



**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**ADMIRALTY COURT (KBD)**

**AD-2021-000028**

18 November 2022

Royal Courts of Justice  
Rolls Building, Fetter Lane, London EC4A 1NL

**[2022] EWHC 2858 (Admiralty)**

**Before:**

**MR ADMIRALTY REGISTRAR DAVISON**

**Between:**

**ANDREW ARNOLD**

**Claimant**

**- and -**

**HALCYON YACHTS LIMITED**

**Defendant**

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**Mr Tom Nixon** (instructed by **Howard Kennedy LLP**) for the **Claimant**  
**Mr Patrick Dunn-Walsh** (instructed by **Thomas Miller Law**) for the **Defendant**

Hearing dates: 18 – 21 October 2022

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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## Introduction

1. This claim concerns a transatlantic yacht delivery from La Rochelle, France to Bear, Delaware, on the eastern seaboard of the USA. The yacht was “VLARODA”, a Bavaria-Nautitech Open 46. She was a new-build, sloop-rigged catamaran categorised by her manufacturer as a Category A Yacht. As stated in the owner’s manual, Category A Yachts are “designed for winds that may exceed wind force 8 (Beaufort scale) and significant wave height of 4 m and above”. She was – or ought to have been – well capable of a transatlantic crossing. However, in circumstances that I will have to examine in more detail, 3 days out from Ponta Delgada her professional crew took the decision to return to the Azores. The yacht had sustained damage. How and why the damage was sustained is the central issue in the case.

## Narrative

2. The claimant is a private individual resident in the USA. The defendant (“Halcyon”) is a yacht delivery company founded in 2010 by Mr Peter Green, an experienced yacht skipper with the RYA Yachtmaster Ocean and Yachtmaster Instructor qualifications. The claimant negotiated the purchase of the yacht via a broker, Mr Gregor Tarjan of Aeroyacht Ltd. Mr Tarjan was based in the USA. The claimant took delivery in La Rochelle, France on Monday 6 November 2017. He had by that time arranged for the yacht to be onward delivered to the USA by Halcyon. The skipper for the voyage was Mr Paul Walton. Mr Walton had the Yachtmaster Ocean qualification and had completed 5 transatlantic crossings. There were, additionally, two crew: Andrew Briggs and Josh Carpenter. They both had the Yachtmaster Offshore qualification. Mr Walton joined the yacht on 7 November 2017. At this time the commissioning team from Bavaria were finalizing the yacht for handover. The claimant left La Rochelle on Friday 10 November 2017. VLARODA departed La Rochelle on Monday 13 November 2017. Her intended route was La Coruna, Spain – Azores – Bermuda – USA. This was the so-called “northern route”. (The “southern route” is via the Canaries and the Caribbean.) She arrived at La Caruna on 15 November 2017 and departed there for the Azores the following day. On 22 November 2017 she arrived at Ponta Delgada, São Miguel, which is the largest and most populous island in the Azores. The crew waited there for a suitable weather window. During this time, they were in contact with Mr Green and his assistant, Allison Smith (also a Yachtmaster) about weather and routing. (Both things are now the subject of detailed expert evidence; see below.)
3. They departed Ponta Delgada on the morning of Monday 27 November 2017. On that day they headed west. The following day, they came on to a south westerly heading. On the 29<sup>th</sup> at 0645 they once again headed west and maintained that heading for the rest of the day coming back on to a more south westerly heading at 0100 on Thursday 30 November. At 0530 the log records “Decision to head to Horta”. They came round on to a north easterly heading in order to retrace their course, but this time heading for Faial, the most westerly island in the Azores and the nearest port (Horta). At this point, the wind was Force 4 and the sea state was Moderate. According to the log, the conditions had been relatively benign. The mean wind had been Force 4, peaking at 5-6 for a few hours on 27 November and at 6-7 for another few hours on 30 November. The following defects with the yacht were recorded in the log: (1) the failure of the generator at 0055 on the 28<sup>th</sup>, (2) the failure of the water-maker at 0905 on the 29<sup>th</sup>, (3) the battery registered only 12.2V (about 50% charge) at 2240 on the 29<sup>th</sup> and (4) the failure of the wind instruments at 0315 on the 30<sup>th</sup>.
4. On the way back to the Azores, VLARODA encountered more severe weather. At 1150 on 30 November the Notes and Remarks column in the log had an entry: “Huge swell, need to get a mo[ve on] 7Mtrs pushing ahead of it”. (The letters in square brackets are my interpolation because the copy of the log itself is clipped. There was broad agreement that this was the sense of the entry.) The weather gradually worsened. The sea state progressed from Moderate to Rough and the windspeed climbed to Force 7. At 0700 on Friday 31 November, the jibhead parted from the swivel; (the jib halyard shackle had failed). At 0900 the mainsail was reefed down to 3. From noon the windspeed reached Force 8, dropping to Force 7 at 1800. The sea

state was Very Rough and at 1500 the log remarked "Huge Seas". During this period, the boat (no doubt surfing down swell) temporarily attained high speeds. The log at one point recorded 23.8 knots. The full comment was "23.8kts High speed. Massive swell Sky clear[ng]".

