Mr Kearsey to be a careful and impressive witness. He took account of new information as it came to light and adjusted his conclusions appropriately. His evidence was supported by that of Mr MacLeod who had chartered vessels in and out for ST in the relevant market at the material time. The latter's view, based on experience, was that, when the market was around WS 200 there was a 2.5% - 5% differential for double sided as opposed to double hulled vessels (5-10 points on WS), but that occasionally he would have to give a discount of 15 points (7.5%), but this was not often. Mr Summerell, who had been employed by Capital and was called to give evidence by the Owners, gave an "off the top of my head" figure for the discount of 5%-10%. Mr Jarman considered that the higher the market rate, the lower was the differential.

111. The reasons Mr Kearsey gave for preferring the K1 figures (fixtures concluded within 3 days of each other for double hulled and double-sided tankers), to other scheduled figures, seemed to me to be good. The reason for the apparent difference between the overall average differential in K6 and K2B on the one hand and the 3 day window differential on the other is that K6 and K2B included a good number of fixtures of double sided vessels when the market was low, so that the average figures over the year were weighted towards months when the

market was weak and the differential greater. A comparison of the rates obtained by double hulled and double-sided vessels of about the same time better reflected the true position.

112. I thus conclude that the discount from double hull vessels to double-sided vessels which were MARPOL 13H(5) compliant is much less than the 10% TCE differential derived from K6 and closer to the 5% TCE differential derived from K1. Given the uncertainty which is inevitably involved in such an assessment, I find, on the balance of probabilities, bearing in mind schedule K2B, that the discount figure to be applied over the relevant period is 6.5%.

113. I have already mentioned the question of Frixos bunker consumption. Once again I accept Mr Kearsey's evidence that the net effect of applying the figures for MDO consumption, offset by the savings in IFO consumption and port time is to reduce the estimated average TCE for the period by $350 per day. Mr Jarman's calculations appear to have taken a straight 17 month average on a Platts' based figure, which if adjusted for the actual time taken (excluding those parts of August 2005 and December 2006 which are irrelevant) would give rise to a figure of $35,162 per day as opposed to Mr Kearsey's $34,895 TCE, once the $350 figure is subtracted from the $35,245 Double Hulled starting point.

114. If the discount of 6.5% is then applied to the double hulled average rate for the period, as I have found to be appropriate, with the bunker adjustment, the result is to reduce the figure of $34,895 to $32,626.825.

115. Mr Kearsey maintained that there should then be an uplift in respect of the vessel's potential to carry backhaul cargoes from the Far East. There were two typical backhaul voyages which were potentially available. The first was from Vietnam to Singapore and the second from Malaysia to India. The effect of these, on Mr Kearsey's calculations, taken from the SSY reported fixtures was as follows. With a voyage from Bandar Mahshahr to China and a Vietnam-Singapore backhaul leg, an additional TCE of $3,338 could be achieved. On a voyage from Bandar Mahshahr to China with a backhaul leg of Malaysia-India, an additional $6,040 TCE could be achieved. Taking an average of these two figures, the possibility of an additional TCE of $4689 is possible. This however would assume that a backhaul cargo was obtained on every voyage from the Arabian Gulf to the Far East when such voyages would not necessarily be to China and when the timing would not in any event necessarily work out.

116. Having examined the voyage records of the vessel and the limited number of backhaul cargoes which were achieved prior to August 2005, I find it difficult to accept that there would have been a large number of backhaul cargoes. In his supplementary report Mr Kearsey re-calculated the laden:ballast split for the Frixos, on a mileage basis, in the period prior to August 2005 at 52:48, whilst that for the Elli was 54:46. This gives some indication of the ability to obtain backhaul cargoes in the period prior to the coming into force of the Regulations.

117. Mr Jarman was prepared to allow an additional $500 to the TCE in respect of potential backhaul cargoes on the assumption, which he regarded as optimistic, that such a backhaul cargo would be obtained on every alternate journey. I consider that he underestimated the earnings on backhaul cargoes and he only took into account one potential route, namely Vietnam/Singapore. When Mr Jarman was cross-examined about the assumptions underlying the calculations made by Mr Kearsey, he accepted those assumptions. Nonetheless, taking all the evidence into account, I consider that ST cannot show, on the balance of probabilities, that it would have achieved a backhaul cargo on more than one out of four Arabian Gulf-Far East voyages. The effect of this is to add $1,172.25 to the TCE, giving rise to a total of $33,799.075.

