The “Rainbow Star”
[2011] SGHC 35

Case Number : Admiralty in Rem No 151 of 2008

Decision Date : 17 February 2011

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Thomas Tan (Haridass Ho & Partners) for the plaintiff; K Muralitherapany (Joseph Tan Jude Benny LLP) for the defendant.

Parties : The "Rainbow Star"

Damages

17 February 2011

Judith Prakash J:

Introduction

1 This matter came before me as an appeal from an assessment of damages carried out by the Assistant Registrar Ms Crystal Tan (“the AR”). The assessment exercise was conducted in respect of claims made by both the plaintiff and the defendant, and various sums were awarded to each of them. The plaintiff, however, was not satisfied either with the award in its favour or with the award in favour of the defendant and has appealed against various components of both awards.

2 The plaintiff, Kreuz Shipbuilding & Engineering Pte Ltd, whom I shall hereafter refer to as “the shipyard”, carries on the business of providing ship docking and ship repair services in Singapore. The defendant, whom I shall hereafter refer to as “the owner”, was the owner of a vessel called *Rainbow Star* (“the vessel”) which was an oilfield supply/towing vessel. In March 2008, the owner sent the vessel to the shipyard for certain repair work to be effected. On 8 June 2008, whilst the shipyard was carrying out work on the vessel, an explosion occurred and this was followed by a fire. As a result, the vessel became a constructive total loss.

3 In September 2008, the shipyard commenced this action in which it claimed the costs of the repair works that it had carried out on the vessel prior to the fire. The owner, alleging that the explosion and fire were caused by the negligence of the shipyard and its employees, put in a counterclaim for the loss and damage caused to it thereby. In October 2009, by consent, interlocutory judgment for damages to be assessed was entered in respect of the claim and the counterclaim.

The proceedings below

4 The claim by the shipyard was for payment of three invoices which it had issued to the owner between May and August 2008. These were as follows:

(a) Invoice number 5551 dated 28 May 2008 $128,253

(b) Invoice number 5593 dated 16 July 2008 $476,929

(c) Invoice number 5630 dated 28 August 2008 $22,596

Total $627,778

The amount claimed was, however, only $570,612.90 as the shipyard deducted an advance payment made by the owner and also a sum which it had overcharged in respect of certain pipes it had supplied.

5 The AR's decision in respect of this claim was as follows:

(a) in respect of invoice 5551 which the owner did not dispute, the AR awarded the full sum of $128,253;

(b) in respect of invoice 5593, the AR found that the following amounts were due in respect of various works included in the invoice:

(1) for pipes of normal length, $13,132;

(2) for pipes of in between sizes, $4,506.66;

(3) for steel work, $80,657.80;

(4) for subcontractors' invoices in respect of standard items, $16,869;

(5) for subcontractors' invoices in respect of non-standard items, $13,642.96;

(6) in respect of lump sum items, nominal damages of $100; and

(7) in respect of items of work admitted by the owner, $23,163;

(c) in respect of invoice 5630, no amount was awarded at all.

6 The AR then went on to consider the owner's counterclaim. Both parties had agreed that the vessel be regarded and assessed as a constructive total loss. On this basis, the owner's counterclaim comprised the following items:

(a) costs, expenses and third party liabilities incurred by the owner - $85,938.68 and Rp48,697,500;

(b) loss of profit under an aborted charterparty - $1,741,811.58

(c) value of the vessel as at 8 June 2008 – US$1,750,000

The AR allowed the claims under items (a) and (b) in full. As regards item (c), the AR assessed the value of the vessel as being US$1.6m and awarded that amount to the owner. The AR also awarded the owner interest at the statutory rate on the value of the vessel from the date of the explosion (8 June 2008) up to the date of payment.

The shipyard's appeal on its own claim

7 In its notice of appeal filed on 8 September 2010, the shipyard indicated that it was dissatisfied with the following portions of the AR's decision:

(a) the award in respect of invoice 5593 which it wanted increased to $469,763.90 (*ie*, the original sum claimed for after deduction of the amount that had been overcharged for the pipes);

(b) the AR's decision to make no award in respect of invoice 5630;

(c) the AR's decision to award the owner $21,000 as agency fees (being part of the costs and expenses claimed by the owner); and

(d) the award of loss of profit in respect of the charterparty which reflected one year's loss of income less operational expenses; and

(e) the award of interest from the date of the explosion.

8 In the course of the hearing before me, counsel for the shipyard indicated that it was not proceeding with its appeal in respect of invoice 5630 ([7(b)] above). I will deal with each of the other grounds of appeal in turn.

Invoice 5593

The decision below

9 It was common ground below that the work items covered by invoice 5593 had actually been carried out by the shipyard. The owner had, however, disputed various items set out in the invoice on

the basis that it had not agreed to the prices charged by the shipyard. The owner had only admitted that work items amounting to $23,163 had been priced on the basis of agreed rates set out in the first and second quotations (dated 12 February 2008 and 22 April 2008 respectively) which had been issued by the shipyard to the owner and had subsequently been accepted by the owner. The AR found, on the evidence, that:

(a) nine subsequent quotations dated between 23 April 2008 and 6 June 2008 which the shipyard claimed to have sent to the owner, had not been received or confirmed by the owner;

(b) the owner had never been made aware of the methods of charging by the shipyard and the prices set out in invoice 5593 had never been agreed; and

(c) the shipyard had not managed to establish that the prices set out in invoice 5593 were reasonable.

The AR then went on to consider each of the disputed items and to fix the rates payable by the owner for the same. I will give the basis of the prices so fixed in more detail later in this judgment if necessary.

The shipyard's arguments on the appeal

10 On the appeal, the shipyard took the position that it was entitled to the amounts claimed on the basis that they had been agreed to, either specifically on this occasion or by reference to past practice; alternatively, that since the work had been done, the owner had to pay a reasonable amount for the same and the amounts that it charged were reasonable. The owner's response was that the amounts charged had not been agreed to, and although it accepted that the shipyard was entitled to a reasonable price for the work done, the onus lay on the shipyard to establish that its prices were reasonable and this it had failed to do.

Contractual basis

11 In relation to its contention that the amounts claimed in invoice 5593 had been agreed to, the shipyard put forward three main points. First, it argued that the invoice had been accepted by the owner and therefore could no longer be challenged. The shipyard pointed out that there were various "ticks" against the prices on the invoice and that similar ticks had appeared on an earlier invoice, *viz*, invoice 5551, which the owner had accepted. Counsel contended that no one would mark an item with a tick without giving due consideration to them. He argued that Mr Juffri, the owner's business and development manager, who had dealt with the invoices on the owner's behalf, had not been able to explain the "ticks" or who made them.

12 Secondly, the shipyard relied on past practice. It noted that the quotations had been addressed to Permata Sari Services ("PSS"), the former manager of the vessel, who had only been replaced as manager by the owner itself in April 2008. From 2006 up till 2008, the shipyard had dealt with PSS and had charged for its work on the vessel based on yard tariffs and past practices. In fact, the first quotation had been addressed to PSS and this was a quotation that had been passed to the owner and which the owner had specifically confirmed and accepted.