5. VLARODA arrived in Horta at 0130 on Sunday 2 December 2017.
6. Once in Horta, the skipper and Peter Green talked on the telephone and the conversation was followed up by an email from Mr Walton to Mr Green. The email set out an explanation of the circumstances in which the crew had turned back – the essential reason being that an accumulation of defects had caused them to lose faith in the boat. The defects were more extensive than those that had been noted in the log:

"Dear Pete, Further to our conversation this morning here is the situation we find ourselves in. We have had some reasonable seas and decent winds but nothing outside of the boat's rating and capability. Here is a list of faults that have developed in no particular order of severity.

- Generator starts and supplies power to the main fuse board in port engine compartment. No power from main fuse to switchboard in owners cabin so no battery charging or 115 volt supply. After running for a short while generator then shuts off and displays 'unknown fault' - 115 volt side of water maker does not work - fitted galley and freezer housing have moved considerably and require removing and refitting. Joints are opening further as journey has gone on - Ceiling panels to port and starboard hulls have come down some damaged. - lighting has come down from behind panels, some of which are hanging by wires - sliding door to exterior catch not holding the door - sliding door to owners cabin came off its rails - shower door to owners cabin fallen off its hinges and split the wood surround - starboard rear cabin door now jams showing signs of hull movement - nearly all hatches leaking - window in the starboard forward hull leaking (main hull window) - reefing lines chafing within the boom - yesterday shackle for the jib halyard broke (non-user-adjustable) - traveller block port broken - wind instruments no longer working / showing information or getting signal. Could be combined with ceiling panels coming down. - Touchscreen switching off auto helm and radar when raining.

As you know we were just about half way through so the decision to turn back and stop the delivery was not an easy one. Any of the issues above in isolation would not have been a reason or a major problem to deal with, however, with one mounting after another put both the crew and boat in SERIOUS danger. One usually finds in my experience that problems like this just build until a major failure / disaster happens. The safety critical parts to take us across the Atlantic could take some time to repair and sort out under warranty etc. The Azores have pretty much closed for winter. Unfortunately it seems that the rush / panic to get the boat ready for the owner has meant that, in my opinion, corners have been cut leading to all the problems experienced. If it were my boat, which of course it isn't, I would give it back to Bavaria in La Rochelle to prepare properly and to safety standards so the owner can take delivery of a new boat and not one that already shows signs of 5 years wear and deliver in the new year. It would now be the new year anyway when the owner could realistically expect delivery. There are other small inbuilt issues that could be fixed as well such as tank gauges incorrect. Water tank isolators not allowing selection port or starboard to run the whole boat. etc

Nobody is more sorry than me to be the bearer of such bad news, especially to such a great owner in Drew. Looking forward to your instructions, Paul"

7. This email was forwarded by Mr Walton to the claimant with some suggested options for the necessary repairs, which it was assumed were the responsibility of Bavaria. The claimant forwarded the email to Gregor Tarjan, the agent through whom he had bought VLARODA. Mr Tarjan then instructed Mr Duncan Sweet of Mid Atlantic Yacht Services to inspect and report on the damage. (Mid Atlantic Yacht Services was founded in 1993 by Mr Sweet and is the biggest yacht repairer in Horta.) Mr Sweet produced 3 reports: (1) Initial Defects and Damages Report, 3 December 2017; (2) 46 Point work list, 6 December 2017 and (3) 61 Point work list,

19 January 2018. In an email to the claimant dated 9 January 2018, Mr Sweet stated that it was his “considered opinion the only damages falling outside of Nautitech’s warranty obligations are the broken mooring cleat aft and some gelcoat damage on the starboard stern”. At this time, it did indeed appear that the defects would be treated as warranty issues. In an email to the claimant dated 20 December 2017 Mr Tarjan stated that, with some small exceptions, “all defects will be covered by Bavaria”. Initially, there was a plan that the yacht would be sailed to Lisbon by a new crew provided by Reliance Yacht Management (Mr Tarjan’s recommendation) and the repairs carried out there by a Bavaria agent. In the event, that did not happen. VLARODA was moved by Reliance from Horta to Ponta Delgada. She underwent basic repairs there, described by the claimant as “jib repair, replacement of reefing blocks and line, bypass of generator relay and replacement of a gasket”. Then, in the spring of 2018, a Reliance crew sailed her to Bear, Delaware.

