



Neutral Citation Number: [2021] EWHC 2633 (Comm)

Case No: CL-2018-000474

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/09/2021

Before :

MR JUSTICE JACOBS

Between :

SALT SHIP DESIGN AS

Claimant

- and -

PRYSMIAN POWERLINK SRL

Defendant

Michael Ashcroft QC and Tim Austen (instructed by **Holman Fenwick Willan LLP**) for the
Claimant

Henry Byam-Cook QC and Jonathan Hill (instructed by **Wikborg Rein LLP**) for the
Defendant

Hearing dates: 18th – 20th, 24th – 27th May and 9th – 10th June 2021

Approved Judgment

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

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MR JUSTICE JACOBS

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Mr Justice Jacobs:

Section A: Introduction

1. These proceedings concern the design of a Cable Laying Vessel (“CLV”). CLVs are specialist vessels used to lay undersea cables which may be used for power transmission, telecommunications and other purposes.
2. The Prysmian Group is one of the world’s largest businesses engaged in the production and installation of cables across the globe, including submarine power cables, with an annual revenue of €10 billion. The Defendant (“Prysmian”) is a company headquartered in Milan, Italy. It produces and lays underground and other submarine cables for power transmission, as well as other types of electrical cables. It also produces and lays copper, optical and optical fibre cables for data transmission.
3. In 2017, Prysmian held a competitive tender process to appoint a designer of a new CLV. After careful consideration, and shortlisting of two candidates, the Claimant (“Salt”) won the tender. Salt is an independent Norwegian ship design company. Prysmian and Salt then concluded a “Short Form Agreement” dated 13 July 2017 (the “SFA” or “the contract”). The contract provided for the appointment of Salt as the “exclusive designer” for the “Project”, which was defined in the SFA as “the planned collaborative enterprise to achieve the Design of Prysmian New Build cable laying vessel”.
4. The Vard group of companies is a multinational shipbuilding and design business, part of the Fincantieri group. One of the companies in the group, Vard Design AS (“Vard Design”) was one of the companies that had tendered for the design of the new CLV, but, in the event, it was not successful. Vard Design is a wholly owned subsidiary of Vard Group AS, which is a shipbuilding company and the parent company of Vard Singapore Pte Ltd. I shall refer to these various Vard companies, where it is appropriate to do so, collectively as “Vard”. However, the argument in the case has identified the potential relevance of the distinctions between the design company, Vard Design AS, and the shipbuilding company, Vard Group AS. Accordingly, where appropriate, I shall refer to those companies by their separate names.
5. In due course, it was Vard Group AS which entered into a shipbuilding contract in April 2018 for the construction of a new CLV for Prysmian. Vard Design AS carried out the design work for Vard Group AS for the purposes of that shipbuilding contract. Pursuant to the shipbuilding contract with Vard Group AS, a new CLV has now been constructed. It is now known as the Leonardo Da Vinci (the “Vessel”), to be owned by the Prysmian Group.
6. Thus, despite its success in the 2017 tender process, Salt’s involvement in the design process effectively came to an end in April 2018, and it played no active part in the design work thereafter. The facts relating to the switch from Salt are described in detail in Section B below. Those facts, and the work thereafter carried out by Vard Design AS, have given rise to the present proceedings against Prysmian. Stripped to their essentials, there are two claims which Salt makes.
7. First, Salt contends that Prysmian acted in breach of contract in proceeding with the construction of the CLV without using Salt’s services as designer. This gives rise to

what Salt claims is a “plain vanilla” claim for damages for breach of contract, assessed principally by reference to the sums which Salt would have earned for its further design work, less the costs of carrying out that work.