13 Thirdly, the shipyard relied on the fact that the actual work had in many cases been done

before a quotation was issued. The owner had not given full details of the work-scope. Therefore, upon completion of the work, the repair manager of the shipyard would do a write-up and follow that up with a quotation. If the owner had wanted a quotation to be issued and accepted for a particular job before actual work was carried out, it could easily have instructed the master and its superintendent not to allow the shipyard to carry out such work until the relevant quotation had been issued and accepted. As the owner allowed the shipyard to carry out work before there was an accepted quotation, the shipyard was entitled to charge for the work based on existing yard tariffs and past practice. The items that were charged by reference to yard tariffs were, according to the evidence, items such as staging works, engine room cleaning, tyre fender works, tank valves, spindle works and tank cleaning.

14 Taking the first point relating to the "ticks" on the invoice and the argument that these indicated acceptance of the prices charged, the owner's response was that there was no evidence before the court as to the purpose or meaning of the "ticks". They had not been made by Mr Juffri so it was not surprising he could not explain them. In any event, there was documentary evidence that showed that he had queried the charges very soon after invoice 5593 was rendered. Thus, there was no basis on which to contend that this invoice had been accepted. I agree with the owner that the "ticks" in themselves did not prove that the prices were accepted. Their presence was equivocal and could not lead to any inference of acceptance. They might equally have meant that the person making the "ticks" wanted to query the marked items.

15 When it came to the yard tariffs, I should first of all state that because the vessel's entry into the shipyard in March 2008 was not its first call there, if the evidence supported it, I would be inclined to rule that on the basis of past practice, the owner had agreed to pay yard tariffs for items of work that were covered by tariffs issued by the shipyard and customarily applied. However, as far as I can see, the shipyard did not introduce any evidence as to what its yard tariffs were or that it had on the vessel's previous visits charged such yard tariffs which had been accepted and paid for either by the owner or PSS. Further, looking at the two quotations that were accepted by the owner in relation to the March 2008 work, with one minor exception, neither of these bore any mention of the yard tariffs at all. In fact, even the nine further quotations which were not seen by the owner before the work was done had no reference to the yard tariffs. The minor exception that I referred to above appears in the quotation dated 12 February 2008. Item 11 of this quotation refers to "Pipe Renewal Tariffs" and sub-item i) states "Removal and refitting for access – 50% of tariff rates". This evidence, however, does not help the shipyard in that it shows that the tariff rates were not applied across the board and could be reduced either voluntarily by the shipyard or after negotiation. In the absence of evidence establishing that the shipyard had published yard tariffs that applied across the board to the items mentioned in the publication and in the absence of evidence that such yard tariffs had been paid previously by the owner or PSS, I cannot allow these charges.

16 As regards the third point, *ie*, that actual work had been done in advance of approval and had to be so conducted in order not to hold up the ship, this argument does not support an inference that the owner was agreeable to paying any amount that the shipyard might subsequently charge for the work. The only inference that can be drawn from the owner's agreement that work be done before a quotation for the same had been seen and accepted is that the owner was agreeable to paying for the work on the basis that the charges therefor would be reasonable. It would not be correct to draw the inference that by allowing the work to proceed in advance of an accepted quotation, the owner was thereby agreeing to whatever charges the shipyard might seek to impose at its discretion irrespective of whether they were reasonable. Such an inference would not be consistent with the usual understanding that applies when a person engages another to provide services without specifically agreeing to the price for the same, which has led to the long established legal principle that where price is not agreed between parties, the price to be paid is a reasonable price having

regard to the circumstances of the case. This conclusion leads me to the next issue canvassed by the parties which was whether the AR was correct in her decision that the charges were not reasonable.

Reasonableness of the charges

17 The AR's finding was that the shipyard had not managed to establish that the prices in invoice 5593 were reasonable. The shipyard had relied on evidence given by Graeme Noel Temple ("Mr Temple"), the shipyard's expert, who commented on the prices in the invoices as well as those in quotations from two other ship repairers – Drydocks World-Singapore Pte Ltd ("Drydocks World") and Jurong SML Pte Ltd ("JSML"). The AR rejected his evidence. As she explained in [18] of her judgment:

> [Mr Temple] testified that he considered the prices reasonable in the context of the ship repair industry in Singapore. However, he admitted that he *only* considered the [shipyard's] documents and did not provide in his report any comparative prices or quotes from the industry. When asked to comment on Drydocks World quotation, he testified that the unit prices for Drydocks World were more expensive than the [shipyard's] unit rates. However, no reference was made to the type, nature of work and services carried out by Drydocks World. [emphasis in original]

18 On the appeal, the shipyard argued that since the owner did not engage an expert witness to give evidence on what would be a reasonable sum payable to the shipyard for the cost of the repairs, the evidence of the shipyard's expert witnesses should be accepted. Its contention that the charges in invoice 5593 were fair and reasonable was supported by the evidence of Mr Temple. Mr Temple had surveyed the vessel to assess the damage to it and the cost of repairs. He opined that the amounts charged under invoice 5593 were fair and reasonable and were not unusual, they were not "out of the ballpark". As a surveyor, he stated his job was to examine shipyard documents, casualties and breakdowns and he had provided his opinion on the prices here based on his experience. He also stated that if he had been analysing the bills for the underwriter, he would have come to the same conclusion that the charges were fair and reasonable. Additionally, the unit prices from Drydocks World and JSML (two other repairers who had been asked by the owner to quote for the repairs after the fire) were significantly higher than the shipyard's prices.

19 The shipyard had the burden of proving the quantum of its claim. See *Abe Isaac (Pte) Ltd v Marieta Montalba Pacudan and Another* [2007] SGHC 46 ("*Abe Isaac*"). The shipyard chose to discharge this burden by adducing the evidence of someone who it considered had expert knowledge of charges in the ship repair industry in Singapore. It was entitled to proceed in this way and the owner was equally entitled to challenge the expert's evidence by logic and analysis alone. I do not accept the submission that simply because the owner did not produce any expert of its own to put forward alternative figures it was not entitled to dispute the reasonableness of the charges. Any expert's evidence must be tested and if it does not satisfy such testing, may be rejected, even though there is no countervailing evidence from another expert before the court.

20 In the present case, counsel for the owner contended that Mr Temple's evidence was correctly rejected by the AR. It pointed out, citing *Sim Ah Song and Anor v Rex* [1951] MLJ 150 and *R v Abadom (Steven)* [1983] 1 WLR 126, that a bare expression by an expert of his opinion is of little evidential value. There must be some foundation for his opinion or explanation how he arrived at his opinion so that the correctness of his opinion can be examined. It is the duty of an expert to consider any material available in his field and not merely draw conclusions based on his own experience.

21 Counsel also drew my attention to the following material portions of the evidence given by Mr Temple. In cross-examination, Mr Temple agreed that "reasonableness" must be considered in the

context of the ship repair industry in Singapore. He said that he had compared the shipyard's figures to general rates in the industry for such work in Singapore. However, he also agreed that:

(a) he had not provided any comparative prices or quotes in the report and there was no information in his report to look at so as to evaluate whether the shipyard's invoiced amounts were fair and reasonable;

(b) he considered only the shipyard's invoice in isolation to come to his conclusion. He conceded that he did not consider mark-up levels and only looked at the figures contained in the invoice;

(c) the scope of his report did not involve any contractual discussions before the vessel went into the yard and hence he was not aware of the specifications given to the shipyard.

