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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
LONDON CIRCUIT
COMMERCIAL COURT (QBD)



No. LM-2019-000147

Neutral Citation Number: [2020] EWHC 3720 (Comm)

Rolls Building
Fetter Lane
London EC4A 1NL

Thursday, 1 October 2020

Before:

HIS HONOUR JUDGE MARK PELLING QC
Sitting as a Judge of the High Court

B E T W E E N :

ABS COMPANY LIMITED

Claimant

- and -

(1) PANTAENIUS UK LIMITED
(2) TOKIO MARINE KILN EUROPE S.A.
(3) STAR STONE INSURANCE SERVICES LIMITED
(4) XL CATLIN SERVICES SE

Defendants

MR E. JONES appeared on behalf of the Claimant.

MR J. WATTHEY appeared on behalf of the Defendants..

J U D G M E N T

(Remote hearing via Skype)

A

B

C

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E

F

G

H

(Transcript prepared without the aid of documentation)

JUDGE PELLING:

Introduction

1 This is the trial of a claim by the owner of the Motor yacht Queen B Speed (“Yacht”) for the reasonable costs of repairing the Yacht pursuant to an insurance policy underwritten by the second to fourth defendants (“Policy”) following a grounding incident in the Bosphorus Strait on 7 January 2018. The first defendant marketed the Policy as agent for the second to fourth defendants. The claimant maintains that it is entitled to recover the whole of its actual costs of repairing the Yacht, whereas the defendants maintain that the Yacht could and should have been repaired much more cheaply using facilities and labour located in Turkey and that some of the costs incurred as a result of damage not attributable to the grounding incident relied on by the claimant.

2 The trial took place between 26 June to 1 July 2020. I heard oral evidence from

(a) Ms Ece Demickot, who is and was at all material times employed by the individual who is the beneficial owner of the claimant and thus of the Yacht to manage his private affairs including his various yachts including the Yacht;

(b) Mr Peter Chettleborough, an experience chartered marine engineer and naval architect who gave expert evidence on behalf of the claimant;

(c) Captain Naci Arica, a marine surveyor and former professional yacht master who gave expert evidence on behalf of the defendants

The claimant served a statement by the Yacht’s master at the time of the incident giving rise to this claim that the defendants decided not to challenge. It follows that his evidence is admitted.

Factual Background

- 3 The Yacht was a little over 6 months old at the date of the incident. She is a Pershing 82/20 VHP built by Ferretti, a well known Italian registered motor yacht builder. She is just short of 24 metres in length with a beam of 5.5 metres and draws 1.3 metres. She had a planning hull manufactured from Glass Reinforced Plastic (“GRP”) and is powered by two 3,878 HP high performance diesel engines. She has a top cruising speed of about 45 knots and thrust is delivered by a high performance surface piercing propellor connected to each engine via proprietary surface drive unit attached to the yacht’s transom. The yacht is designed to accommodate up to 9 guests in four guest cabins and is crewed by three people including a master accommodated in a further two cabins. The yacht is unusual by reason of her planning design and consequent high speed. The yacht’s master had commanded her from July 2017 and had covered approximately 1000 nautical miles in her prior to the incident.
- 4 The incident leading to this claim is described in the master’s statement. Given that his statement has been admitted unchallenged, it follows that his description of what occurred is accepted by the defendants. At the time of the incident, the Yacht’s home port was Istinye Marina, which is located on the Northern side of the Bosphorus Strait. The incident occurred when the Yacht was returning from a day trip to her home port at a location close to an islet at the southern entrance to the Strait. The Yacht’s master states and I accept that (a) there was at the time a 10 knot speed limit in the Bosphorus Strait and (b) that as he says in paragraph 19 of his statement:

“It is not unusual to encounter debris in the waters of the Bosphorus. In my six years’ experience of navigating the Strait, I have seen numerous loose ground tackles, chains, wires, cables, fishing buoys, ropes and lines. Some of this debris floats but some is also part or fully submerged, which makes it difficult to see, particularly at night or at twilight. It is not uncommon for yachts to have their propellers entangled with such debris.”

In paragraph 22 of his statement, the master says and I accept that the yacht was not suffering from any damage not had she been involved in any other incident prior to the incident the subject of this claim since the Yacht had been delivered to the claimant in May 2017 or since he had taken command of the Yacht in July 2017 – see paragraphs 8, 10 and 14 of his statement. I am satisfied that the master would have known of any relevant prior damage or incident.

5 The master describes the incident in paragraphs 24 to 32 of his statement in these terms:

“24. We departed The Princes Islands at around 5.30pm bound for Istinye.

25, I was in the helm position driving “*Queen B Speed*” when, at about 7.10pm, in approximate position 41°01.203’ N, 029°00.215’ E (just south of The Maiden’s Tower) and while cruising at about 7 — 8 knots (about 1,000 — 1,200 RPM) the starboard engine system alarmed on the engine indicator panel. Consequently, the starboard engine automatically shut down into “safe mode” to prevent damage or further damage.

26. It was a bad moment to lose power. We were at a very busy section of the Strait where there is an east-west ferry crossing and north / south bound traffic funnels round The Maiden’s Tower. It was dark, and there were numerous fishing and smaller pleasure craft between the Tower and the Uskudar shore to the east. We also had to deal with a south / south westerly wind which was setting us towards Uskudar.

27. It was very difficult to control and manoeuvre “*Queen B Speed*” with only one engine (the port engine) in the prevailing weather conditions, so much so that I was forced to steer her eastwards between The Maiden’s Tower and Uskfidar shore, Whereas usually I would keep to the deeper water to the west of the Tower.

28. It was about 5 to 10 mins later (during which time I was doing my best to keep “*Queen B Speed*” in safe water and avoid collision with other nearby traffic) that I was unable to keep away from shallower water such that the yacht ultimately passed over – at between 5 and 6 knots speed — some reefy rocks found between the Maiden Tower and the Uskudar shore. We did not remain aground but were able to continue. The grounding is what I would describe as a “touch and go”.

29. Shortly after grounding the crew member with the most engineering experience, Mr Okan Ceviker, went to the engine room and switched the starboard engine back on by taking it out of “safe mode” and then both engines were used to manoeuvre “*Queen B Speed*” away from the shallower water.

30. Once clear of the shallow water, the crew and I checked to see whether the yacht was taking on water. We also checked the engines. We determined that we would be able to make it back to Istinye safely, about 7 — 8 miles away.

31. We continued our voyage at about 7 — 9 knots, although the propulsion was extremely “jerky”, giving a very uncomfortable ride.

32. We arrived at Istinye at about 8.00pm and I, together with the crew, undertook some further checks, including whether the engine room and bilges had any water. I also contacted Ms Demirkol, who was in the US on business at the time, to give her my report of events.”

I accept this evidence because it was not challenged. It is asserted by the defendants that further damage could have been caused to the Yacht both by the post incident part of the voyage the master describes and by what happened on the 8-9 January 2018, which the master describes in paragraphs 33-35 of his statement in these terms:

33. The next morning, 8 January, divers were asked to inspect the bottom of “Queen B Speed” in order to assess the extent of the damage. There was damage to the propellers and the aft section of the hull bottom.

34. On 9 January, I captained “Queen B Speed” from Istinye to Pendik with the same two crew as previously, leaving in the early afternoon, heading south back through the Strait’s southern entrance and then south eastwards along the Asian side of the coast before arriving at Marinturk Marina, arriving in the late afternoon, subsequent to which Dentur Turim ve Yatacilik Ticaret A.S. undertook damage assessments.

35. I have been asked to comment on the allegation that the engines of “*Queen B Speed*” were operated for 32 to 35 hours with damaged propellers after the incident. I think that is incorrect. As described above, following the grounding off The Maiden Tower, it took about 50 minutes or so to return the 7 — 8 miles back to Istinye. The voyage on 9 January from Istinye to Marinturk was about 25 miles which, at about 7-9 knots, took about 3 hours, giving a total post incident duration of about 4 hours running time until arrival at Pendik.”

I accept that evidence too since as I have said it is not challenged.

6 Before turning to the issues that matter, I note two points – first the defendants’ counsel challenges the description of the Yacht as a “superyacht”. Nothing turns on this point as long as it is accepted, as I accept, that the Yacht is a luxurious high performance yacht that was designed travel at much higher speeds than is expected of a motor yacht of the same length with a displacement or semi displacement hull. For what it is worth, it is common ground the Yacht was insured by the defendants under the Policy that was subject to the first defendant’s “superyacht clauses” at an agreed value of €4m at a premium of €14,000. The other

preliminary point I should address concerns a comment by Mr Wathey in his skeleton opening argument on behalf of the defendants that it was a misconception to characterise the Yacht as had Mr Chettleborough “ ... *in a rhetorical flourish befitting a professional advocate as ‘the Ferrari of the seas’*”. Pausing only to say that in this as in a number of other respects, Mr Wathey’s skeleton was unnecessarily combative in tone, I reject the substance of the point. The Yacht had a planning form hull and was capable of speeds of up to a maximum speed of 50 knots and a cruising speed of about 45 knots. Many and perhaps most motor yachts of the same length as the Yacht will have displacement or semi displacement hull forms and cruising speeds of around 30 knots. The substance of the point being made by Mr Chettleborough was making is that the Yacht was a high performance vessel designed and capable of cruising at speeds substantially in excess of what might be expected of a conventionally designed twin screw motor yacht of about 24 metres in length. I accept that evidence as correct.