8. In the period following the arrival of the yacht back in the Azores and the receipt of Mr Sweet’s various reports, the claimant lost confidence in both Mr Sweet and Halcyon. He came to regard Mr Sweet as lacking in impartiality – adopting an “accusatory tone of blaming Bavaria for all damage and exaggeration of issues” whilst “exonerating the skipper and crew of all fault”. He also began to suspect Mr Sweet’s motives. He formed the view that he was “padding the report for his own benefit”, i.e. itemising work that was not really necessary in order to generate business and income. The corollary was that the claimant also came to regard the defects as attributable to the Halcyon crew having negligently sailed VLARODA into very bad weather conditions. Halcyon had “seized upon” Mr Sweet’s reports in order to “justify their crew’s decision to turn around in bad weather into very bad weather and head back to the Azores”. The claimant’s loss of faith in Mr Sweet and/or in Halcyon may have been prompted or encouraged by Mr Tarjan. In a February 2018 email to the claimant, Mr Tarjan observed that 4 Nautitech 46’s had crossed the Atlantic in the past month via the southern route with no mishaps but that VLARODA had “suffered a lot of abuse” due to the “careless misconduct of the original delivery crew”. It also appears that, despite their apparent initial acceptance of liability, Bavaria may not in fact have been willing to accept that all the repairs were warranty items.
9. The claimant did not immediately convey his feelings to Halcyon. Mr Green remained under the impression that Halcyon would be continuing with the delivery. He pressed for the crew’s incurred expenses to be paid. In response to a chasing email, the claimant, on 10 March 2018 said: “Peter, Yacht is still stuck in Azores and will remain there until weather improves. In May she will be moved to complete repairs. Once repairs are complete, I’ll know what costs are, Regards, Drew”. In April 2018 Mr Green noticed that Reliance were advertising for crew to take the yacht from the Azores to Delaware. He took this up with the claimant, who responded: “The yacht is not fully repaired yet. The crew will move her to Canaries for additional repairs before continuing delivery to Delaware”. Mr Green in turn responded: “OK. I am glad to hear that you have found a solution. If there is anything we can do to help then please do let me know”. (This somewhat equivocal exchange is the basis for the claimant’s plea in the Particulars of Claim that he was accepting a repudiatory breach on the part of the defendant. It is also the basis for the statement in paragraph 31 of his witness statement that he “made clear I was going elsewhere and that [Halcyon’s] services were no longer required” and that, thus, it was “mutually agreed” that the contract would come to an end.)
10. On 4 January 2019, 7 months after VLARODA had arrived in Delaware, the claimant sent a letter of claim to the defendant. Summarising, the letter identified three areas of fault:
  - i. Choosing the northern route during the winter months rather than the safer southern route.
  - ii. Failing to utilise proper or sufficient weather routing.
  - iii. Knowingly sailing into a forecast storm. (This allegation was supported by a detailed analysis of the weather forecasts for the period 26 – 28 November 2017.)

11. The letter claimed losses then estimated at a little under £25,000 comprising mainly extra delivery charges, the repairs carried out in Horta and marina fees incurred due to delay.
12. The claim form was issued two years later on 26 February 2021. The allegations were broadly the same. The Particulars of Claim added an allegation which was derived from pre-action correspondence. This was that the crew had “failed to heed the advice of Mr Green to set off in a southerly direction from Azores”. The cause of the decision to turn back to Horta was made more explicit, namely that “the skipper considered that the weather conditions posed a serious threat to the safety of the yacht and the crew and decided to return to the Azores”. To the existing items of damage was added a further category – the repair costs for damage caused by adverse weather conditions. This was based upon a quotation from Zimmerman Marine for (predominantly) joinery repairs. The total amount claimed was now £42,530 plus interest and costs. The defendant denied the claim and counterclaimed for the balance of the fees and expenses owing.
13. The narrative set out above is for the most part uncontentious.

#### **Evidence and expert evidence**

14. The claimant and Mr Peter Green gave evidence. At the outset of the trial and for reasons that I gave at the time I refused permission for the defendant to rely upon a witness statement from Mr Andrew Briggs, one of the crew of the yacht. The statement had been served just two working days before trial. It should have been served in April 2022. Absent agreement, I would have admitted it only on terms that the claimant was given a full opportunity of reviewing it himself and with his experts, which Mr Nixon said was impossible in the time reasonably available to him. That would very probably have meant adjourning the trial on terms that the defendant paid the costs thrown away. Mr Dunn-Walsh was clear that in those circumstances his client preferred to go ahead without the statement. And so that is what happened. The net result has been that the actions and decisions of the crew have had to be examined at one remove – essentially by an examination of the information that was available to them, what they recorded in the yacht’s log and what they said to others immediately before and after the voyage from the Azores.
15. The parties were given permission to rely on expert evidence in the fields of (1) navigation / weather planning and (2) marine engineering.
16. The navigation experts were:
  - Captain Alistair Roaf (claimant), a Chartered Master Mariner with long experience at sea aboard commercial vessels, but also on yachts, including training yachts and,
  - Mr Simon Rowell (defendant), a Yachtmaster Ocean Examiner, formerly the chief instructor at the UK Sailing Association.
17. The marine engineering experts, who gave evidence remotely from the USA and the Azores respectively, were:
  - Mr Buddy Hitchcock (claimant) of Hitchcock Marine Services in Florida, USA and
  - Mr Duncan Sweet (defendant) of Mid Atlantic. (Mr Sweet was, of course, also a witness of fact.)
18. In the interests of economy I will not at this point elaborate on the factual evidence or set out a summary or analysis of the expert evidence. The relevant parts and the relevant considerations appear from the discussion of the issues below. However, I will make a general observation, which is that the claimant’s experts stood at a disadvantage to the defendant’s.
19. So far as the navigation experts were concerned, it was clear that Mr Rowell’s qualifications and experience were of more relevance and carried more weight than those of Captain Roaf.