22 Mr Temple, however, shifted his position in re-examination when he said that he had compared the unit rates in invoice 5593 to the quotations of Drydocks World, dated 6 September 2008, and JSML, dated 2 September 2008, and concluded that the shipyard's rates were lower and thus reasonable. Counsel criticised Mr Temple's conclusion because of differences between the Drydocks World quotation and invoice 5593. The Drydocks World quotation provided a unit rate for pipes and staging but no rate for steel work. The shipyard's invoices did not contain a unit rate for staging. The charging methods and prices used by the shipyard in the invoice (*viz*, historical pricing, yard tariffs and mark-ups) were not reflected in the invoice so it was unclear how Mr Temple was able to conclude that the rates in the shipyard's invoice were lower than those in Drydocks World's quotation. Even if the shipyard's rates were lower than those of Drydocks World and JSML, that by itself would not make them reasonable especially since Mr Temple had agreed that the quotation from Drydocks World was excessive. It was also pertinent that the nature and scope of work covered by the subsequent quotations were different from those in invoice 5593. The invoice related to repair work for a class survey while the quotations from Drydocks World and JSML were in respect of post-casualty repairs to damage caused by fire. Thus, different considerations and rates could apply. In any event, Mr Temple's claim that he had made such a comparison was not in his report and must have been an afterthought.

23 In my judgment, the above criticisms of Mr Temple's evidence are valid. I agree with the AR that his evidence that the shipyard's charges were reasonable was a bare assertion which was not supported by a proper study or analysis. His own admissions in the course of cross-examination showed that he had considered the shipyard's invoice in isolation and had not provided information in his report which would help substantiate his evaluation that the invoiced amounts were fair and reasonable. Accordingly, Mr Temple's evidence did not prove the shipyard's case.

24 The shipyard, however, also argued on appeal that the various items in invoice 5593 could be justified even without reference to Mr Temple's evidence. For this portion of the appeal, the shipyard followed the course taken by the owner before the AR which was to categorise the various items in the invoice according with the manner in which the shipyard had calculated its charges. This is because various methods of charging were used by the shipyard. The evidence given by the shipyard's witness, Mr Seet, was that the prices in this invoice were calculated based on six different methods: on a lump sum basis, in-between sizes for pipes, yard tariffs, a mark-up on non-standard items bought off the shelf, labour charges and a mark-up on sub-contractors' prices.

items charged on a lump sum basis (excluding steel work)

25 With respect to yard tariffs, labour charges and other lump sum items, before the AR, the

owner argued, on the authority of *Abe Isaac*, that the shipyard had not produced any evidence that the prices were reasonable and was therefore entitled to only a nominal sum of $200. The AR accepted this argument and awarded nominal damages of $100. Her reasons, as stated in [24] of her judgment, were:

> The [shipyard] argued vigorously however, that *Abe* Isaac was not applicable in the present case as there was credible evidence that yard tariffs were relied on and known to the former manager of the [owner], Chong. Mr Seet testified that Chong knew but Juffri didn't and that "he assumed he communicated with [Chong]". In my view, from the evidence adduced before me, it appeared that though the fact of a loss had been shown by the [shipyard], the necessary evidence as to its amount had not been given. The only evidence that was given in the course of the hearing before me were Seet's bare assertions that the yard tariffs were known to Chong, but it has to be pointed out that Chong was not even called as a witness.

26 On the appeal, the shipyard did not make any argument that the yard tariffs were reasonable. All it said was that certain items were charged by reference to such tariffs and whilst the first quotation of 12 February 2008 did not refer to such tariffs, it did not follow that the shipyard could not put up charges on this basis. As I have said above, the shipyard adduced no evidence as to the publication of its yard charges or established that it had previously charged the owner on this basis and these charges had been accepted on those previous occasions. I also note the AR's reasons for disallowing these items. I have no reason to disagree. Accordingly, there is no basis on which to interfere with the AR's decision in this regard.

lump sum charge for steel work

27 During the appeal, the shipyard dealt separately with the lump sum charges for steel work. Its argument was that with regard to steel renewal, it was entitled to charge on a lump sum basis for quantities of one tonne and below because item 12 of its quotation of 12 February 2008 read, *inter alia*, as follows:

> 12) STEEL RENEWAL (based on flat welded construction of grade 'A' steel)
>
> Per location 1 tonne and below Lumpsum price basis
>
> Per location 1 to 5 tonne, per kg S$6.20
>
> Per location 5 to 10 tonne, per kg S$5.80
>
> Per location above 10 tonne, per kg S$5.50

This quotation had been accepted by the owner and it was therefore reasonable for the shipyard to charge on a similar basis for quantities of steel of one tonne and less used for work covered by the other quotations which had not been accepted.

28 The AR had agreed with the owner's approach regarding payment for steel work on the basis of the top rate of $6.20 per tonne (for one to five tonnes) plus any applicable surcharge due to the dimensions of the steel involved, as set out in the first quotation. She considered this a fair approach to take as it was consistent with the approach in the first quotation. She therefore awarded $80,657.80 for steel work.

29 The shipyard disputed this method of charging. It argued strongly that it should be entitled on

the basis of the first quotation to charge for smaller quantities of steel on a lump sum basis. It contended that this is really an issue of construction of the quotation. The owner had agreed to be charged on a lump sum basis. The quotation did not say that the shipyard could charge a lump sum to be agreed between the parties. All it said was that the shipyard could charge a lump sum price. The shipyard was therefore entitled to charge such lump sum as it considered reasonable without referring back to the owner for agreement. The discretion lay with the shipyard to fix the lump sum to be charged for these steel renewal items. Looking at the sequence of the items chargeable in the quotation, the amount that it could charge for steel renewals of one tonne and below on a lump sum basis had, the shipyard argued, necessarily to be more than $6.20 per kg, on any view. Further, the term "lump sum basis" was clear enough to those in the business of ship repairs and it would have been understood by the owner that the lump sum would be fixed by the shipyard.