118. In a late run argument, the Owners, through Mr Jarman's evidence in chief (nowhere covered in his reports) contended that account should be taken in the TCE of idle time. In examination in chief, Mr Jarman produced a schedule of idle time for the Elli in respect of the period 22 June 2004 to 30 August 2005. This involved a calculation by him of the time which should have been taken between sailing from the last discharging port to giving notice of readiness at the next loading port. The calculation proceeded on the basis of a speed of 14 knots plus a 5% steaming allowance. In a revised version of this, over 7 voyages he assessed 45.7 days additional time above and beyond that which would have been taken had the vessel steamed at the given speed, with the steaming allowance, over the distance set out in BP tables. This gave rise to a percentage of idle time of 12%. Nowhere had this been foreshadowed in any of the previous evidence, so that no opportunity was given for any investigation to be done as to the details of the voyages but the Master apparently declared adverse weather conditions on all of these voyages. In order to ascertain what was really going on during these voyages, a detailed investigation would be necessary of the kind which is commonly undertaken in a speed and consumption claim. I was informed by the parties that there was such a speed and consumption claim advanced in an arbitration taking place between the parties.

119. In the circumstances I did not see how this calculation could be brought into account in the Frixos TCE, particularly as the convention when calculating TCE is not to take account of idle time because of the obvious difficulties in working out what time is attributable to any given cause, but to allow a 5% steaming allowance. That is why speed and performance claims are dealt with by experts with engineering and meteorological expertise examining the vessel's engine logs and deck logs and obtaining independent weather information. Moreover, it is hard to see why idle time assessed by reference to 405 days of the Elli's performance should be relevant to the Frixos in a different and later period.

120. Whilst the burden of proof lies with ST to make good its claim for lost profits, it is entirely inappropriate for a new point of this kind to be raised in the course of examination in chief of an expert for the very first time, after all the factual evidence has been heard. I could see no basis upon which it would be right to draw any inference

from that untested evidence, in the circumstances I have outlined, in relation to the performance and earnings of the Frixos between August 2005 and December 2006. No doubt the speed and consumption claim will be properly examined in arbitration and account can be taken there of any delays. For present purposes it cannot be taken into account in relation to the assessment of the TCE, where a 5% voyage allowance is already provided for in the calculations in any event. There is therefore no further deduction to be made from the figures for TCE, at which I have arrived, as set out above.

121. The financial result of this is that ST's claim is for 479.16 days at a TCE of 33,799.075 = $16,195,164.78. From this there falls to be deducted the hire payable to Owners, the profit share attributable to Owners and earnings actually received by ST, being $8,517,069, $4,355,799.64 and $2,068,492.44 respectively. The net figure for lost profits in the period therefore amounts to $1,253,803.70.

Conclusion

122. For all the above reasons, the Owners fail in their claims for payment of additional hire by way of profit share, because they are overborne by the set-off and counterclaims of ST in the net amounts already set out for the Elli and the Frixos. Whilst an issue about re-delivery of the Elli remains to be decided, it appears that any interim monetary judgment will have to be for a lesser sum in respect of the Elli than that set out above, but for the full sum in respect of the Frixos. The parties may be able to agree the form of Order which will follow from this judgment but if not I will hear submissions, when the judgment is handed down, on questions of interest, costs and the form of Order to be made. Unless there are special circumstances of which I am unaware, it appears to me that ST must be entitled to interest at a commercial borrowing rate for US $ from a date or dates which represent the date at which the loss of profits would have been received and that costs must follow the event, so that ST is entitled to its costs, on a standard basis, to be assessed if not agreed.

Mr Gavin Kealey QC and Mr Tim Hill (instructed by Stephenson Harwood) for the Claimants
Mr Nicholas Hamblen QC and Dr Malcolm Jarvis (instructed by Clyde & Co LLP) for the Defendant