Captain Roaf's primary experience was as Master of a variety of large tanker vessels. Although he also had extensive yachting experience and had served as sailing master aboard a Sea Cadets Square Rigger, he had never planned or undertaken a trans ocean voyage in that capacity. His experience as an expert witness was predominantly in the commercial field. He had no formal qualifications in meteorology (though I acknowledge that his Master Mariner ticket and his degree in Maritime Studies would both have involved a close study of the subject). By contrast, Mr Rowell was a professional yachtsman who had planned and made numerous ocean passages. He had won (as skipper) the Clipper Round the World Yacht Race in 2002-3 and had provided weather information and skipper training to that Race since 2011. He had a degree in applied meteorology (with a dissertation concerning weather systems in the North Atlantic). He was the author of *Weather for Sailors* and of the weather chapter of the 8<sup>th</sup> Edition of *Heavy Weather Sailing*. Both Captain Roaf and Mr Rowell were open, careful and impressive witnesses. But to the extent that they differed, I found Mr Rowell's evidence more useful and more reliable and I preferred it.

20. Neither of the marine engineering experts had formal engineering qualifications. Both were highly experienced and knowledgeable. As with the navigational experts, they gave evidence in a way that promoted respect and confidence in that each listened carefully to questions, did not try to avoid or deflect them, gave considered answers and made concessions where appropriate. There was, however, a fundamental difficulty with the claimant's expert witness, Mr Hitchcock. The difficulty was twofold. First, he did not see VLARODA until December 2019, which was two years after the voyage in question and after she had already had substantial repairs, the precise extent of which was unknown. Mr Dunn-Walsh asked him if that had made his assessment difficult. Mr Hitchcock's reply was: "... makes it impossible". Second, Mr Hitchcock was heavily, if not exclusively, reliant on what he had been told by the claimant as to the conditions that VLARODA had encountered. This included a "series of storms". But as he acknowledged in cross-examination, "storm" meant winds exceeding Beaufort Force 9, which VLARODA did not encounter. The highest recorded wind was Beaufort 8. By contrast, Mr Sweet saw the yacht and spoke with the crew immediately afterwards. His survey was not complicated by prior repairs and he was not given an incorrect description of the weather conditions that she had encountered. The suggestions that he was part of some sort of "cover-up" of blameworthy conduct on the part of the crew or that he was "padding" the worklists in order to create business were fanciful and unsupported and I have rejected them. To the extent that the experts differed, I preferred or would have preferred Mr Sweet's evidence. But, in fact, on important points they were substantially agreed.

### **The contract and the law**

21. The contract dated 24 July 2017 contained the following relevant terms:

#### **AGREED COMMENCEMENT DATE**

Please note the following:

- It shall be the sole responsibility of the Delivery Skipper to delay the delivery voyage on account of adverse weather conditions, or to put into any harbour on account of anticipated or stress of weather condition. ...

#### **TERMS AND CONDITIONS OF DELIVERY**

... the Owner offers the yacht for delivery on the agreed commencement date, as follows:

- In commission, clean and ready for sea:
- All machinery and gear fully serviced, maintained and in full working order:
- Standing and running rigging fully serviced, maintained and in good working order:
- Sails in good working order, of sufficient quantity and appropriate for the passage to be undertaken:

Nothing in this agreement shall relieve the Owner of his responsibility at all times for:

- The safety and condition of the vessel:
- Any liability incurred by him to any third party as a result of delay, deviation or termination in delivery of the vessel: and,
- His liability for all losses and expenses incurred in respect of the vessel during the proposed delivery

The Delivery Skipper reserves the right to:

- Deviate from the proposed route if necessary and if in the interest of the safety of the vessel or crew:
- Terminate this contract before arrival at the port of destination in the interest of safety of the vessel or crew.

The Delivery Skipper agrees to:

- Carry out the proposed delivery with professional care and attention to the vessel at all times; and,
- Base all decisions on the best interests of the safety and protection of the vessel and crew.

Should the Owner feel they have any claim against the Delivery Skipper, this claim must be made in writing within a fair and reasonable time.

22. It was agreed that the contract contained the term to be implied by section 13 of the Supply of Goods and Services Act 1982<sup>i</sup> that the defendant would exercise reasonable care and skill in delivering the yacht. It was also agreed that because the crew were professionals exercising the skills of their trade, the duty they owed was to act in accordance with a body of competent professional practice (the so-called *Bolam* test originally developed in the context of medical negligence, but applicable in principle to “any person in a skilled trade or business”).<sup>ii</sup> Finally, it was agreed that the defendant was a bailee and owed the claimant a duty to take reasonable care of the yacht in that capacity. Halcyon also, as bailee, bore the legal burden to prove that any damage suffered by the yacht was not caused by their negligence or other wrong.
23. I am not sure that a statutory duty such as arises under the 1982 (or 2015) Act can, in fact, be regarded as qualified by the *Bolam* test. But in this case nothing turns on it so I will say no more. Similarly, few claims require resort to the application of the legal burden of proof in order to resolve them. This one has not and I need say no more about that either.

### **The issues**

#### **(A) Time bar**

24. Although the defendant took the point, it is obvious that a time bar expressed as a requirement that a “claim must be made in writing within a fair and reasonable time” will be difficult to deploy because it is so lacking in precision. The claimant aligned himself with the general time bar in the Limitation Act 1980 (6 years) in support of a submission that to notify the claim within about a year of the damage occurring and only some 7 months after the yacht was finally delivered to the USA was well within any “fair and reasonable time”. The defendant drew an analogy with the 12 month time limit in the Hague-Visby rules. That analogy, already inexact, did not, however, assist the defendant since delivery occurred in June 2017. When I asked Mr Dunn-Walsh when it was that he said that the claim ought to have been notified to the defendant, he said “a few months after delivery”. That is more or less when the claimant did notify the claim.
25. I do not think that the point merits further or lengthy consideration. The claim was notified to the defendant 7 months after delivery to the USA. On any view, that was a “fair and reasonable time”.