7 Although Mr Wathey summarises the issues that have to be resolved as being in substance three in number being:

- (a) What repairs were carried out;
- (b) What were the cost of these repairs; and
- (c) To what extent those repairs were necessary and reasonable.

in my judgment the issues that arise are really five in number being:

- (1) Whether any of the damage had been suffered by the Yacht prior to that suffered in the incident;
- (2) Whether any of the damage was caused after the incident;
- (3) Whether it was reasonable to require repairs to be carried out to the port and starboard drive units by their manufacturers;

- (4) Whether it was reasonable to require replacement of the Yacht's propellers by the original manufacturers as opposed to undergoing repair by a local repairer; and
- (5) Whether various minor items are reasonably recoverable as part of the cost of repair.

The Policy

8 In so far as is material, the term of the policies provided that,

"Partial loss claims for partial loss or damage to the yacht should be settled on the basis of reasonable repair and/or replacement costs necessary to reinstate the yacht as nearly as is reasonably possible to its pre-accident condition. Where a claim is recoverable under this insurance these necessary costs will include the cost of transporting the yacht to the nearest appropriate repair facility. The insurer will not apply any 'new for old' deductions. This clause will apply to the insurance of any other property insured with the specified limits under Article 8, para.2 of this insurance.

4. Deductibles

The deductibles specified in the schedule will apply in respect of each claim ...".

9 I accept Mr Jones' submission that these provisions are to be construed in their documentary, factual and commercial context, being so far as factual context is concerned those facts known or ascertained at the time the policy was agreed - see Arnold v Britton [2015] UKSC, [2015] AC 1619 per Lord Neuberger PSC at [15]. In my judgment, that context is, as I have described already, that the yacht was a high value, luxurious high performance yacht designed to cruise at high speeds in safety. It is in that context that the key phrase, "*... on the basis of reasonable repair or replacement costs necessary to reinstate the yacht as nearly as reasonably possible to its pre-accident condition ...*" is to be construed. Ultimately, this will be a question of fact tested objectively but against the point made above and the requirement that the yacht can be used after repair in the same way that it was before the casualty - see in this regard The DC Mewestone [2013] 2 Lloyd's Rep 131 at [141-142].

The Damage to the Yacht

- 10 The claimant's case is that as a result of the incident, the yacht suffered: (1) impact damage to both the port and starboard propellers; (2) impact damage to the starboard side directional fin; (3) stress damage to both the vessel's drive systems, including the driveshaft, steering rams and trim cylinders and all associated components within; (4) de-lamination of the transom collar around the starboard driveshaft and stress cracking in way of the starboard trim ram support, i.e. structural damage to the hull; and (5) impact damage to the hull bottom starboard of the keel, including removal of the anti-fouling paint in some areas.
- 11 Before turning to these items in detail, I should describe the drive system. It is the component by which power is transmitted from the engine to the propellers. The drive system is attached externally to the transom of the yacht. There is a through-hull connection by which the engines, located in the engine space at the stern of the vessel, are connected to the drive units. Each drive system can be moved by the master from the helm position both horizontally and vertically. Vertical adjustments enable the vertical angle of the yacht between the bow and stern to be altered so as to enable the yacht to commence and remain planing and is controlled hydraulically by trim cylinders. Horizontal movement is controlled by using hydraulic rams. The yacht does not have conventional rudders but is steered by altering the angle of the propellers to the centre line of the yacht. Attached to the underside of each of the drive units is a directional fin. Its purpose is to provide directional stability, in particular at low speeds, and is the closest that the yacht has to a rudder.
- 12 There are a number of drawings and photographs of the relevant parts but that which is most helpful in showing the features I have so far described are those at para.21 of Mr Chettleborough's report, which I incorporate by reference into this judgment at this point. The pictures at para.19 are also helpful in showing the drive units and their connection to the yacht's engines through the stern of the yacht.

13 Turning next to the propellers, it is common ground that they were surface piercing. Mr Chettleborough says, and I accept that,

"... surface piercing propellers are high performance propellers and because they are designed to operate half in and half out of the water they are 30 to 40 per cent larger than comparable standard propellers. Additionally, they will experience higher stresses and falters on account of the speed that they are rotating. In light of this, they will cost more to manufacture than comparable standard propellers. In this case the propellers were supplied by a well-known Swiss manufacturer, Rolla SA - see para.27 of his report".

14 In cross-examination, Captain Arici accepted that: (a) the propellers were high speed propellers; (b) that they were subject to very high stresses when running at high speed; and (c) in those circumstances an owner would have to be very sure about being able to rectify damage to the propeller blades before deciding to repair rather than replace them. He also accepted that he was not a marine engineer and that he had no experience of repairing propellers. However, he maintained the position that there was a locally based company capable of repairing the yacht's propellers. I return to that issue in more detail later.

15 Before turning to the issues that matter, I should say something about the expert evidence, not least because this is the most important evidence relevant to the issues that matter. I am satisfied that subject to one qualification both experts did their best to provide objective and professional evidence on the issues that arise. I reject the suggestion that Captain Arici's professional independence was compromised by the frequency of instructions received by him or his firm from the first defendant or companies associated with the first defendant. This was tested directly in cross-examination but of more importance was the nature of his responses on the technical issues that arise. Subject to one qualification, to which I return later, his evidence was fair and objective.

16 Mr Chettleborough's evidence in all respects was objective and fair. I reject the implicit suggestion that he was in any sense an advocate for the claimant, as was implicitly, or perhaps even explicitly, suggested by Mr Watthey in his opening submissions. Mr Watthey suggested

that I should simply prefer the evidence of Captain Arici over that of Mr Chettleborough because Mr Chettleborough did not carry out a first-hand inspection of the vessel following the incident or at any time thereafter. I consider this submission to be mistaken in relation to the issues that matter. As I have said, both experts did their best but could only do so within the limits of their professional qualifications and expertise. As Captain Arici accepted, he was not a marine engineer and he has no experience of repairing propellers and could not carry out any meaningful inspection of the drive units because, (a) he was not an engineer and, (b) in order to see whether and, if so, to what extent the drive units were damaged internally it was necessary for each to be stripped down by a qualified engineer. In one respect Captain Arici's evidence needs to be treated with caution. Prior to the onset of this litigation he was retained by the defendants to carry out an assessment of the damage to the vessel for them. He accepted that at that stage he was motivated to reduce the cost of repair for insurers. In one respect I consider that approach carried through to his expert evidence. I refer to this in more detail below.

17 Although Mr Chettleborough did not inspect the yacht, or the component parts, in my judgment he was fully entitled to carry out an engineering assessment on the basis of the information to be gathered from the various photographs, of which there are many, and other technical assessments available to him. I am satisfied that if, and to the extent, he was unable to express an unqualified opinion by reference to these materials, he would have done so. Where the issues turn upon questions of engineering or naval architectural expertise, therefore, I prefer his evidence, simply because he is a qualified and experienced marine engineer and naval architect and Captain Arici is not and did not claim to be.

18 Finally, before turning to the factual issues that require resolution, I need to say something about the onus and standard of proof. The legal onus of proof rests on the claimant to prove that it was entitled to recover the sums it claims under the policy. However, where the

defendants seek to advance a positive case then the evidential burden rests on the defendant to prove that positive case. With these preliminaries addressed, I now turn to the issues that need to be resolved.

19 Captain Arici carried out an inspection of the yacht on behalf of the defendants on 31 January 2018 - that is to say, some three-and-a-half weeks after the incident. The yacht was ashore at the time of that inspection. Captain Arici described the damage as follows, at para.10.2 and following of his initial report. In respect of the hull, he stated,

"There is scraping skidding damage to the hull in an envelope of about 120 cm by 30 cms, 10 to 40 cm starboard to the midship line, ending and clipping off at the transom. The depth of the damages start at 0 mm forward and increase to about 10 mm or more at the transom. In the scraped areas, the structure appears as monolith/single skin laminate, the outer layers consisting of approximately 6 to 7 mm thick opaque white body similar to gelcoat, a transparent resin, another thinner layer of gelcoat, an anti-fouling coating ... The damage seems to have been inflicted by, (a) hard, ragged/serrated and resilient objects in a comb-like formation. A skin fitting is located 30 cm dead ahead of the scraped area. The fitting strainer slices are oriented longitudinally and two of the five slices have been slightly depressed, while the other three do not seem to have been in contact with anything. I have not noted ragged or serrated imprints on the strainer. The four small retaining screws of the strainer had not been disturbed ...".