30 In my judgment, the shipyard's argument is correct. It was clear from the acceptance of the first quotation by the owner that it was willing to pay the shipyard on a lump sum basis for the smallest quantities of steel used in the renewal exercise (*ie*, one tonne and below). That meant that it would accept whatever lump sum was charged by the shipyard unless the sum was exorbitant. The owner did not qualify its acceptance of the quotation in any way. It did not reserve to itself the right to agree on the quantum of the lump sum. Accordingly, as far as this item is concerned, I think that rather than the onus being on the shipyard to show that the lump sum charged was reasonable, in order to avoid the amount charged, the onus would be on the owner to show that the lump sum charged was unreasonable. The owner did not adduce any evidence on this point. Since the owner was willing to accept the lump sum basis of charge in the first quotation for the requisite quantities of steel, I can infer that it would have accepted the same basis of charge for such quantities in the later quotations. Accordingly, the appeal must be allowed on this issue and the amounts to be paid by the owner for steel renewals of one tonne and below must be as per the amounts shown for the same in invoice 5593.

pipes (in between sizes)

31 The amount charged by the shipyard for this item was $6,331. The AR accepted the owner's argument that the shipyard's calculations were incorrect and the correct amount to be charged was $4,506.66. Although the shipyard put in written submissions challenging this decision, in the course of the oral arguments, counsel informed me that it was not proceeding with its challenge on this amount. I therefore do not have to deal with it.

mark-up on non-standard items bought off the shelf and mark-up on sub-contractors' prices

32 During the course of the work, the shipyard procured non-standard items from suppliers and also employed sub-contractors for some of the works that needed to be done. In respect of these two items, the shipyard did not simply pass on to the owner the amounts which it had paid the suppliers and sub-contractors. Instead, it charged the owner for the same at prices which included its own mark-up which often amounted to well over 35%. The AR accepted the owner's argument that the sub-contractors' and suppliers' invoices should be taken as reflecting the reasonable prices payable for the services and goods supplied. In the absence of evidence that the shipyard's mark-up was reasonable, the AR awarded only the amounts which the shipyard had actually to pay its suppliers and sub-contractors.

33 Before me, the shipyard argued that the AR was wrong to award these items at cost only. It said that there must be an element of profit worked into the amount that the shipyard could charge. This was simple business logic as otherwise there would be no point in the shipyard carrying out the work and in such circumstances it would be better for the owner to engage a sub-contractor directly.

I must say that I do not accept this last argument because any shipowner would engage a ship repairer on the basis that that ship repairer has offered to do all of the work on the vessel that the shipowner requires. The shipowner is not concerned with whether the repairer does the work itself or employs sub-contractors to do so as long as the work gets done. There is no way that any shipowner would know which part of the work the repairer cannot do on its own and needs a sub-contractor for. In fact, if any ship repairer were to go out and tell vessel owners that it would only do part of the repairs and the owners would have to employ sub-contractors for the rest, such a ship repairer is unlikely to get much business.

34 On the other hand, I do accept that whilst a repairer may have to outsource some of its work and obtain some items from others, it will incur costs in doing so and it would not be fairly remunerated if it were only entitled to charge the exact price that it had to pay for such goods and services. The question is: what is a reasonable mark-up? The problem here is that there was no evidence on what a reasonable mark-up would be. Mr Temple had testified that the amounts charged were reasonable but there was no evidence as to whether he knew by how much each item had been marked-up. The shipyard submitted that for the items listed in schedule 7 of the list it had furnished to the AR, the mark-up was actually about 35% whereas the items listed in schedule 9 had been marked-up by 29.2%. No explanation was given for this difference and there was no evidence as to why such mark-up rates were reasonable. The shipyard ideally should have furnished evidence as to the usual rates of mark-up in the industry. In the absence of such evidence, whilst I think it is incorrect not to allow the shipyard some element of profit, that element cannot be as high as 29.2%, let alone 35%. In the circumstances, I would vary the award by allowing the shipyard a mark-up of 10% to cover its administrative costs in sourcing the supplies and supervising the sub-contractors. I accept that this is a rather arbitrary figure but I think it is not unfair in view of the lack of evidence justifying a higher mark-up.

Conclusion on invoice 5593

35 I have accepted the shipyard's arguments, to some extent at least, in respect of two categories of items in invoice 5593. Accordingly, the AR's award has to be varied to reflect this. I will see the parties to determine the exact sums which are payable to the shipyard in the light of this decision.

The shipyard's appeal on the owner's claim

The award in favour of the owner for loss of profit

36 At the time of the fire, the owner had entered into a confirmed charterparty in respect of the vessel for a period of one year with an option to extend for another year. The commencement of the charterparty (originally scheduled for 21 May 2008) had been delayed by the fact that the work on the vessel had not been completed, but, as at the date of the fire, the charterparty was still in force and the owner expected that upon completion of work, the vessel would immediately be on hire. The charter hire payable was $5,900 per day. On 27 June 2008, the charterers terminated the charter because the vessel was unable to perform the contract due to the damage caused by the fire.

37 The owner's case before the AR was that it was entitled to claim loss of profits arising out of the cancelled charterparty for the confirmed contractual period of one year. The loss was calculated by taking the total revenue that would have been earned under the charterparty and deducting the expenses that would have been incurred in earning that revenue for the period of one year. The shipyard contested this claim and argued that the owner could not claim loss of hire for the full 12 months but should only be awarded loss of hire for two months since its expert had testified that the

owner should have been able to replace the vessel within two months. It also made arguments relating to the quantum of compensation. The shipyard said that in any event, it was not likely that the vessel would be fully utilised on the charter for 12 months and a utilisation factor of 85% should be applied. Further, the shipyard questioned the owner's costs of operating the vessel (the owner had calculated these as being $411,688.42) and submitted that the operational cost would instead amount to US$3,000 a day or US$1,095,000 per year. The AR rejected all the shipyard's arguments and awarded the owner the amount that it had claimed. On the appeal, the shipyard reiterated the arguments that it had made below. I will consider these in turn.

What was the owner's loss of profit?

38 There are three sub-issues that have to be considered in relation to the calculation of the loss of profits suffered by the owner by reason of the destruction of the vessel. The first relates to whether the whole of the expected charter hire should be considered and if this is decided in the affirmative, then the next two relate to what deductions should be made from such charter hire to get the owner's net loss.

What are the relevant legal principles?

39 Relying on *The Kate* [1899] P 165, *The Racine* [1906] P 273 and *Owners of Dredger Liesbosch v Owners of Steamship Edison* [1933] AC 449 ("*The Liesbosch*"), the AR accepted that it was established law that where a profit-earning chattel is lost or destroyed, the owner is entitled to claim putative profits lost as a result of the destruction. The shipyard acknowledged the principle established in those cases but submitted that the owner could only be compensated for loss of the charter hire up to the date on which a substitute vessel could reasonably have been available for use. It submitted that the case was not about mitigation (the AR having held that she was not convinced that there was a reasonable opportunity for the owner to mitigate its loss by acquiring an alternative vessel) but about awarding the owner an amount in damages that properly and adequately compensated for its loss. The shipyard further submitted that the measure of damages should reflect the value of the vessel and for that purpose cited the following observation by Lord Wright in *The Liesbosch* (at 464):

> [T]he measure of damages in such cases is the value of the ship to her owner as a going concern at the time and place of the loss. In assessing that value regard must naturally be had to her pending engagements, either profitable or the reverse. The rule, however, obviously requires some care in its application; the figure of damage is to represent the capitalized value of the vessel as a profit-earning machine, not in the abstract but in view of the actual circumstances.

I should note at this stage, however, that that statement must also be looked at in the light of the overarching principle which Lord Wright himself had expressed earlier in the judgment (at 459) as follows:

> The substantial issue is what in such a case as the present is the true measure of damage. It is not questioned that when a vessel is lost by collision due to the sole negligence of the wrongdoing vessel the owners of the former vessel are entitled to what is called *restituto in integrum*, which means that they should recover such a sum as will replace them, so far as can be done by compensation in money, in the same position as if the loss had not been inflicted on them, subject to the rules of law as to remoteness of damage.