**(B) The choice of the northern route**

26. The choice of the northern route was squarely attacked in the letter before claim dated 4 January 2019. In the Particulars of Claim, the “possibility of avoiding” the low-pressure system “by taking a safer southerly trade winds passage via the Canary Islands” was pleaded more as a sub-set of the main allegation, which was the allegation of setting a collision course for that system. By the time of the experts’ joint statement, it no longer featured as a freestanding allegation and Mr Nixon did not press it in his closing submissions. It survived only as an allegation that the course from the Azores should have been more southerly and/or that the yacht’s departure in that direction should have been delayed. To the extent that any finding on my part is necessary, it is that the much shorter and more direct northern route via the Azores and Bermuda (which the claimant knew was the chosen route) was a reasonable choice in November provided that it was properly planned and executed. That was Mr Rowell’s firm evidence, which I accept and from which Captain Roaf did not noticeably dissent.

**(C) Weather and route planning**

27. Both the letter before claim dated 4 January 2019 and the Particulars of Claim set out an analysis of the forecasting available from the US National Weather Services (the “NWS”) and, by reference to that forecasting, alleged that the Halcyon crew had sailed VLARODA into “a storm” (the letter) or “a low-pressure system which became a storm” (the Particulars of Claim). The proper course, it was alleged, would have been to have planned and taken a more southerly route and/or to have delayed departure.
28. There was direct evidence about the crew’s decision making from Mr Peter Green. Both he and Allison Smith had been closely involved in the planning. The relevant paragraphs of Mr Green’s witness statement were as follows:

20. When the Vessel stopped in (Azores) for 5 days waiting for a weather window (22 – 27 November), the Crew used a full range of detailed weather forecasts online and also telephoned to discuss the forecasts and proposed departure before setting off. The Crew also had a satellite device giving them live weather information while underway which enabled them to choose their route in an informed manner.

21. My colleague Allison Smith (“Allie”) and I both also provided weather information and routing advice via telephone, I recall this well. Before setting off the Skipper and Crew had made a very careful evaluation of a number of weather reports. This is the best way to evaluate longer term forecasts, by comparing different models a pattern emerges that suggests that it is safe to sail or not. We also discussed the decision on the phone.

22. From Halcyon’s communications it is clear that the Crew had waited out bad weather in several ports prior to the finally setting sail. They also sailed South of the rhumb line when they did set off. Delaware is on a latitude of 38 91.08 N. The evaluation of the weather that had been made was that there was a low pressure ( the “Low”) system that was crossing the Atlantic West to East at the point that Crew intended to set off. The Low would go North of the Crew’s proposed route across the Atlantic. The Low’s pattern was stable and confirmed by four different forecasts to be moving West to East and steadily North, this meant that the intended course for the Vessel would be well to the South of the Low’s track.

23. As the Vessel passed south of the Low, the Crew would of course evaluate the state of the sea and wind and monitor real time data, in the event that the wind strengthened to any significant extent (marking the Southern extremity of the Low), the Crew would sail further South making the wind more a favourable wind angle to the Vessel for a short while. Once the wind eased as the Vessel moved away from the Southern extremity of the Low, the Vessel would be sailed back on to course.

29. This evidence accorded with the expert evidence of Mr Rowell, who, in his supplemental report of 8 September 2022, said this:



The winter months are characterised by the North Atlantic high pressure system usually positioned south of the Azores extending towards the Bahamas to the WSW and towards the Bay of Biscay to the NE, with a train of depression going generally from west to east on the northern side of this giving mostly NW to SW winds. This is a great generalisation. When looking at the day to day weather the depressions often push the high further south, and themselves may move in a south-easterly direction at times, which is what happened on this voyage. On a small sailing vessel the route taken is almost always indirect and is usually a balance of making progress west when possible then ducking further south west or south as needed to avoid stronger conditions and larger seas.