I accept that description as accurate. The photograph at para.10.2 within his report shows the damage described, and I incorporate that photograph by reference into this judgment at this point. Mr Chettleborough refers to a similar photograph at para.62 of his report and describes hull damage in substantially similar terms to Captain Arici. I am satisfied that this damage occurred at the time of the incident - see para.79 of Mr Chettleborough's report, which I accept. Captain Arici did not suggest otherwise - see para.14.1.6 of his report. Captain Arici questions whether the incident could have occurred as described by the yacht's master given the damage that occurred to the starboard hull. However, that is immaterial, for two reasons. First, it is immaterial because the Master's statement has been admitted, and secondly it is immaterial because the policy would respond to the damage however it occurred, subject only

to issues concerning the numbers of deductibles that would be appropriate in relation to the damage caused.

20 It is next necessary to consider damage to the transom of the yacht. Captain Arici describes this in detail at section 10.3 of his report. His conclusions were set out at para.10.4.3 in these terms,

"The boat's transom was constructed by sandwich core composite. However, the surface drive mounting locations have been built in single skin structure shaped as recesses. After the installation of the surface drives, the remaining recesses around the drive bodies are filled and fared. The keel line is constructed in a single skin composite. Accordingly, our findings are as follows:

1. We noted that the faring round the collar of the starboard surface drive was delaminated from the transom laminate. However, we did not note any signs of delamination on the transom structure next to the recess. In a section of approximately 10 cm we received the delaminated collar faring enough for the probe to meet the FRP and check the underlying laminate. We did not find any signs of delamination at this location. Still, the laminate structure of the recess should be checked after the surface drive is dismantled ...
2. The surrounding laminate around the starboard drive surface drive's trim transom mounting was delaminated approximately 10 cm around the mount ...
3. We noted delamination in the interior laminates of the starboard side of the transom which corresponds to the surface drive's position. However, access to internal laminates was very limited. The laminate structure of the interior at the transom should be rechecked after suitable access is obtained.
4. We found that the recess as well as the laminate structure around the port driveshaft was not affected by the incident. We only noted a flaw of approximately 5 cm size in the upper side of the faring of the collar around the port surface drive only ...".

Mr Chattleborough on this issue at paras.58 to 62 of his report does not differ from that of Captain Arici in most respects but to the extent that he does, I prefer his evidence for the reasons already identified. I accept, therefore, that as a result of the incident, there was leaking into the engine room through the starboard side transom connection flange where the drive unit penetrates the hull to enable it to be connected to the engine. I accept his analysis that

this and the other transom damage there referred to was due to the incident because I accept his analysis of the mechanical effect of the grounding on the drive unit set out in para.61 of his report. This is an issue for an engineer and naval architect and I prefer his evidence on this issue for that reason.

21 I now turn to the starboard directional fin attached to the underside of the starboard drive unit. This is the first area of serious dispute between the parties. In summary, the defendants maintain that the damage was inconsistent with it having occurred during the incident and probably was either pre-existing or occurred after the incident when the yacht returned to her home port or on the trip on 9 January 2018. The damage is to the leading edge of the fin and is shown in a number of photographs at para.10.6 of Captain Arici's report. This shows a notch-shaped dent in the leading edge of the fin which has been bent to starboard as a result of the impact. Captain Areeke says of this damage, at para.10.6 of his report,

"The directional fins of the surface drives are just forward of the propellers ... Each fin is attached to the respective drive tube by two gusset plates, one for each side. The gusset plates are welded to the tube and the fin is bolted to its gusset plates by countersunk allen bolts, 20 bolts in total for each fin. The fins are relatively exposed and precarious components ...

There is peculiar and isolated damage apparently fresh at the time of inspection to the starboard directional fin leading edge about 25 cm above the fin's sole. The vertical size of the damage is about 2 cm and the horizontal stretching towards starboard about 1 cm. The damage is quite uniform in shape and not much material has been abraded. Some superficial abrasion traces on the fins port side start from the said deformed area and lead aft horizontally to its trailing edge. Apparently due to this damage, the fin has been bent to starboard as expected with the fin sole located about 5 cm. The damage is not due to contact with an abrasive non-uniform object but more likely due to contact with a hard object shaped like a metal rod, a metal wire or a large chain link as examples. There are further superficial longitudinal scratches on both sides of it and close to the sole of the fin. All scratches have exposed the former red anti-fouling under the present black one. The adhesion of the black anti-fouling is weak and at many unrelated further areas I observed the exposure of the former anti-fouling.

I did not note any damage to the related starboard propeller in alignment with the damage to the starboard fin. As a result of the damage to the directional fin, the starboard welded gusset plate fixing the fin to the starboard main body stern tube has cracked along the entire weld. The damage is consistent with the direction of the fin's damage. I did not note any damage to the gusset plate to port".

Mr Chattleborough's evidence on this issue is at paras.54 to 57 of his report, where he says this,

"Both the Marine Solutions report [that is Captain Areeke's report] and the sail drive damage report indicate that the damage was found on the starboard directional fin. As explained above, this sits below the starboard drive system and assists with the steering and hence the directional stability of the vessel. The damage seen was a 10 to 15 mm indentation on the leading edge, deformation to starboard and a cracked weld at the intersection with the driveshaft. Additionally, there are clear abrasion marks running aft from the indentation and further down the fin the same are present. Marine Solutions noted that the fin was bent to starboard and that it dislocated from its sole by about 5 cm and that one of the welded plates holding it in place had cracked. This is consistent with the top system preliminary report which suggests that the fin had been bent 'a few degrees to the right'. According to the Captain's declaration in his witness statement, the vessel hit an object similar to a ground cable. A ground cable is fixed to the seabed, so assuming that this was the cause of the damage, there would be sufficient force resisting the direction of motion to cause the damage to the fin. The indentation is circular in shape and as such could have been caused by a cable of some kind. The abrasion markings are similar to what would be expected if a cable or rope ran along the fin and as such I consider this as being clear evidence of such an event happening".

Captain Areeke says at para.14.1.7 of his report that,

"The damage to the fin and the consequential damage to the mounting plate are of a very different nature to the rest of the damages. We see it as a possibility that the damage to the fin has occurred due to another separate incident possibly not noticed by the crew".

22 The claimant submits that I should reject that evidence because:

(a) Mr Chattleborough considers the damage to be consistent with the Master's description at para.36 of his witness statement, where the Master states that,

"I consider that the cause of the incident was the starboard propeller encountering an unidentified object while QUEEN B SPEED was cruising at between 7 and 8 knots. This contact and/or damage caused the starboard engine to shut down which, given the prevailing weather conditions, meant a loss of manoeuvrability and led to the grounding and associated damage. There is no way of knowing for certain but in my experience of the BOSPHORUS, the unidentified object was probably a loose chain wire or cable. It could also have been loose ground tackle, a fishing buoy rope or line. As stated above, the debris is not uncommon for the strait and could have stuck or wrapped around the starboard propeller causing the engine to shut down either because of damage or to protect itself from further damage".

(b) Captain Areeke says merely that there is a possibility of the damage to the fin having occurred in another separate incident; and

(c) the Master's evidence is that there were no incidents and no damage prior to the incident giving rise to the claim.

23 Both experts are agreed that the damage was caused by contact with a metal rod, wire or chain. The key difference between the experts in the end comes to this, that Mr Chettleborough considers the damage to the fin is consistent with the damage to the starboard propeller but Captain Arici does not. As I have said earlier, if the defendants wished to advance a positive case that damage to the fin was caused by another incident, the evidential burden was on the defendants to prove it. Their own expert evidence does not prove that cause.

24 Captain Arici considers that the damage to the fin to be "*fresh*". I agree. That rules out the possibility of damage on a date materially prior to the date of the incident. This conclusion is supported by the unchallenged evidence of the Master that there were no incidents causing damage to the yacht before the incident the subject of these proceedings. There is no evidence of any other collision incidents before or after the incident. Although there is evidence of directional instability following the shutdown of the starboard engine in the first phase of the incident the subject of these proceedings, there is no evidence of directional instability once the starboard engine was restarted, thus making it improbable that the damage was suffered in any docking manoeuvre following the incident either on the evening after the incident or 9 January. I accept that the engine alarm report referred to by Mr Chettleborough at para.6-15 of his report could show a starboard engine failure on 9 January 2018, i.e. during the voyage the day after the incident. However, if the defendants wished to assert this resulted in a loss of directional stability and to further damage, that needed proof and for that issue to be put to the Master in cross-examination. As I have said, the Master's statement is admitted and says that the only incident resulting in damage was that which is the subject of this claim and which occurred on the evening of 8 January.