40 As stated earlier, the shipyard submitted that this was not an issue regarding mitigation. It was about awarding the owner an amount in damages that properly and adequately compensated for its

loss. Relying on *The Liesbosch*, the shipyard was seeking to establish not that the owner ought to have mitigated its loss but that the measure of damages should reflect the value of the ship. The measure of damages must be calculated in this way in order to ensure that the principle of *restituto in integrum* was upheld. In order to put the owner back into position, the true value of the vessel must be derived and therefore some consideration must be given as well to the lost vessel's pending engagements. Such consideration was given in *The Liesbosch* as compensation for the "delay and prejudice" caused to the pending engagements. Therefore, the shipyard submitted, the correct heads of damage to which the owner was entitled were:

a) market value of the vessel as the same had been determined by its expert, Captain Meade; and

b) compensation for the delay and prejudice caused to the pending charter (*ie*, loss of profits until the vessel could be replaced – a period of two months).

41 In order to consider the shipyard's submissions I will have to spend some time discussing the applicable principles by which one can determine the appropriate measure of damages due to a claimant who has lost his vessel by reason of the defendant's negligence, where the vessel was engaged under a prospective time charterparty. The general principle, that of *restituto in integrum*, was, as noted above, enunciated by Lord Wright in *The Liesbosch*.

42 Before referring the *The Liesbosch* in more detail, it is useful to look at the two preceding cases which were applied by it and which the AR also referred to. In *The Kate*, the President (Sir F. H. Jeune) stated at 168-9 that:

> [I]t would have appeared to me clear that in some way or other the principles upon which damages are assessed would *require account to be taken of the profitable character of the charterparty under which the ship was at the time of her loss*. … It may be nothing more than a question of statement of figures whether the owner of a vessel, lost when under a profitable charterparty, is recouped his loss by receiving her value at the conclusion of her voyage plus the profits of her charterparty, or by receiving her value at the time of collision, such value being enhanced by the fact that the ship at the time was under a profitable charterparty. But unless in one or other of these ways the owner gets the benefit of the profitable engagement of his ship, he obviously fails to realize a *restituto in integrum*.
>
> [emphasis added]

43 The learned President drew support from *The Northumbria* (1869) LR 3 A & E 6 which considered the measure of damages to be awarded for a total loss of a ship with cargo. In such a case, the damages included the value of the ship at the end of the voyage and the value of freight that would have been earned less operational expenses (*ie*, the net income); and if no cargo was on board, then interest on the value of the ship from the day of the collision (*ie*, the value of the ship as a going concern). The judge then extended the principles from a ship with cargo to a ship without cargo but under charter, and awarded the profits lost under the charterparty.

44 In *The Racine*, the defendants appealed to reduce the amount of damages awarded by the registrar on a ground that the allowance of possible profit the plaintiffs would have made on three successive charterparties was problematic and too remote, and the arbitrary deduction of 10% for contingencies revealed the speculative character of the calculation. This argument was rejected. The

English Court of Appeal followed *The Kate*, and upheld the registrar's award of the loss of profits on the *three* successive (one ongoing and two prospective) charters as damages, less a reasonable percentage for contingencies. Fletcher Moulton LJ said (at 281) that he saw no difference in principle between one voyage and a chain of voyages under the same charterparty, or a chain of voyages under *separate charterparties* which was the situation in that case. Future profits were however subject to a discount "by taking the possibility of accidents into consideration; and if [there is a] chain of charterparties, of course the possibility of earning the profits not being defeated increases with the lapse of time" *per* Vaughan Williams LJ (at 278) and Fletcher Moulton LJ (at 281).

45 Turning to *The Liesbosch*, there the claimant's dredger, which was required by them for the performance of a contract, was sunk by the defendant. The case differed from the earlier cases in that the dredger was not under charter, but was "employed by owners in the normal course of their business as civil engineers" (at 465). The House of Lords recognised that *if immediate replacement was possible*, the measure of damages would be calculated by taking the market price of a replacement. But because immediate replacement was a merely fanciful idea in the circumstances (as a purchase would take time), the claimants were entitled to damages for the delay and prejudice to their contract. It was in the context of his analysis of the charterparty cases that Lord Wright uttered the observation which the shipyard placed so much emphasis on and which I have cited as the first quotation in [38] above.

46 Then, with respect to the measure of damages that was applicable in the situation of the dredger working for the claimant to perform services due from the claimant under a general contract for dredging, he stated (at 468-9):

> [T]he value of the *Liesbosch* to the appellants, capitalized as at the date of the loss, must be assessed by taking into account: (1.) the market price of a comparable dredger in substitution; (2.) costs of adaptation, transport, insurance, etc. to Patras [*ie*, the place of performance]; (3.) compensation for disturbance and loss in carrying out their contract over the period of delay between the loss of the *Liesbosch* and the time at which the substituted dredger could reasonably have been available for use in Patras, including in that loss such items as overhead charges, expenses of staff and equipment, and so forth thrown away, but neglecting any special loss due to the appellants' financial position. On the capitalized sum so assessed, interest will run from the date of the loss.

47 The learned author of *McGregor on Damages* (Sweet & Maxwell, 18th Ed, 2009) ("*McGregor*") noted that the rule in *The Liesbosch* fused the two heads of conventional losses which are the normal measure and consequential loss: at para 32-063, P 1188. This might lead to a duplication of damages if the two heads are not viewed in relation to each other, a danger recognised by Lord Wright who stated (at 464) of *The Liesbosch*:

> The rule … requires some care in its application; the figure of damage is to represent the capitalized value of the vessel as a profit-earning machine, not in the abstract but in view of the actual circumstances. The value of prospective freights *cannot simply be added to the market value* but ought to be taken into account in order to ascertain the total value for purpose of assessing the damage, since if it is merely added to the market value of a free ship, the owner will be getting pro tanto his damages twice over. The vessel cannot be earning in the open market, while fulfilling the pending charter or charters.
>
> [emphasis added]

Hence, in cases where the vessel was under no ongoing or prospective engagements, the measure of

damages would simply be its value as a going concern at the date of loss. The shipyard's application of *The Liesbosch* to the facts of this case does not take account of the difference between the situation of the vessel here which had a prospective engagement and that of the dredger which was simply engaged in general work which could be performed by a substitute vessel although the shipyard did accept that once the charterparty was cancelled, it could not be resuscitated and performed even if a replacement vessel had been purchased by the owner in the ensuing two months.

48 Apart from *The Liesbosch*, *The Kate* and *The Racine* were also applied in *The Empress of Britain* (1913) 29 TLR 423. Unfortunately, *The Liesbosch* did not refer to *The Empress of Britain*. In that case, the plaintiff's vessel, the *Helvetia*, was employed under a charterparty dated 1909, which was to be in force from 1911 to 1917 unless the charterers cancelled it for any particular reason. The vessel was sunk in 1912 by the defendant's vessel. The plaintiff claimed £24,320 for the loss of this charter for the unexpired period of 1912 and the subsequent five seasons. Before the registrar, £2,000 was allowed as he thought that *restituto in integrum* would be better effected if loss of hire was allowed only up to 15 November 1912 "than to endeavour to ascertain the value of the *Helvetia* five years hence, and of the loss of hire with various deductions for contingencies."