30. The experts produced contemporaneous weather charts from the NWS. Of these, the most important were those issued on 26 November 2017, which was the day before departure. These would have formed an important part of the crew's decision making. The 48 hour forecast valid at 1200 UTC on 28 November 2017 showed a low marked as "developing storm" west of the Azores. The 96 hour forecast valid at 1200 UTC on 29 November 2017 showed the low now west and a little south of the Azores decreasing in size with storm force winds on the SW quadrant. The low was forecast to move counter-clockwise from SE to NE to a position just west of the Azores.
31. Mr Rowell's evidence was that the predicted weather pattern would have made it prudent "to head SW over the first 2 days then duck S ahead of the incoming low, aiming to get down to approximately 30°N 033°W before then heading W, most likely sailing to windward (but rarely hard on the wind) in about 10-15 kts of breeze from the S side of the lows". He also said that given that the incoming low was forecast not to head further south but rather to turn and track north east (which it did) then the decision to depart on 27 November 2017 was reasonable.
32. Captain Roaf's evidence was that it was "reckless" to take a westerly route from the Azores towards the predicted location of a storm (paragraph 3.3 of his report and paragraph 2 of Part B of the joint statement). He also said that the more "prudent" route would have been to set off in a southerly direction until sufficiently clear of the low pressure system before heading west (paragraphs 4.1 & 5.1 of his report).
33. I did not, in the end, detect a great deal of difference between the experts. The route apparently decided upon (and taken – see following section) was the "prudent" route described by both, i.e. to head to the south of the low pressure system which was predicted to track (and did track) north east. A decision to head directly west into that system would have been lacking in prudence, or even reckless. But that is not what VLARODA did and there seems little to criticise in the planning aspect of the voyage. Such difference as there was between Captain Roaf and Mr Rowell seemed to lie in the decision to take a predominantly south westerly course in order to achieve the objective of staying south of the stronger winds and larger seas. Captain Roaf's view was that the course should have been due south and then west, i.e. two sides of a triangle. But this view seemed to me to give too little weight to the need to balance avoidance of stronger conditions with the need to make progress west. This was, perhaps, well-illustrated when it was pointed out that Captain Roaf's preferred route plan would have ended up with VLARODA facing directly into a westerly wind, i.e. a headwind. I prefer the evidence of Mr Green and Mr Rowell, which was grounded in their long practical experience of the exigencies of transatlantic crossings by yacht (as opposed to tanker).
34. My conclusion is that the weather and route planning showed no lack of care or breach of duty. To express that in terms of the contractual terms, the planning was carried out "with professional care and attention" and was also congruent with "the best interests of the safety and protection of the vessel and crew".

#### **(D) Execution – the route taken and the decision to turn back to the Azores**

35. I have already in paragraph 3 above described the route taken. From day two the route was predominantly south west from the Azores. (There was a passage in his cross-examination of Mr Rowell where Mr Nixon made much of the westerly course taken on the 29<sup>th</sup>. But I am satisfied that this was because the wind on that day was southerly. It was expected to and did

veer round to a more westerly direction. The log recorded that the course was changed back to a south westerly heading when the wind veered to WNW – a reasonable and seamanlike method of maximising the advantages to be gained from the wind patterns in an area of low pressure.) Very importantly to the issues in this case, and as I have already noted, prior to the decision to turn back VLARODA had not encountered particularly strong winds or heavy seas. The average wind was Force 4 and the sea state was, for the most part, Slight. In other words, VLARODA did not sail into a storm, or anything approaching a storm. On the contrary, the conditions were nothing out of the ordinary and well within the warranted capabilities of the vessel. Against this, the claimant seized on some isolated entries in the log to support the proposition that for economic reasons and without weather information en route the crew had sailed into adverse conditions and then “panicked” and turned back. The entries were as follows. On 29 November there was a comment in the “Notes and Remarks” section of the log: “shitty sea”. The sea state at this time was described as Slight and the wind was Force 4. As any yachtsman will know, a sea can be uncomfortable due to the waves being short or confused or due to an underlying swell without it being threatening or adverse and I would so interpret this entry in the log. No other interpretation is realistically possible. Earlier the same day there was an entry “Baro 4 in 6 hours”. Neither expert made anything of this. A rapid fall in barometric pressure indicates that strong winds can be expected. But a fall of 4mb in 6 hours would (as Captain Roaf conceded) be characterised as “falling” not “falling quickly”. There was no support in the log or in the experts’ reports (including his own expert) for Mr Nixon’s submission that the crew were panicked into turning around due to weather. At the point that they turned around, the wind was Force 4 and the sea state was Moderate. These conditions did not change much for another 24 hours.

36. The submission that the crew did not have up to date weather information is also unsustainable. They had a Garmin with access to weather updates via text. This was the evidence of Mr Green and is confirmed by the statement made by Mr Carpenter referred to in the next paragraph. It is apparent from the log entry “Huge swell, need to get a mo[ve on] 7 Mtrs pushing ahead of it” that they were using this facility. This is because the sense of the phrase “need to get a move on ... pushing ahead of it” is that this was swell that was expected (i.e. forecast) and the crew would need to try to avoid it.
37. It is true that there is some tension between, on the one hand, the record in the log as supported and borne out by the experts’ analysis of the actual weather conditions and, on the other, what Mr Green said in his initial response to the letter before claim dated 4 January 2019 (more than a year after the voyage). At that time he said that the strong winds extended further south than expected and he also quoted an account from the crew member, Josh Carpenter, that the low “tracked further South than forecast and we caught the strong winds and heavy seas at the southern edge”. In actual fact, the experts agreed that the conditions developed very much in line with those forecast. It seems to me likely that what Mr Green and Mr Carpenter were referring to were the conditions encountered after the yacht turned back. Although the route back that they took was the shortest and though at the time that the decision was made the centre of the low was 340 NM to the north west, turning on to a north easterly course back to the Azores meant that as they approached Horta on 1 December 2017 (the last day) they encountered the strongest winds of the passage, estimated by them to have been SE veering SW F8, and “huge seas”, (noted in the sea state section of the log as Very Rough). These conditions were worse than those that would have been encountered had VLARODA continued with her passage to Bermuda.
38. Why did the crew turn back? There is no reason to reject the explanation given at the time, which was that they had lost confidence in the yacht because, to use both Mr Green’s and Mr Sweet’s graphic phrase, it was “falling apart”. This phrase was derived from what the crew had told them. At paragraphs 24 – 25 of his main report Mr Sweet said this:

24) I met with the crew of the Vessel on the instructions of the Owner, all of whom were shaken by their experience aboard and were very clear that the Vessel as they saw it was a ‘death trap’ (Andrew Briggs Yacht Master Ocean and Crew Member) and that it was not fit for the passage to be undertaken.