25 The Master describes two phases of the incident: first, an initial fouling of the starboard prop causing the starboard engine to shut down, then subsequently the propellers hitting the bottom as the vessel became difficult to control on one engine at low speed- (see Captain Arici's report at para.9.1 and the Master's statement at paras.25 to 28 and at para.36. In those circumstances, (a) there were two parts to the incident; (b) the damage to the fin is consistent with the first part as described by the Master; (c) there is no admissible evidence that shows the incident did not occur as the Master described and (d) no evidence of the vessel being involved in any other incidents before or after the incident. The damage to the starboard propeller was much more severe than that to the port propeller. That is consistent with the incident having occurred in the way described by the Master. On the material that is available to me, I am satisfied, on the balance of probabilities, that the starboard fin was damaged in the first part of the incident described by the Master. Had I concluded otherwise, the cost of repairing the fin, quantified at about €1,000, would be irrecoverable, because it would have constituted a separate incident and therefore subject to a separate deductible of €15,000.

26 The next issue concerns the damage to the drive units. The drive units were ultimately removed from the yacht on the claimant's instructions and shipped back to the manufacturer. The damage found is summarised in the report prepared by the manufacturer of the drive units, Top Rise SRL. There is no dispute as to these findings. Mr Chettleborough's view is that the reported damage all resulted from the incident as described by the Master. The only issue between the parties arises from the suggestion by the defendants that at least some of the damage was the result of motoring the yacht back to her home port after the incident and/or during the trip on 9 January to the marina where the yard that maintained the yacht at the material time was located. Captain Arici is not in a position to give any evidence on this issue. He did not examine the drive units and, more importantly, is not a marine engineer. His evidence is limited to a speculative comment that damage to bearings and/or other equipment within the drive units may have been either caused or worsened as a result of

operating the vessel for a further 32 to 35 nautical miles with, as he put it, "*Heavily imbalanced propellers*". In support of this argument, the defendant relies on the drive units' manual that warns that in the event of a system failure, both engines should be stopped and restarted only after the fault had been removed and with the prior approval of authorised staff.

27 In my judgment, this is an issue on which the evidential burden rested on the defendants and they have failed to discharge it. Mr Chettleborough does not support the theory, and Captain Arici is not qualified to give any evidence about it and in fact does not do so. Not merely is there no evidence of any additional damage being caused by use of the engines after the incident but no evidence either as to what, if any, additional damage was or might probably have been caused as a result of such activity and, more importantly, what material impact, if any, that had on the repairs that had to be carried out as a result. As to the second of these two points, if a bearing, for example, had been damaged in the incident, it is likely it would have to have been replaced whether or not it was further damaged subsequently. There is no evidence that addresses these issues at all. Although Mr Watthey submitted that it would never be possible to establish that additional damage was caused to the drive units after the incident, I do not accept that to be so. Engineering evidence could have been obtained as to the effect on the drives of running the engines with damaged propellers. Indeed, such evidence might have been obtained from the manufacturers. However, no such evidence has been adduced. Even if such evidence had been adduced, it would have been necessary to prove that any additional damage increased the costs of repair. Again, this is a matter for expert engineering evidence and there is no such evidence. As I said earlier, if a bearing, for example, was damaged in the incident and was further damaged by subsequently using the engines, that would be nothing to the point if the bearing had to be replaced as a result of the damage caused in the incident. It is possible, however, that subsequent running with a by then damaged bearing might have damaged other parts unaffected by the original incident. If so, the cost of making good the additional damage might well have been a separate incident

triggering a separate claim and deductible. However, in the absence of any evidence on that issue, this is impermissible speculation.

28 In consequence, I conclude that the whole of the damage to both drive units was caused by one or other of the phases of the incident described by the Master and that the whole of the cost of repairing both drive units is recoverable as part of the repair of the damage to the yacht caused by the incident the subject of these proceedings and I reject the submission that any part of the reasonable cost of repairing the drive units should be deducted from the sum otherwise recoverable by reference to the assertion that the drive units were further damaged as a result of use after the incident. I turn to the reasonableness of the cost of repair of the drive units later in this judgment.

29 The next issue I have to consider concerns the damage to the propellers. There is no dispute that both were damaged in the incident and that the starboard propeller was more severely damaged than the port propeller. Initially, Captain Arici assessed the damage to the blades of the starboard propeller as about 40 per cent. However, it is agreed between the experts now that the extent of the damage to the starboard propeller is about 50 per cent. This is unsurprising given the description of the first part of the incident by the Master and in particular his evidence that the initial impact was so severe as to cause the starboard engine to shut down.

30 There are a large number of photographs of the damaged propellers reproduced in both experts' reports. Mr Chettleborough's evidence was that the damage was consistent with both propellers coming into contact with hard objects. I accept that evidence, which is not in dispute. In my judgment, the level of damage is consistent with the description of the incident; that is, of an initial contact that was so severe as to cause the starboard engine to shut down and thereafter a touch and go grounding at a time when the only power available was from the port engine. This is consistent with damage to the port propeller being caused either in

the initial part of the incident, but to a lesser extent than the starboard propeller, or perhaps more likely as a result of contact with rocks during the second part of the incident.

31 At paras.41 to 44 of his report, Mr Chettleborough says this,

"The Marine Solutions report [that is Captain Arici] indicates that the percentage amount of damage of each blade as being, 'To about 10 per cent of the blade radiuses' but, 'on the starboard propeller one blade is damaged to about 40 per cent of the blade radius'. No indication has been given as to how this was determined but it would appear to be a visual estimation. In any case, it is clear that large chunks of metal were missing or have been torn away from the propeller blades. The damage is consistent with the propeller blades repeatedly striking hard metal such as a chain or cable or an object like a rock. I note that Captain Arici also concluded that the damage, 'Appeared due to contact with non-uniform hard object like rocky seabed'.

The Marine Solutions report also states that there was, 'No trace of the wrapping of chain, wire, rope around props and/or other elements of the transmission'. However, the photographs within the Marine Solutions report clearly indicate evidence of a chain, wire or rope coming into contact with the starboard side fin. The photograph clearly shows an indentation on the leading edge of the fin with wear-like abrasive marks in the anti-foul paint proceeding aft. There are then additional patterns in the anti-fouling paint towards the lower edge of the fin which are all commensurate with a wear pattern being produced by rope, chain or cable.

In light of the starboard engine being shut down at the time of the grounding, it would be reasonable to state that probably all of the damage to the starboard blades occurred as a result of a collision with a object such as a ground cable. It is possible though that some further damage occurred to the propeller as a result of the grounding by way of the stationary blades coming into contact with a hard surface.

As reported above, there is also damage to the port propeller blade which could have been caused by either action of the cable rod that the vessel initially came into contact with or alternatively it could have been caused as a result of the grounding or both. It is reported that the port engine remained running during the incident, so it is likely that the damage occurred during the grounding".

Captain Arici disagrees with this only to the extent of asserting,

"Damages appear to be due to contact with a non-uniform hard object such as a rocky seabed. I did not note any traces of the wrapping of chain, wire, rope, net around prop shaft or further elements of the transmission".

In relation to this issue that I am now concerned with, I prefer the evidence of Mr Chettleborough as being more consistent with the physical evidence concerning the damage that occurred. Captain Arici's evidence on this issue depends on me concluding that the damage to the starboard fin did not occur in the incident. However, I have rejected that theory,

for the reasons given earlier. I conclude, therefore, that all the damage to both propellers was caused in the incident described by the Master, with all or most of the damage to the starboard propeller being caused by the initial phase of the incident and all or most of the damage to the port propeller being caused by the second phase of the incident.

Repair Costs

32 It is convenient to start with the propellers. The issue between the parties is whether the propellers reasonably required to be replaced or, as the defendants maintain, repaired, as Captain Arici puts it, "... at a local propeller engineering shop, including dynamic balancing ...". It is not in dispute that in fact the claimant acquired replacement propellers from the manufacturers of the propellers damaged in the incident at a cost of just short of US\$68,000. In the end, the defendants authorised the replacement of the starboard propeller but only local repair of the port propeller.