49 On appeal by the plaintiff, it was held that the *whole* charterparty (*ie*, from 1912 till 1917) was to be taken into account in assessing the damages. This included the contingencies and the charterparty's special terms such as the annual option to cancel. The relevant part from the report is set out in full:

> The learned Registrar had excluded from his consideration the benefit accruing to the Helvetia from the fact that she was under this charterparty not to run out except in certain events till 1917, and he had specifically allowed loss of hire to November 15, 1912, only - the end of the current season during which the Helvetia was sunk. Some date had to be taken, and his Lordship had to say what that date ought to be. He did not think the end of the season was the date, and there were only two other possible dates - (1) February, 1914, the date at which another vessel like the Helvetia could have been built. His Lordship did not think that date would do, for it did not follow that if another vessel like the Helvetia was ordered she would be engaged under *this charterparty or in this business*, and without a charterparty of this kind it was doubtful if any one would build a vessel like this. (2) The only other date was November 15, 1917, when the charter expired. This was *a date long forward of the time at which one had arrived*, and his Lordship thought it might create difficulty as to ascertainment, *but to that date the value of this vessel had to be determined*, subject to all the contingencies as to the charterparty which would exist and the special provisions as to the terms of the charterparty.
>
> [emphasis added]

5 0 *McGregor* commented, in relation to *The Empress of Britain*: "This goes a long way: one may suspect that there is this limitation, namely that the period over which loss of profit is allowed does not extend beyond the time when the claimant could reasonably have procured a substitute vessel" (at para 32-061, P 1186-7). The shipyard relied on this comment to argue that even in cases where it was *not necessary* for a ship owner to seek a replacement vessel, loss of profits *should still be limited* to the date by which a replacement vessel could reasonably be obtained. In this case, citing the evidence of Captain Meade that supply/towing vessels of the type of the *Rainbow Star* were fairly easily obtainable in the market and that a replacement could be located and purchased within two months, the shipyard submitted that a reasonable time period for the replacement of the vessel was two months and therefore no more than two months' loss of profit should be awarded to the owner.

51 It would be noted that the shipyard's argument goes further than *McGregor's* comment. It is

implicit in that comment that the procurement of a substitute vessel must be held to be reasonable before the limitation applies. In any case, I think that there are good reasons to reject the shipyard's argument which is based on *McGregor's* comment which itself is not an established principle of law.

52 First, *McGregor* did not explain when and why it considered such a limitation should be imposed. If the length of the vessel's engagement is to be the sole trigger for the imposition of such a limitation, it would be impossible to avoid an arbitrary application of the rule. If the underlying concern is to protect the defendant from indeterminate liability, the existing rules of remoteness (*viz*, the test of "reasonable foreseeability") and causation (*viz*, the "but for" test) are sufficient to do so. There is no need for an additional limitation which is predicated on what the plaintiff ought to have done subsequent to the defendant's wrongdoing.

53 Secondly, even if *McGregor* meant something more specific, *viz*, "… beyond the time when the claimant could reasonably have procured a substitute vessel [*to perform that contract*]", the limitation remains objectionable. It assumes that the party who contracted with the claimant would be willing to keep the contract alive so as to give the claimant time to obtain a substitute vessel to perform the contract and that the claimant had the necessary wherewithal to obtain such a vessel. Only if these two assumptions obtain would the claimant have lost only the income over the period before the substitute vessel was obtained, thus allowing the risk of overcompensation to materialise. However, if the claimant's contracting party terminated the contract immediately, it is hard to justify why the claimant should purchase a substitute vessel. It is not commercially realistic or fair to allocate the risk to the ship owner and expect him to purchase a substitute vessel in contemplation of procuring a similar engagement.

54 Thirdly, the words *McGregor* used - "when the claimant *could reasonably have procured* a substitute vessel" (emphasis added) - bear strong resemblance to the rule of mitigation. But the concept of mitigation contains several essential features which are inconsistent with the shipyard's contention. In this regard, as mentioned above, the shipyard itself was at pains to argue that the concept of mitigation was not relevant to the circumstances of the present case and that the AR had been incorrect to invoke it. It is thus somewhat ironical that the textbook passage it relied on should bear an essential similarity to the concept of mitigation which I will briefly discuss.

55 A claimant must take reasonable steps to mitigate the loss arising from the defendant's wrong, and the claimant will not be entitled to recover damages in respect of any part of the loss which is due to his neglect to take such steps. However, the standard of reasonableness must take into account the claimant's characteristics: *The "Asia Star"* [2010] 2 SLR 1154 at [31]. Also, the question of mitigation is a question of *fact*. This means that what is reasonable must be determined according to the circumstances the claimant is placed in: *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623 at [27]. Hence, it cannot be correct to impose a separate rule of *law* which restricts the claimant to the damages he would have obtained had he mitigated, *whether or not* the mitigation was reasonable or even possible: *The "Asia Star"* at [30]-[32].

56 As a matter of procedure and burden of proof, the legal rule which the shipyard proposes is also at odds with the rules which apply to mitigation. It is well-established that the issue of mitigation must be pleaded and proved by the defendant seeking to rely on it: *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR 288 at [71] following *Geest plc v Lansiquot* [2002] 1 WLR 3111 at [14] and [16]. However, the shipyard's proposition would enable a defendant to circumvent these procedural rules entirely. Thus, it cannot be a tenable proposition.

57 The shipyard also relied on several cases which involve vessels with no engagements (referred to as seeking ships). These cases did not assist the shipyard because the vessel here had a

prospective time charter and did not fall into the category of a seeking ship. In *Voaden v Champion* [2001] 1 Lloyd's Reps 739 ("*The Baltic Surveyor*"), the lost vessel was not under any engagement. Despite that, the owner attempted to claim for loss of *potential* chartering income. Colman J after analysing *The Liesbosch* held, (at 76), that:

> [T]he claim for loss of chartering profits advanced in the present case is, in my judgment, wrong in principle. *BS* [*ie*, the lost vessel] had no pending charter commitments at the date of the loss, which was at the end of the chartering season. She was currently in a position analogous to Lord Wright's seeking ship and, as such, her potential as a profit-earning engine in future chartering seasons would be reflected in her replacement value. If interest were to run on that sum from the date of the loss, the owner would be sufficiently compensated …

It can be seen from that quotation that it was because the vessel was a seeking ship that its future earning potential was said to be reflected in its replacement value. This does not support the shipyard's proposition that the loss of charter income for the full period of one year should not be awarded here because Capt Meade in valuing the vessel had regard to its future earning potential.