25) The Crew all made clear to me that it was the sheer number of issues that had arisen on the voyage to Bermuda that had caused them to turn back. They told me that had one or two issues arisen they would have dealt with these as is normal for any ocean passage, however one failure on top of another gave them serious safety fears and meant that they could not continue on the Vessel at sea given that they had only completed one third of the intended passage.

Mr Nixon did not challenge the evidence of either Mr Green or Mr Sweet that the crew had said these things to them. Further, it is clear that the defects were indeed present. It therefore seems entirely unrealistic to propose that the crew had a different and unexpressed reason for the decision to turn back, based upon their own miscalculations as to the weather.

39. As far as the validity of the reason was concerned, I attached particular significance and weight to the evidence of Mr Green and Mr Rowell that the decision to turn back was the right one and “seamanlike”. This was the view of very experienced yachtsmen and I would note, in passing, that the decision was contrary to Mr Green’s financial interests, but he still supported it. As Mr Dunn-Walsh pointed out, a decision made by an experienced crew on their own in the middle of the Atlantic is not very apt for review or challenge in the calm and safety of a court room a long way from the sea and a long time after the event. In his oral evidence Mr Rowell ranked the observed defects in ascending order of seriousness. These were:

- water ingress and the possible knock-on effect on:
- the electrics and the engines,
- the movement of the cabinets, joinery etc indicating excessive flexing in the vessel.

Mr Rowell emphasised that it was the cumulative effect of the defects that mattered. Taken individually, none was critical. But these were, as he put it, multiple failures at sea in conditions that were not unusual. That characterisation was, in my view, justified and reasonable.

40. As a postscript to this part of my judgment I should record that Captain Roaf’s view was that “the reported reasons for returning to Horta were ... insufficient to justify returning. Instead of returning to Horta through huge waves the skipper should have headed south away from the forecast heavy weather and completed the voyage”. By “reported”, Captain Roaf meant those recorded in the log. But these did not comprise by any means all of the defects and a skipper would not be expected to record all defects in the log. The cumulative effect of those defects made the decision to return to the Azores entirely justifiable and well within the skipper’s general discretion and the specific discretion conferred on him by the contract. The latter reserved to the skipper the right to “deviate from the proposed route ... if in the interests of the safety of the vessel or crew” and, as noted above in the context of route and weather planning, to base his decision-making on “the best interests of the safety and protection of the vessel and crew”.

#### **(E) The cause of the defects**

41. In the context of this claim this question can be posed as whether the defects (the precise extent of which is not agreed) were caused by either lack of care or by the crew “beating up” the yacht, as the claimant contended, or by manufacturing defects, as the defendant contended. The actual claim is for the costs of the repairs carried out by Mid Atlantic in Horta (€4,355.79) and the estimated costs of further repairs to be carried out by Zimmerman (US\$22,573.60). The Zimmerman repairs comprise carpentry and joinery repairs to the interior cabin, leak to starboard teak step, water damage to port aft electrical boxes, broken cleat starboard aft, collar on port opening hatch and gelcoat repair starboard aft.

42. With one exception, the evidence points firmly to the defects being manufacturing or production defects. My reasons for so concluding are as follows:

- i. I have found that the defects were present and were indeed the cause of the decision to return to Horta. At that point, the weather conditions had been unremarkable and the yacht should have come to no harm.
- ii. Even on the return passage to the Azores, the conditions were well within the design capabilities of the yacht.
- iii. To the extent that those conditions were more severe than on the way out, the wind was Force 8 for a brief period only and was behind the vessel, thereby decreasing the apparent wind and the strain on the rig. Although the log noted 7 metre swells, these were, I find, the conditions forecast and which the crew intended to get ahead of, not those actually encountered. By reference to recorded data, Mr Rowell demonstrated that the actual swell was probably around 4 metres (see Figure 1.1 of his supplemental report). The wave period was 13 – 14 seconds. Although VLARODA sometimes attained high speeds, it is unlikely that in those conditions she would have slammed into the troughs and none of the crew made any specific report of that happening.
- iv. The experts agreed that with regard to the interior “some of the original glue joints may not have been sufficient” and that “many of the interior damage issues involved a lack of adequate adhesive and/or physical fastenings amongst the various elements of the interior cabinetry and furnishings”. This accorded with Mr Sweet’s evidence that the adhesive used was neither strong enough nor used in sufficient quantities to prevent the joints coming apart. Importantly, this evidence was part of a larger picture of defects in the fitting out of the yacht. Mr Sweet did not criticise the yacht’s basic structural integrity, (and so, to that extent, the understandable concerns of the crew that the joinery defects were caused by excessive flexing of the structure were unfounded). But he found many defects that nevertheless impacted on seaworthiness. It is unnecessary to enumerate them. I mention only two. The jib shackle failed because it was insufficiently robust to withstand the conditions, which were, at the time of failure, only a Force 6/7. When it failed, the halyard fell down inside the mast – a difficult repair to effect at sea, had that been necessary. One of the nuts securing the autohelm mechanism to the rudder quadrant detached and was found lying in the bilge. This could have led to the rudder suddenly disengaging from the autohelm. Depending on the conditions in which that occurred and the position of the crew, such a failure could have had serious consequences.
- v. Much of the claimant’s witness statement consisted of a line by line refutation of the faults identified in Mr Sweet’s worklists. Leaving aside the question whether this amounted to impermissible comment rather than evidence, this section of the statement struck me as lacking in balance and objectivity. For example, the claimant described the missing locknut on the autohelm link to the rudder quadrant as a “non-issue” because, had it failed, “the autopilot alarm would have sounded immediately alerting the crew”. But in heavy conditions in mid-Atlantic a lot can happen in the interval between an alarm sounding and the crew responding. The snapping of the jib shackle he attributed to “extreme weather”. But the weather was not extreme when it snapped. The claimant refused to accept that contemporaneous photographs of the starboard forward hull windows showed leakage and alleged that Mr Sweet had simply “taken the word” of the skipper. Through Mr Nixon, he suggested that what was shown in the photos was condensation. Mr Sweet responded that he had tasted the water, which was salty. The suggestion that he could not differentiate between condensation and ingress of seawater was, indeed, treated by him with a certain amount of wry amusement. But the condensation theory was not withdrawn.
- vi. If the defects were not manufacturing defects I would not have expected Bavaria to have offered to rectify them. I was shown no unequivocal withdrawal of that offer.
- vii. The claimant sought to deflect blame for at least some of the defects on to the crew on the basis that they should have been picked up and rectified on their inspections before and during the voyage. Most of the defects identified by Mr Walton in his email of 2