33 This issue has to be approached applying the conclusions I reached earlier concerning the construction of the policy. In my judgment, the claimant is entitled to recover the cost of replacing both propellers. My reasons for reaching that conclusion are as follows. First, I accept Mr Chettleborough's evidence on this issue, at paras.105 to 108 of his report, which are in these terms,

"Both propellers suffered substantial damage as a result of the incident ... An attempted repair to that damage would have required welding a large amount of metal back on to the propellers. In my experience, welds of this nature are susceptible to failure on propellers on high performance speed vessels such as the subject vessel, and particularly surface piercing propellers, as they can be under extreme stresses during operation. This would be like replacing the tyres of a Formula 1 car with re-treads. It is an unnecessary risk and one that would potentially lead to more serious issues and problems later on. Weld failure on a propeller moving at extreme speed (1000 RPM plus) could be potentially catastrophic, particularly because the propellers are surface piercing. Any metal shards would be thrown with considerable force potentially back into the vessel and the hull. The engine would go into overspeed with an associated loss of control. Even a small risk of these eventualities could not be ignored. In my view, such a repair would not ultimately be considered safe. Weld failure on a propeller moving at extreme speed resulting in an individual blade breaking would in

all probability lead to a catastrophic failure of the entire drive system due to significant vibrations that would occur due to the off-balancing of the propeller. It is also extremely likely that this would cause significant damage to other elements of the drive train(?) such as the gearbox and the main engine. It is crucial that surface piercing propellers are properly balanced to avoid unnecessary vibrations and as such they have to be dynamically balanced prior to installation.

In the case where propellers are repaired by welding, balancing is achieved by grinding material from the blades. Although the propellers may appear to be balanced on the 'test jig', once they have been installed on the boat there is a high probability that they will appear unbalanced. As material has been removed from the blades, in order to achieve balancing, the thrust forces from each blade would be unequal, not symmetrical, leading to an increase in shaft vibrations. This will not be known until the propellers are installed on the vessel and operated".

I accept that evidence, for two reasons. First, I consider Mr Chettleborough to be more qualified to express an opinion on the issue that Captain Arici, for the reasons I explained earlier in this judgment. Secondly, that opinion is consistent with that expressed by the manufacturers of the propellers. The manufacturers were Rolla SP Propellers SA. Rolla was asked for its advice by the yard to which the yacht was taken on 9 January. This yard was the yard that had maintained the yacht from new and was a Ferretti authorised dealer.

34 By its letter dated 1 March 2018, Rolla advised the yard (in translation) as follows,

"We have checked the photos included in your PDF document ... and the propellers installed on Pershing 82/20 seem to be seriously damaged. Moreover, to carry out a possible repair, it will be necessary to carry out extensive welds to bring back the missing material on the damaged blades with a subsequent grinding operation to restore the surfaces of the blades themselves. It should also be considered that we are talking about surface piercing in propellers whose blades are subjected to far greater stresses than traditional submerged propellers. On the basis of our specific experience on surface piercing propellers, we are not in a position to guarantee an intervention of reparation perfectly done, so our advice is not to proceed with the repair of these propellers in order to not compromise the safety of the propellers themselves and the safety of the boat in general. A possible and total blade failure during the use of the boat could cause a much greater damage besides to the propellers themselves, also to the drive system and the structure of the hull".

Although Mr Watthey submitted that the letter was concerned with guaranteeing an outcome, I consider that mischaracterises the substance of what was being said. The reference to guaranteeing, in my judgment, is saying no more than that a less than perfect repair could result in some or all of the problems identified in the letter, and for that matter by Mr

Chettleborough in his report. Assessing whether replacement rather than repair was reasonable involves assessing or taking account of the consequences of a failed repair. The more serious the likely consequences of a failed repair, the more reasonable becomes a replacement rather than repair of the propellers. In my judgment, the likely consequences of a failed repair point very clearly towards the need for replacement. If either propeller was repaired and the repair failed, the results would, in my judgment, be catastrophic, causing severe damage to the drive units, to which they are attached and to the hull of the yacht, possibly to the extent of compromising the safety of the yacht, her passengers and crew. I am not suggesting that there are no circumstances in which propellers can be repaired; that is not the effect of the evidence. However, the evidence is entirely clear that the risks posed by a failed repair are much greater with high performance, high revving, surface piercing propellers than lower speed conventional fully submerged propellers.

35 Captain Aricie maintained that there was a rule of thumb that a propeller was repairable if less than 10 to 15 per cent of the outer edge of a blade had been damaged. If right, this would suggest that the port propeller was capable of repair even if the starboard one was not. However, he accepted that this supposed rule was his personal rule and that it was not supported by any technical literature. In my judgment, it is not a sound basis for reaching a judgment on the issue I am now considering, because it was a personal rule, there was no objective engineering basis for it, Captain Arici is not qualified to arrive at such an engineering conclusion and, finally, it was not a rule that Mr Chettleborough had ever come across in many years of marine engineering experience. In my judgment, all of these are very good reasons for rejecting Captain Arici's rule as a tenable basis for deciding whether or not the port propeller should be repaired rather than replaced. Further, Captain Arici's rule was one that, if correct, would apply to all propellers irrespective of what they were required to do. That is inherently problematic, because, as is obvious, the engineering stresses that high

speed surface piercing propellers will experience are different from those to which a prop driving a slow speed displacement vessel which are fully submerged will be subject.

36 Although Captain Areeke maintained there was a specialist repairer able to carry out propeller repair work in Turkey called Germari(?), in my judgment, if that point was to be proved, it required evidence from the repairer concerned of its ability and experience in carrying out such repairs; there is none. Finally on this issue, it was suggested to Ms Dermacott(?) that she, and/or the beneficial owner of the vessel, was motivated only by a desire to ensure (break in recording) and it was for that reason the propellers were replaced rather than repaired. In my judgment, this is immaterial to the issue that arises, as Popplewell J (as he then was) held in the *DC MERWESTONE ibid* at para.142,

"Whether the cost of repairs is reasonable is objective and the cost of an objectively reasonable repair is recoverable whatever the motives of the insured in taking that course".

37 In any event, I consider Ms Dermacott to be a reliable witness and I accept her evidence, therefore, that all she was concerned to ensure was that a reliable repair was carried out to the yacht so that the yacht was safe for use by the beneficial owner and his family. The reason why this point is said to be of significance is because clause 4.3 of the policy conditions provides that the policy does not cover loss of a manufacturer's warranty. However, as I have explained, that was not the basis on which the propellers were replaced. They were replaced in order to ensure that the yacht was safe to use and could safely be used in the way she was designed to be used, and intended to be used, when she had been delivered.

38 I turn now to the repair costs in respect of the drive units. The claimant paid for the drive units to be removed from the yacht, sent to the Top System's factory in Italy, where they were both repaired at a cost of US\$151,589, together with €3,100 and Turkish Lira 4,263 odd. The

defendants' case is that this was in excess of what was reasonable and that each unit should have been repaired locally in Turkey. I reject that case, for the following reasons. The drive units are specialist pieces of equipment. This is reflected in the fact that the experts are agreed that the units needed to be inspected by the manufacturer (see para.5 of the joint memorandum signed by the experts). Top System carried out an on-site inspection and produced a report on the state of the two units dated 31 January 2018. That report has not been translated well but, in summary, stated: (a) the propellers could not be repaired; (b) that the thrust bearing, needle bearings, oil bath universal joint and certain other components inside each drive unit, would at least probably have to have suffered damage and the units required disassembly at Top System's workshops in order to ascertain the damage suffered; and (c) the trim pistons were likely to have suffered internal damage as a result of the shock imposed on them by the incident and require disassembly and overhaul at Top System's workshops. Captain Areeke accepted that Top System were well equipped to give considered advice on the condition of the drives.

39 There was a suggestion by Captain Areeke that there was no need to inspect both drives, at any rate initially, and that it was necessary to inspect only the starboard one initially, with an inspection of the port drive only if damage to the starboard one was found. I reject that evidence. First, as I have said, Captain Areeke is not an engineer. This is classically an engineering issue. Secondly, given the physical damage to both propellers it is highly likely that shock mechanical damage to both drives would have resulted. Thirdly, merely because damage to one drive has not occurred does not lead safely to the conclusion that damage to the other drive has not been suffered. Fourthly, since any damage was internal, it was only by disassembly of the units that the existence of any damage could be found.

40 In relation to the advice given by Top System, it was suggested by Captain Areeke in cross-examination that it would be high risk to disagree with the advice of a reputable

manufacturer of specialist equipment such as the drive units. Captain Areeke accepted that to be so and accepted too that it was risky to disagree with a manufacturer when not having carried out an internal examination and if not qualified to do so. He continued to maintain, however, that it was not necessary to inspect the port drive unit. In my judgment, this was mistaken unless it could be concluded that no damage to the machinery within the drive unit had been caused by the damage that was visible to the port propeller. Given that the port propeller was the only source of power during the second phase of the grounding, I do not see how anyone, particularly someone who is not an engineer, could reasonably reach such a conclusion, and I reject it. In any event, following inspection, it was clear that the port drive unit had sustained damage in the incident and required repair, thus if the issue was looked at at the time when the decision to remove the units was taken, it was reasonable to remove both units because that was the advice of the manufacturer and the physical damage to the port propeller reasonably justified the conclusion that the port drive was likely to have suffered internal damage as a result. If the situation is looked at with all the relevant information now available, the decision was plainly correct because, when the port unit was shipped, it was found to be damaged.