58 In *The Llanover* [1947] P 80, although at the time of collision the claimant's ship was under a government charter for an indefinite period, it was *not* awarded damages more than such profit as the vessel would have made if the voyage on which it was engaged at the time of its loss had been completed. Pilcher J reversed the decision of the assistant registrar who had treated the lost ship as "under a long-term charter and after making deductions for contingencies and for wear and tear" awarded the loss of profits on top of the market value of the ship: at 85. It may therefore appear that the *entire* charter was not to be taken into account when assessing the payable damages.

5 9 *The Llanover* was, however, a unique case. The incident took place during the Second World War. Pilcher J found that, at 86:

> in March, 1942, any British shipowner selling or buying a British ship would do so with the knowledge that his ship would, so long as she was kept efficient, be *assured of profitable engagement* probably at rates laid down by the Ministry of War Transport. If this were so, it seemed to follow that *any enhanced value due to the virtual certainty of profitable employment was already reflected in the prices realized by the sales of comparable ships* and was therefore already included in the sum allowed by the assistant registrar under [the going concern value of the vessel].
>
> [emphasis added]

Thus, the war time circumstances ensured that there were no seeking ships and the value of the lost ship when assessed as a going concern had already reflected the profitable engagements it had obtained.

60 On the other hand, in *Four of Hearts (Owners) v Fortunity (Owners)* [1961] 1 WLR 351, Hewson J awarded the loss of profits that a motorcruiser, hired out on the Broads, would have made *for the whole of the 1959 season* had she not been sunk, although only 16 out of the 25 weeks of that season had been booked at the time of the sinking. This result was based on the finding [at 354] that "[v]essels on the Broads … are employed in one small defined area, whose seasonal employment at scheduled rates, not subject to fluctuation, can be fairly accurately determined by comparison with what actually occurred in the hiring of other craft similarly employed by the same owners". He drew a distinction between ocean shipping engagements that were not already contracted for and fixed which were too uncertain to be taken into consideration and the particular engagements that

the motorcruiser would have been assured of. Hewson J then awarded £350 for the loss of *expected* net profits on top of the vessel's £2,200 market value.

61 These three cases highlight the significance of the basis of valuation in determining whether or not to award the loss of profits for certain engagements. Where the going concern value only accounted for the *earning capacity*, but did not take into account the vessel's *assured engagements*, the value of these engagements must be added because the ship owner can say for sure that but for the defendant's negligence, he would have been able to perform them. In the present case, it was clear from Capt Meade's report that he considered the earning capacity of a vessel of the same type as *The Rainbow Star* in the prevailing market conditions but without regard for the confirmed charter that *The Rainbow Star* was due to embark on immediately the repair work had been completed. He stated in his report that on or about 10June 2008 (expected date of completion of repairs and work done) upon successful completion of her repairs and class survey, he would have valued the vessel at around US$1.75m. He based this valuation partly on the cost of completing the special survey which he estimated (including ship repairer's bills) as being in the region of US$1m. He also noted that a similar vessel of this size, type and age, when "out of survey", would have been worth US$650,000 to US$750,000. Capt Meade observed, "It is also fair to state that the 'special survey' would 'add value' to the vessel almost on a $ to $ basis of total cost of the survey to value added". Plainly, in valuing the vessel at US$1.75m, Capt Meade did not have regard to the expected profit from the charterparty that had been fixed for it.

62 Accordingly, I must reject the shipyard's submissions. The AR was correct to use the charter hire the vessel would have earned for the whole of the confirmed period of the charter as the basis of calculation of the owner's loss of profits by reason of the fire.

What utilisation factor should be applied to the vessel?

63 The shipyard contended before the AR and again on appeal that the utilisation level of the vessel during the charter would only have been 85% (*ie*, that the vessel would have been off-hire for 15% of the charter period) and therefore any loss of profit would have to be adjusted according to this factor. This argument was based on the evidence of Capt Meade who said that because of its age and condition, the vessel could not be fully utilised during the charter as it would break down and require both repairs and routine maintenance work. The AR rejected this argument on the basis that Meade's figure of an 85% utilisation rate was not supported by any evidence or analysis. Moreover there was no evidence to show that the vessel had had repair or maintenance issues during prior charters with the same charterers.

64 On the appeal, the shipyard reiterated its arguments. It again emphasised the vessel's age and Capt Meade's assertion that it would break down from time to time. The shipyard further pointed out that the principle of applying a discount to profit was recognised in *The Racine*. There the English Court of Appeal had upheld a discount of 10% from the net freights which the claimant had lost.

65 The owner responded by supporting the AR's reasoning and by pointing out that during cross-examination, Capt Meade had agreed that there was no evidence to show that repairs or maintenance issues had arisen during the vessel's prior charters. Capt Meade had further considered that the vessel had undergone extensive repairs and would have commenced the new charter in good condition. Thus, he agreed that it was not certain that the vessel would break down during the charter. It submitted that on the evidence, Capt Meade's figure of 85% was without any objective basis and the AR was correct to apply a utilisation figure of 100%.

66 The owner did not seriously argue that contingencies that might have arisen to prevent him

from earning his full net income even if the vessel had been able to carry out the charter should not be accounted for. Its point was that there was no basis for the 85% figure, and without evidence as to what contingencies might arise and for how long they would put the vessel off-hire, it would be too speculative to reduce the income by any amount. The authorities are clear, however, that contingencies must be provided for.

67 The difficulty resides in identifying such contingencies, which are speculative by nature, in order to prevent overcompensation whilst at the same time respecting the principle of *restituto*. Whilst a majority of the reported cases have dealt with voyage charterparties, this does not stand in the way of making deductions for contingencies arising in time charterparties, as *The Empress of Britain* illustrated. Similarly, in *The Racine*, three successive voyage charterparties were taken into consideration and a discount of 10% was given for contingencies which was upheld on appeal. The assessment of contingencies in *The Racine*'s engagement was arguably fraught with even greater speculation than a straightforward year-long charterparty. In any event, Lord Wright while acknowledging the speculative nature of this task did not think it ought to prevent the entirety of the assured engagement or engagements from being considered. He stated in *The Liesbosch* (at 464):

> [T]he present valuation for a future charter becomes a matter of difficulty in the case of *long charters*, such for instance as that in the *Lord Strathcona Steamship Co. v. Dominion Coal Co*. [1926] 1 AC 108 which was for ten St. Lawrence seasons, with extension at the charterers' option for further eight seasons. The assessment of the value of such a vessel at the time of loss, *with her engagements*, may seem to present an *extremely complicated and speculative problem*. [emphasis added]

68 What contingencies any particular vessel may meet would be a question of inference and probabilities depending on the age and condition of the vessel, the type of work it performs and the geographical routes it can be expected to undertake. In this case, the contingencies mentioned by Capt Meade were the breakdowns and routine maintenance works that he thought a vessel of this age would encounter. However, as he himself admitted, in view of the repair works conducted by the shipyard, it was uncertain whether these would materialise. I cannot, however, disregard the likelihood of breakdowns entirely nor can I disregard the possibility of an accident like a collision with a fixed or floating object occurring during the term of the charter. However, since the charter term was only for a year, the likelihood of such an incident would be proportionally reduced. In the circumstances of this case, I think it would be fair to allow a 5% discount for contingencies. I would therefore fix the utilisation level at 95%. That would mean that over a period of 365 days, I assume that the vessel would be on hire for approximately 347 days and off hire for 18 days. I think that it is a reasonable approximation bearing in mind that in *The Racine*, the utilisation level chosen was 90% over three voyages which could have extended to a year or somewhat more in duration.