December 2017 were not susceptible to this criticism because no reasonable inspection could have identified them. The paradigm example of that is the defective gluing and fastening of the cabinetry. It does seem correct that the hatches leaked because or partially because the dogs had not been adjusted properly and the covers did not bed sufficiently into the neoprene seals. In the joint statement, Mr Hitchcock observed that that was a factory fault, though he resiled from that somewhat in his oral evidence. Mr Sweet did not agree that this was a fault that was easily identified. "You'd need a pressure hose or a fire hose." It does not seem to me that the crew could fairly be held accountable for this defect. Nor does it seem to me that they can fairly be said not to have taken reasonable care of internal fittings such as doors and shower doors (and anyway damage to the doors themselves does not feature in the Zimmerman quotation).

43. The exception to the above was the broken starboard aft mooring cleat and the associated damage including to the gelcoat and the starboard teak step. This happened during the time that the yacht was moored in Ponta Delgada. The harbour was affected by swell causing the pontoons to heave. One of the pontoon cleats that VLARODA was tied to broke away. This placed an additional strain on the mooring cleat, which broke. The vessel then came into contact with the pontoon causing the damage to the gelcoat. The claimant was immediately informed of what had happened and how. He did not then blame the crew and it seems to me that they were not to blame for this minor damage which occurred due to events which could not reasonably have been foreseen or guarded against. The damage comes under the heading "fair wear and tear".

#### **(F) The counterclaim – repudiatory breach**

44. I have found that there was no breach of duty in the planning or execution of the voyage and that the damage was the product of manufacturing defects. It follows that the defendant committed no repudiatory breach (and I note again, in passing, that at the time the claimant did not say that it had). Halcyon are therefore entitled to be paid the sums remaining due under the contract, comprising the balance of the crew's travelling expenses and the subsistence rate payable in respect of days of "delay". These were pleaded in the total sum of £6,094.91, but this was subject to an adjustment or recalculation in respect of the delay days. I invite counsel to submit a perfected calculation.

#### **Summary**

45. The planning and execution of the proposed transatlantic delivery were both carried out with reasonable care and skill. VLARODA might have been expected to suffer some wear and tear on the voyage. Instead she suffered more serious damage. But that was attributable to manufacturing defects. These were defects in what I might call the "finishing" of the yacht as opposed to her structure. They were not (as the crew feared) indicative of major failures. Nevertheless, in combination they were at the time reasonably perceived as serious and the crew's decision to abandon or postpone the delivery voyage and return to the Azores was reasonable. There was no breach of duty on the part of the crew, let alone a repudiatory breach. Nor was that alleged at the time. On the material before me, the claim would have been better directed to the manufacturer.<sup>iii</sup>
46. It follows that the claim against Halcyon fails and the counterclaim succeeds.

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<sup>i</sup> It seems to me that the relevant statutory provision is, in fact, section 49 of the Consumer Rights Act 2015, (which is materially identical).

<sup>ii</sup> In the vast majority of professional negligence claims, the Bolam test applies. As such, a defendant professional will not be found to have acted in breach of the obligation and/or duty to exercise reasonable skill and care so long as he acted in accordance with a body of competent professional practice. There are two elements to the Bolam test. The first element is that the standard of skill and care is determined by reference to members of the profession concerned, rather than the person on the Clapham omnibus. The second element is

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that the defendant is acquitted of any culpability so long as his conduct finds support from at least one body of competent professional practice even if practitioners falling within a distinct body of competent practice would have behaved or advised differently; see 2-77 Jackson & Powell on Professional Liability, 9th Ed.

<sup>iii</sup> However, Bavaria, not being a party to these proceedings, will not be bound by my findings.