41 Finally on this issue, I accept Mr Chattleborough's evidence that,

"Although I have no specific experience with the drive system installed on this vessel, which was manufactured by Top System, I have inspected yachts with drives manufactured by other manufacturers such as Twin Disc. Fundamentally, regardless of the manufacturer, the principles of operation are the same. Based on the obvious damage that has occurred to the propellers, I would consider it normal to recommend the dismantling of the systems for further investigations. That is because impact damage to propellers often causes misalignment or fractures in other elements of the drive system because of the transference of considerable forces, so regardless of the

drive system, if propellers are damaged it is necessary to remove and check the other components in the drive system. To the naked eye it would not have been possible to determine if damage such as misalignment, twisted shafts, bent rams, etc, were present. As such, the only way to safely confirm that this would be so is to dismantle and investigate. In my view, no reasonably competent surveyor would recommend otherwise".

42 As Mr Chattleborough stated in his report, the drive systems are highly specialised proprietary and computer controlled systems and the ability of the yacht to manoeuvre and operate safely depended on them working correctly. In those circumstances, it is plain that both units needed to be removed and thoroughly inspected by disassembly. In my judgment, that was something that reasonably required the units to be removed and returned to their manufacturer unless the work could be done locally.

43 I now turn to the contention by the defendants that it was unreasonable for the units to be internally inspected and repaired by the manufacturer and that all that work could and should have been carried out in Turkey. In my judgment, it was plainly reasonable for the units to be returned to Italy and all necessary work carried out by the manufacturer. First, as I have already explained, these were highly specialised units that were integral to the safe operation of the yacht. There is no evidence from any repairer in Turkey that it was capable of repairing the units, much less repairing them to the standard required by the policy. Secondly, it is artificial to suggest that the repairs could or should be carried out locally once it had accepted, as both experts accept, that the units had to be inspected by Top System representatives and once it is accepted that such an inspection ought, on the recommendation of the manufacturers, to be carried out at its manufacturing facility. Thirdly, I do not accept that because the units are capable of routine servicing locally it therefore follows that the stripping down and repair

of the units following the incident could have been undertaken in the same way. Fourthly, there was no Top System authorised repairer in Turkey.

44 Captain Areeke's evidence on this issue was set out in para.14.2.3 of his report in these terms,

"The dismantling and inspection of these drives requires some skill and possibly some special tools and documents. I was under the impression that the insured wished to have the drives inspected and rebuilt in Top System's headquarters. However, the surface drive systems can be and are serviced locally. Indeed, we noted that there was a local service point listed on Top System's website ... where this Mr Alip Sari is still listed. This person was unknown to us and no address coordinates have been published and are still missing on the web. So at the very early stages I contacted Top System headquarters and asked for the address coordinates of this Mr Sari.

45 In reply, the Top System headquarters directed me to another service point, in Greece, Sea Front SA. Our addressee there, Mr Stavros Cassandris(?), appeared on the same list ... When I contacted him, Mr Cassandris was very interested and cooperative. He confirmed that he would be prepared to travel to Istanbul, disassemble the starboard drive, inspect it on-site, carry out replacements and would then assemble and deliver the drive. He would do the same for the port drive if requested. We agreed on the duration, on his daily rate, on the spare parts needed and the special tools he might take along or which may have to be engineered locally.

46 We agreed a local shop support. Esbieka(?) Yachting offered their engineering support for free and glad to have an opportunity to overlook these inspections. Then, at a later phone call, when I wished to firm these conversations in the form of a quotation, there happened a change and Mr Cassandris' conversation style started to become evasive. At some stage I remember Mr Cassandris said, more to himself, that he may not be able to obtain the spare parts from Top System.

- 47 In any case, in spite of reminders, he never supplied the agreed quote. In any case, dismantling and assembling work can be carried out locally by Sea Front SA or another suitable Top System service provider or upon receipt of the appropriate service manual by any engineering company experienced with similar marine propulsion systems".
- 48 In my judgment, this is unreal. First, all this is hearsay evidence going to a critical issue in this case that was incapable of being tested in cross-examination since Mr Cassandris was not called to give evidence. Secondly, it does not make sense, on its face, since it was impossible to agree on the spare parts needed until each of the drive units had been disassembled and the extent of the damage ascertained. That reduces the weight that can safely be put on this evidence. Thirdly, it seems improbable that a commercial entity such as Esbieka Yachting would be willing to allow its facilities and equipment to be used without charge either for the reasons identified or at all.
- 49 This is another example of the defendants seeking to advance a case concerning locally based operators being willing and able to undertake specialist repairs without adducing any direct evidence from the locally based repairers as to their willingness or ability to undertake the work. In any event, Captain Areeke's own evidence is that Sea Front was unable in the end to do the work. All this evidence has to be viewed in the context of a concession by Captain Areeke that at the time all the discussions were taking place he was trying to minimise costs. In my judgment, that was the primary focus of his attention at the point at which he was in contact with the proposed Greek based repairer rather than on ensuring that the necessary repairs were carried out to the level required by the policy. Captain Areeke accepted that he never received a firm quote from Sea Front SA, which is not surprising in the circumstances.
- 50 In his oral evidence, for the first time Captain Areeke said he was told by Mr Cassandris that he could not quote because Top System had already quoted to carry out the work. He accepted that by then the drives were on their way to Italy for disassembly and inspection. I am

sceptical about this evidence, simply because there is no explanation offered as to why it did not appear in Captain Areeke's report. However, even accepting it at face value, it merely underscores the point that there is no evidence that there was a contractor in Turkey ready, willing or able to undertake the necessary work.

51 If and to the extent that the reason Sea Front ceased to be willing to undertake the work are the reasons set out by Captain Areeke in his oral evidence, in my judgment, that can have no impact on the issues that arise. Under the policy, the claimant was required to act as if uninsured (see clause 5.2 of the policy conditions) and I do not see how reasonably it could be suggested that seeking a quote from the manufacturers of the units was anything other than so acting. In my judgment, the course adopted by the claimant in relation to the repair of the drive units was reasonable in all the circumstances.

52 It is not entirely clear whether the defendant disputes the costs of the various inspections that were carried out on the instructions of the claimant. However, Captain Areeke accepted in the course of his evidence that it was prudent for the claimant to have done so, not least because it did not have access to the reports prepared by the defendant at the time when the repairs were being considered. In those circumstances, I conclude that incurring the costs of such inspections was reasonable.

53 The next issue I have to determine concerns the claimant's claim for the costs of repairing GRP damage both internally and externally. The claimant has paid \$13,906 for this item. Captain Areeke maintains that this was in excess of what was reasonable, whereas Mr Chattleborough considers that sum to be reasonable. Mr Chattleborough was cross-examined about this issue on the basis that all he had done was to accept the claimant's figures at face value. Mr Chattleborough's response was that this was not what he had done. He says that he worked out what had to be done, what the material costs would have been and how many man days it would have taken to complete the work and applied a daily rate taking account of

Turkish labour costs. None of these workings have been produced but I accept this evidence nonetheless, because it was not suggested that the evidence had been fabricated.

54 Turning to Captain Areeke's evidence on the issue, he does not refer in his report, nor did he refer in his oral evidence, to materials required, man hours required or what labour rates should apply. In those circumstances, on the evidence, I am satisfied that the claimant has proved the reasonableness of this head of cost. Even if I am wrong to accept Mr Chattleborough's evidence on this issue, that could have no impact. The defects in Captain Areeke's evidence would remain and I would have to fall back on the general law, being that set out by Lord Blackburn in *Aitchison v Lowe*(?) [1879] 4 AC 775 at [762],

"He may repair damage done by the peril insured against and if he does so, the damage would in general be what would be the reasonable cost of making the ship good as it was before. The actual outlay on the repairs, if *bona fide* made, would be strong evidence of what the reasonable cost was and if the ship was by that outlay made more valuable than it was before the accident, which would generally be the case with an old ship, there should be an allowance for the increased value".

55 Applying that principle here, and it not being suggested that there should be any age adjustment, in my judgment the claimant would be entitled to recover what has been expended in the absence of any evidence that the sums expended were incurred either, (a) in respect of damage not caused by the incident; or (b) was in excess of what was reasonable for the work in fact carried out. It follows that even if I am wrong to accept Mr Chattleborough's evidence in relation to the GRP repair costs, the outcome would be the same.

56 I now come to two issues where, in my judgment, the claimant has failed to prove that the costs, or the whole of the costs, claimed should be recoverable. The first concerns anti-fouling. This has been charged in the sum of \$8,624.81. This appears to have been for

the whole of the vessel. No-one suggests that the damage was such as to require the re-anti-fouling of the whole of the vessel. I accept Mr Chattleborough's evidence, at paras.88 to 91 of his report, that no more than \$1,724 represents the reasonable cost of painting the damaged parts of the hull with anti-foul paint. I prefer Mr Chattleborough's evidence to that of Captain Areeke because Mr Chattleborough has attempted to calculate the areas required as a percentage of the total surface areas that would have to be painted, assuming the whole of the yacht was to be anti-fouled. Captain Areeke has not attempted such a calculation. Whilst I do not ignore the fact that Captain Areeke will be familiar with yacht yard rates in Turkey, without carrying out a calculation similar to that carried out by Mr Chattleborough, that local knowledge does not assist.