What operational costs should be deducted from the total charter hire earned?

69 Before the AR, the owner accepted that the costs of operating the vessel during the one year confirmed charter period had to be deducted from the charter hire. The owner's evidence, given by Mr Juffri, was that its operational costs would have amounted to $411,688.42. The AR accepted this figure and rejected Capt Meade's evidence for the shipyard that the operational costs would be US$3,000 a day. She held that Capt Meade's evidence was not substantiated and was also speculative in part.

70 On the appeal, the shipyard reiterated Capt Meade's opinion that operational costs for this type and style of vessel would be around US$3,000 per day. The owner's contention that its operational costs would be $411,648.42 for one year or $1,127.80 per day was not realistic since it was so much

lower than Capt Meade's figure. I see no reason to accept the shipyard's contention in this regard. Capt Meade had admitted that his estimation of the operational costs was based only on general "empirical experience". On the other hand, the owner had based its calculation on costs paid previously including the wages established by the employment contracts of the crew. Where the owner differed from Capt Meade was that it made no allowance for repair and maintenance costs but this was reasonable because the vessel would have completed extensive repairs when it commenced the charter and would have been on good condition. Further, it had a store of spare parts and two engineers on board to do routine repairs and maintenance without incurring additional costs. Thus, the likelihood of the vessel needing repairs during that one year costing US$450 a day, as estimated by Capt Meade, was extremely low. The AR's holding must be upheld.

Conclusion on loss of earnings

71 For the reasons given above, the AR's order must stand except that the calculation of the gross earnings from the charterparty for the confirmed one-year period should be reduced by five percent.

Interest

72 The AR awarded the owner interest on the value of the vessel from the date of accrual of the cause of action, *ie*, 8 June 2008 up till the date of payment. The shipyard argued that interest should only have been awarded from the date that the owner filed its counterclaim in this action, 31 October 2008.

73 The argument was based on the long established rule in admiralty that where a vessel has become a total loss by reason of a collision, interest on value would be awarded from the date of destruction since the interest is for the loss of use of the vessel. However, this argument is varied in the case where the vessel concerned is carrying cargo at the time of the collision. In that situation, interest would be awarded on the value of the ship plus the value of the freight from the date on which the vessel was expected to conclude the voyage, which is taken to be the date when the freight would have been paid (see para 32-056 of *McGregor*). The shipyard noted that this principle was extended to ships under charter by *The Racine*. It argued that interest was awarded in this way because by allowing for freight, interest would already be given for the use of the vessel during the interval between the collision and her expected arrival in port.

74 Following the shipyard's argument to its logical conclusion, I would expect it to claim that interest should be awarded on the value of the ship from the end of the one year charter term because if the owner recovered charter hire for one year, it would already be in effect obtaining interest for the use of the vessel during that period. However, it was content to argue for interest to accrue from the date when the owner filed its counterclaim.

75 The owner relied on *The Berwickshire* [1950] P 204 in which the court in awarding interest from the date of collision held (at 217) that:

> [T]he true principle underlying the award of interest in Admiralty is that in very £'s worth of damage in respect of which interest is ultimately awarded, the interest has accrued potentially from the moment when the damage was suffered until the liability has been adjudged and the amount finally ascertained.

It therefore argued that the date to be taken had to be the date of the loss.

76 *The Berwickshire*, however, concerned a French fishing vessel which was sunk with a cargo of cod fish during the Second World War and the main issue was whether interest could be awarded from the date of the casualty to 13 October 1944 which was the date when France was liberated from German occupation. Prior to that date, it was impossible for the owners of the fishing vessel to sue the owners of *The Berwickshire* or for the latter to admit liability and pay compensation because this would have been against the *Trading with the Enemy Act, 1939*. The usual principles applicable to the award of interest in admiralty cases were not in issue in that case and, further, in the course of his judgment, Lord Merriman P cited, without demur, the judgment of Sir Robert Phillimore in *The Northumbria* in which the latter had observed, *inter alia*, that under the rule of *restituto in integrum*, the cargo carrying vessel did not obtain interest from the date of the collision because she received it in the shape of the freight at the port of delivery.

77 Having regard to the authorities and the rationale for delaying the award of interest, I think it was not correct to award the owner interest on the value of the vessel from the date of the loss since the AR had also awarded the net amount of charter hire for one year that the owner lost by reason of the fire. The owner was therefore doubly compensated. Since the shipyard only asked for interest to be awarded on the value of the vessel from 31 October 2008, I vary the award so that interest will accrue from that date.

Agency fees

78 The owner claimed agency fees of $1,050 per month which it had paid AMM Ships Pte Ltd from 22 June 2008 to 22 January 2010. The AR awarded the owner $21,000 under this head. On appeal, the shipyard submitted that the amount should be reduced by $3,400.

79 The figure of $1,050 per month comprised $850 for agency fees, $100 for communications and $100 for inland transportation. The shipyard pointed out that during cross-examination, Mr Juffri had said that he was only claiming the agency fees of $850 per month. During re-examination, however, he changed his evidence to say that the fees were $1,050 per month. The shipyard argued that prior to the repatriation of the crew in August 2008, it was reasonable to incur fees for communications and transportation. Once all the crew had been repatriated, however, these services were no longer required. Moreover the vessel was under arrest from 22 September 2008. The amount awarded should be reduced by $3,400 (being 17 months' charges for transportation and communications) to $17,600.

80 In response, the owner said that its case was that the agency fees had to be paid as long as the vessel was anchored in Singapore regardless of whether there was a crew on board. Mr Temple had agreed in court that when a vessel is in Singapore it needs to have an agent, and port dues and agency fees would have to be paid. The owner submitted that the sum of $1,050 charged by AMM Ships Pte Ltd was the latter's basic charge which included minimum charges for inland transportation and communication. This was supported by the invoices from AMM Ships Pte Ltd which were adduced in evidence. The owner had paid these invoices and was simply claiming what it had paid its agent. During cross-examination, Mr Juffri also clarified his error in stating that the fees paid were $850 only and his corrected evidence was consistent with the invoices from AMM Ships Pte Ltd.

81 The invoices showed the amounts paid by the owner to AMM Ships Pte Ltd. The shipyard did not produce any evidence that the amounts charged were unreasonable. The AR considered that these expenses were reasonably incurred. There is therefore no reason for me to differ from her finding or to upset her award in this respect.

Conclusion

82 For the reasons given above, the appeal must be allowed in part. I will see the parties in order to formulate the exact terms of the order so as to reflect the decisions that I have made above on how the amounts awarded by the AR should be adjusted. Further, although the shipyard has been partially successful in its appeal it has also failed in relation to substantial portions of its claim and the owner's counterclaim. Accordingly, I think it necessary to hear the parties on what the appropriate order as to the costs of the appeal should be.