57 The final issue concerns tenting. After the yacht was brought ashore, she was covered by a tent. The total cost paid by the claimant in respect of this element is \$9,552. Captain Areeke's position on this is that it was wholly unnecessary and that all that was needed was a tarpaulin to cover the stern of the yacht after the drive units had been removed in order to prevent adverse weather penetration through the voids left by the removed units. I do not agree with this approach. This was work being carried out to a high value prestigious yacht in circumstances where it was necessary to protect those working on the yacht as well as the yacht itself while her stern was open to the elements initially during the winter and Spring of 2018.

58 I accept that tenting was necessary to prevent foreign objects entering the stern of the yacht while she was ashore awaiting the reinstallation of the drive units when the stern would have been open to the elements, and I also accept tenting was necessary in order to provide a stable environment for both the GRP work and the anti-fouling. However, that did not require tenting of anything other than the stern of the vessel. Mr Chattleborough has assessed the reasonable cost as being 50 per cent of the actual costs, giving a figure of \$4,776. Since

Captain Areeke has chosen not to engage with this issue beyond saying that all that was required was a tarpaulin to cover the stern, evidence which I reject as no more than an attempt to unreasonably reduce costs, I consider I should accept Mr Chattleborough's evidence on this issue.

59 In the result, therefore, I consider the claimant is entitled to recover the sums claimed less the adjustments I have mentioned for anti-fouling and tenting that I have just referred to.

[LATER]

60 The issue that I now have to determine concerns the summary assessment of the claimant's costs, the claimant being the successful party, this being a shorter trial scheme case. The costs which are claimed in the aggregate by the claimant are £213,239.79 in respect of a claim which has quantified out, as I understand the figures, at about €244,000.

61 The first submission which is made, therefore, by the defendants is that the totality of the costs claimed is in excess of what is reasonable and proportionate and that that carries through into the various phases that have to be looked at. Before descending into the detail, I remind myself that an exercise of this sort requires me to arrive at a figure for the claimant's costs which ensure that only reasonable and proportionate work is paid for and only a reasonable and proportionate amount is paid for that work. In a summary assessment of this sort, inevitably the exercise has to be very broad brush because the sort of detail which is made available on a detailed assessment simply is not made available on an assessment of this kind.

62 The first general issue that arose concerns the rates which have been charged. It was submitted on behalf of the defendants that the rates were in excess of the guideline rates applicable. This is to an extent an artificial submission in the sense that the solicitors concerned are a firm established from a City practice where they previously practised together and moved a matter of a very short distance from where their City office had previously been located, as it turns

out, into Dalston or Shoreditch. The result of this is that the postal areas that they practise from is now N1 rather than one of the EC postal districts and this has a profound effect on the grade rates that can be charged.

63 There are at least two points which need to be made in relation to grade rates under the guideline rate scheme. First of all, the rates are significant out of date. They were fixed in 2010 and they, therefore, reflect the position as it was in 2010, not as it was in 2020. Although Mr Watthey submits that it is wrong simply to look at inflation, because solicitors' rates have suffered commercial pressure, particularly in respect of work carried out for big institutional clients such as insurers. Whilst that submission is made, as it seems to me, that is a difficult submission for me to act on without real evidence upon which to arrive at a judgment. The conventional approach in relation to guideline rates is to uplift them by about 25 per cent in order to reflect the effects of inflation on the figures previously arrived at.

64 In any event, and this is the second point that applies in relation to grade rates, it has always been the case that specialist solicitors in specialist areas of activity should recover an uplifted fee to reflect that specialism. With those factors in mind, I would accept the rates which have been identified as appropriate in all the circumstances. This is specialist work. The solicitors involved are specialist solicitors. The difference between where in fact they now practise and where they previously practised is an artificial distinction which has only very limited impact on the fees which can properly be charged, although I recognise that there will be a marginal difference driven by things like rent and rates, but all of that said, this is specialist work by specialist solicitors and I am satisfied that it is appropriate that they should charge such a rate. I note that, in any event, the rate charged by the solicitor acting for the defendant at £290 an hour as an Associate is not unadjacent to the rates which have been charged in this case.

65 The next question which I have to address is whether I should look at this case on a phase-by-phase basis. Although tempted at one stage to simply take a very broad brush

approach and apply a reduction to reflect the necessity to ensure proportionality is arrived at, that would be to do a disservice to the way in which the application has been presented and also because there will be different issues that arise in relation to each phase which will have an impact upon what is recoverable.

66 So far as pre-action costs are concerned, the point which was made is that the sums involved are very substantial. They are, but it is necessary to bear in mind that the claimant is driving the case at this stage. The work that is in fact undertaken is all identified in the schedule, being attendance on client, attendances on documents necessary to move to the next phase, and attendance on others as well in order to get the bare minimum information to hand. Nonetheless, the hours that have been worked are, in my judgment, in excess of what is proportionate having regard to the value of this claim, and therefore a modest adjustment is appropriate, and the modest adjustment that I make is to disallow four hours of Ms Prentice's time in relation to the pre-action costs.

67 The next issue which arises concerns statements of case. So far as statements of case are concerned, again, the hours that have been worked are substantial. The same test applies as I have already identified. It was submitted that it was at this stage that Mr Mavraganis(?) was dropping out of the case as Ms Prentice became, in effect, solely involved in its day-to-day conduct. As it seems to me, therefore, being reasonable and proportionate in relation to the costs of preparing statements of case, there would be no need for Mr Mavraganis to be involved in this stage of the exercise and I will disallow the sums which have been claimed for him as in excess of what is reasonable and proportionate.

68 So far as the preparation of the statements of case are concerned, I accept the submission made on behalf of the claimant that preparing the underlying material to ensure that the statement of case reflected, for example, very accurately the costs which were being claimed would be of benefit to all parties as the litigation moved forward and, therefore, the process would be a

process which would involve more than merely acting, in effect, as a processor for the work product from counsel. Nonetheless, to claim for 24 hours of work in relation to the activities that were required, in my judgment, is in excess of what is reasonable and proportionate and I reduce that to 20 hours for Ms Prentice.

69 So far as counsel's fees are concerned, there is no realistic objection to that, as far as I can see, except that it is said there should be a marginal reduction, I think, to reflect 10 hours of counsel's time for the drafting of the pleading. In my judgment, that goes too far. What is the fee that has been charged for the work involved in preparing a carefully drawn pleading with appropriate annexes is the fee which is being claimed and I allow that as asked.

70 So far as the CMC is concerned, the figure that is being claimed is, again, a high one, but that, in my judgment, reflects the costs which have been incurred in preparing the various documents that had to be prepared ahead of the CMC. The quality of the documents enabled the issues to be resolved without a contested hearing and in those circumstances, it goes too far to suggest that there should be a very substantial reduction to the level of suggesting that the time costs for the solicitors should be the same as counsel's fee. That does not reflect accurately or at all the commerciality of running a solicitors practice, it does not reflect, therefore, the differential between charge-out rates that will exist as a result, and it does not reflect fairly the amount of work which had to be done by solicitors in order to comply with the obligations that arise in relation to a CMC. Nonetheless, again, there is at the margin perhaps a little too much that takes the figures which have been claimed in excess of what is reasonable and proportionate. It is unclear to me what Mr Hatcher brought to the exercise so far as the CMC is concerned and I disallow his claimed fees in their entirety. That adjustment ought properly to bring matters into line with what is reasonable and proportionate when looked at in the round.

71 So far as disclosure is concerned, the claimant's solicitors seek a total of 53 hours for disclosure. I accept the submission which is made on behalf of the defendants that this is in excess of what is reasonable and proportionate having regard to the nature of this case. This case was not a heavy disclosure case. I fully accept that it was necessary to carry out a review of reports prepared on behalf of the defendants which had not previously been seen. I fully accept that there had to be a review and some collating of invoices in order to make good the various financial claims and I understand that there would have to be a degree of review of material, which in the end never made it to trial bundles, in order to carry out the obligations that arise in relation to disclosure. Nonetheless, it is inappropriate, in my judgment, that is to say, unreasonable and in excess of what is proportionate, for a partner to spend 37.6 hours on disclosure in a case of this nature. There is an adjustment to be made there, it has to be a broad brush exercise and what I propose I should do is to leave Mr Hatcher's sums claimed as claimed and I reduce Ms Prentice's hours relevant to disclosure to 15 hours as well. I fully accept that there will be areas where she will have to become involved and I fully accept that she would have to review quite a lot of the material given the circumstances of this case but, as I have said, to claim 37 hours is in excess of what is proportionate in a case of this sort. So there will be 15.4 hours allowed for Mr Hatcher, 15 hours for Ms Prentice.

72 So far as counsel's fees are concerned, those were not seriously objected to and those were allowed as asked.

73 So far as witness statements are concerned, again the hours which have been claimed are challenged. They are challenged on the basis that the total time costs for solicitors are in excess of 58 hours. There were two witness statements of fact that had to be prepared. One related to the individual who managed the private affairs of the ultimate beneficial owner of the yacht and the other concerned the preparation of the Master's statement. I fully accept that Mr Hatcher's task in preparing, or principally preparing, the statement of the Master

would have been rather longer by reference to language difficulties than might otherwise have been the case. In my judgment, the fees that he has claimed are reasonable and proportionate for that exercise. I fully accept that Ms Prentice would wish to review the statements that are prepared but the statement from the assets manager of the claimant was not a task which ought to have proved at all difficult. In my judgment, again, the appropriate hours to be allowed for the preparation of witness statements by Ms Prentice would be 15 hours.

74 The next issue that I have to address concerns expert evidence. There was a fairly root and branch challenge to the fees charged by the claimant's expert in the circumstances of this case because it is very substantially in excess of what the expert retained by the defendant has charged. In my judgment, that is a failure to compare like with like. The expert retained by the defendants was based in Turkey and had different qualifications to Mr Chattleborough, who was retained by the claimant and who was both a chartered engineer and naval architect and of some years' experience and based in the UK with all the implications that carries for charge-out rates. There is nothing that has been drawn to my attention which suggests that what he charged was in excess of what is reasonable and proportionate, other than by reference to the false comparison I have identified, and therefore I permit the expert fee element of this as asked.

75 The next question which arises in relation to expert fees concerns the fees charged by the solicitors. The total hours charged for are 75 hours. In my judgment, this is in excess of what is reasonable and proportionate having regard to the nature of this case and having regard to the sums at issue in it. I fully accept that the issues that arose in relation to the experts would engage the particular skills that Mr Hatcher has to offer because of the nature of the issues that arose, in particular in relation to the grounding and engineering issues that followed. I am prepared to accept, therefore, that he should be permitted to charge 40 hours for that exercise in order to provide the support necessary for the expert concerned. What I do not

accept as reasonable and proportionate is the hours which Ms Prentice has claimed in relation to the same exercise. In my judgment, there will be significant duplication of costs which are unjustified on reasonableness and proportionality grounds. I fully accept that she would wish to review the expert reviews as the partner having conduct of this case, but that is not an exercise which should have taken longer than 10 hours of chargeable time. In those circumstances, I reduce the hours for which she can charge to 10 hours.

76 The next issue concerns the PTR and linked with it the application which was heard, in effect, to require the defendants' expert to provide certain information concerning the degree to which he and his firm had been previously instructed by the defendants. I reserved the costs of that application over until trial because I wished to see whether the point had substance or not. In the result, I concluded that there was no substance in the point and that Captain Areeke gave his evidence fairly and objectively within the confines of the qualifications and experience that he had. There was no basis on which to challenge his independence by reference to previous instructions received. In my judgment, therefore, it will be appropriate to apply a deductible in relation to the costs of that application. In my judgment, those are costs which both the claimant should not be allowed to recover and the appropriate course to adopt in those circumstances is to deduct from the costs otherwise recoverable by the claimant of the sum of, I judge, £2,900, which, in my judgment, adequately reflects a sum that would eliminate that cost element from the sums that the defendants have to pay.

77 More generally, so far as the PTR is concerned, I do not accept that 31 hours by Ms Prentice reflects what is reasonable and proportionate for the task that had to be undertaken. A pre-trial review, shorn of the application itself, ought to have been a straightforward issue concerning a discussion which ought not to have taken any longer than 15 minutes, in my experience, concerning how the remote trial was to be conducted and how the bundles were to be prepared. In those circumstances, I would allow Ms Prentice only 10 hours for the preparation for the

PTR, reflecting the fact that there will be additional costs for a claimant in respect of the PTR that a defendant will not have to have, but, as I say, 31 hours is in excess of what is reasonable and proportionate and I judge 10 hours to be the reasonable and proportionate figure.

78 It is now necessary for me to consider trial preparation. So far as trial preparation is concerned, the brief fee is agreed and that is allowed as asked. So far as the solicitors' time is concerned, in excess of 75 hours has been claimed for the costs of preparing for trial. The breakdown of that, as set out, includes attendances on witnesses and expert of in excess of 15 hours, attendances on the client of a further 9 hours, attendances on documents, for a further 32 hours, attendance on the defendant for two-and-a-half hours and on others, counsel, etc, a further 18 hours. This figure is in excess of what is reasonable and proportionate and requires to be adjusted. The preparation of the trial bundle is presumably what is reflected in the hours, or part of the hours, that Ms Prentice spent on this exercise, but there is no breakdown as between her and Mr Hatcher as to who did what and, therefore, I have to come at this in a very broad brush way. The attendances on witnesses and on the client are both well in excess of what is reasonable and proportionate in the circumstances and doing the best I can with the limited information available, I would allow Ms Prentice's pre-trial preparation at 30 hours and Mr Hatcher's as asked.

79 The next phase I have to consider concerns trial. The counsel's fees are not in dispute and I need say no more about them. So far as time costs are concerned, the solicitors claim 44.2 hours for a trial which lasted two-and-a-half days. I fully accept that it will be appropriate in a trial of this sort for counsel to be attended throughout by a solicitor with knowledge of the case. It was suggested by Mr Watthey on behalf of the defendants that that ought to be 8 hours, plus 8 eight hours, plus 4 hours. I would accept that as a correct assessment. That comes to 20 hours. Effectively, Mr Hatcher has claimed 20.4 hours. I am prepared to accept that figure as reasonable and proportionate having regard to the way in which trial attendances

can vary slightly depending on what needs to be done at the end of any particular day. So I allow Mr Hatcher at 20.4.

80 Again, however, for Ms Prentice to claim, in effect, the same again is in excess of what is reasonable and proportionate. It will be appropriate for the partner in charge of a case such as this to attend at the start of the trial, and perhaps the first hour, to deal with any unexpected developments, and it would be appropriate also for the partner in charge to attend at the end of the trial for the purpose, again, of providing any last-minute input required for counsel. Doing the best I can with that, I would allow, in respect of those two elements, a total of 5 hours for Ms Prentice, to which I would add another 3 hours to cater for out of court advice being given in relation to things as they developed. That comes, as I calculate it, to 8 hours for Ms Prentice on top of the 20.4 hours for Mr Hatcher. There is no dispute about counsel's fees.

81 The next issue, and final issue, I think, concerns settlement and ADR, and again, a point which is made is that the solicitors' time charges are in excess of what is reasonable and proportionate. The point which is made on behalf of the claimant is that this encompasses a number of different points: it encompasses consideration of the preparation for a mediation that in the end did not take place; it concerns the consideration of two Part 36 offers, which in the end contributed not a lot to the costs issues that arise but, nonetheless, had to be considered and advice obtained; and there was the preparation of a *Calderbank* offer as well, which in the end did not impact on the issues that I have to resolve today. I am prepared to accept that counsel's time involved in that exercise is correctly reasonably and proportionately claimed. What I am less sure about, however, is how Ms Prentice could have accumulated 15 hours, in addition to Mr Hatcher's 5.7 hours, to create a grand total of 22 hours for the two tasks I have identified. Again, doing the best I can with Ms Prentice's hours and reminding

myself that it must be what is reasonable and proportionate, I would allow her at 10 hours for this exercise in addition to Mr Hatcher's fees for the same phase.

82 The final issue which arises concerns the post-hearing costs. I do not understand what the estimated fees are about. The post-hearing costs as set out are in excess of what is reasonable and proportionate. I accept counsel's fee as asked as being reasonable and proportionate but, again, I struggle to see how Ms Prentice could have spent 11.9 hours reasonably and proportionately in relation to this phase. The schedule relevant to the quantification of the claim was prepared before ever the trial started and it was only necessary to have that handy for the purposes of dealing with any quantification issues of detail that arose. So far as costs are concerned, the issue really involved the consideration of the two Part 36 offers and the *Calderbank* letter, which cannot sensibly have taken, on a proportionate basis, 11.9 hours. I fully accept that there will be incidental work that would have to be done, including the preparation of this costs schedule and attendance at the hearing. However, the hearing started at 10.30 a.m., it is now 2.10 p.m. There has been no break for lunch. That comes to just short of 4 hours, and the preparation of the schedule will have taken, as it seems to me, another 3 hours, so if one allows Ms Prentice's costs at 7.5 hours to allow for a modest amount of leeway, in respect of the work that had to be done, then that reflects what is reasonable and proportionate for the attendance today.

CERTIFICATE

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