8. Secondly, Salt advances various causes of action for the misuse of confidential information. The principal claim is based upon the express terms of the SFA. In essence, Salt contends that Vard Design AS used its design work for the purposes of its design of the CLV. Salt’s case is that Prysmian together with Vard wrongly used Salt’s confidential information to develop an alternative design for the vessel. Salt relies upon the speed at which Vard purported to develop this alternative design between 21 December 2017 and 3 January 2018, and described this at trial as “the Christmas miracle”. Salt also relies upon what it alleges to be striking similarities between aspects of this alternative design and Salt’s. It is therefore alleged that Salt’s design work was wrongly used as a springboard, with Vard piggy-backing on it, and being encouraged to do so by Prysmian, so as to win the design work and cut out Salt.
9. One of the causes of action relied upon is a claim for unlawful means conspiracy arising from a combination between Vard, Prysmian and Prysmian's representative, V.Delta where the unlawful means relied on are the alleged breaches of the SFA and misuse of Salt’s confidential information described above.
10. These allegations are strongly disputed by Prsymian. In broad summary, Prysmian contends that it was entitled under the SFA not to proceed with the Salt design, and did not commit a breach of contract in doing so. It also denies that there was any improper use of confidential information.
11. The trial took place over 9 days. The original time estimate was wholly inadequate, in that it failed to make any allowance for full written and oral closing submissions in a case which involved substantial legal issues and considerable technical complexity. In the event, it proved possible for the court to allocate additional time, after conclusion of the evidence – which fully occupied the original time estimate – for the written and oral closings.
12. As a result of orders made at the pre-trial review, the scope of the present trial is limited in certain respects.
13. Salt’s “plain vanilla” breach of contract case – ie the case that Prysmian failed, in breach of contract, to ensure and procure that Salt, as exclusive designer, was awarded the contract for the full design of the vessel and paid for further design work by the shipyard that Prysmian selected to build the CLV – is to be determined in full at the present stage. The quantum of the loss and damage arising from the breach of contract is in issue at this trial.
14. By contrast, the claim for breach of confidence – ie the case that the designs produced and constructed by Vard were not all its own work and that many of the features conceived of by Salt, and part of its proprietary know how, have been misused by Vard and Prysmian, with such misuse amounting to a springboard in the design of the CLV – is to be determined as a matter of liability only, with questions of the availability of injunctive relief and damages reserved for later determination.

15. This is itself subject to one qualification. Salt claims that the misuse of confidential information and conspiracy was flagrant and has unjustly benefitted both Prysmian and Vard. Salt says that Prysmian had calculated the likely cost of substituting Salt for Vard, and also deliberately sought to misuse Salt's confidential information. Because of this, Salt seeks exemplary damages in respect of such acts. The Court is asked to determine the availability of exemplary damages at this trial, with the quantum of such damages to be assessed on an inquiry.
16. None of the Vard companies is a party to the present proceedings, although two witnesses from Vard have given evidence on behalf of Prysmian. Salt had no contract with Vard, and the case of breach of contract is advanced against Prysmian alone. Whilst the interactions between Prysmian and Vard are of considerable importance to the breach of confidence claim, that claim is also advanced in these proceedings against Prysmian alone.

Factual evidence at trial

17. Oral evidence at trial was given by 6 witnesses: two from Salt (Tor Henning Vestbøstad and Arne Stenersen); two from Prysmian (Davide Taddei and Biagio Costantino); and two from Vard (Torgeir Haugan and Kjell Morten Urke).
18. Mr. Vestbøstad is the Sales Director of Salt, and a naval architect by background. He was involved in the contract for and the design of the new CLV for Prysmian. He gave evidence as to the engagement between the parties as to the CLV design tender, the SFA, the design process and the shipbuilding tender.
19. Arne Stenersen is the Managing Director of Salt, and has held that position since 2012. He had general oversight of the design tender process with Prysmian and preparation of the design package. Mr. Stenersen gave evidence as to the negotiation of the SFA, including the circumstances in which the SFA was terminated. His third witness statement related to the calculation of the quantum arising from the alleged breach of the SFA, and it was this evidence which formed the principal focus of his cross-examination.
20. Davide Taddei is a Sales Manager at Prysmian in the Submarine Cable Business Unit. Mr. Taddei was involved in the development of the concept of the new CLV, and instructed V.Delta (described in Section B below) in the design tender process and later stages. He was involved in the negotiation of the SFA with Salt and communication with designers and shipyards. He was the individual who broke the news to Salt that the ship design would be carried out by Vard.
21. Biagio Costantino is a vessel manager at Prysmian. He manages Prysmian's fleet and was involved in the specification of Prysmian's requirements for the new CLV. He managed the technical aspects of the construction of the CLV.
22. Torgeir Haugan is employed by Vard Singapore Pte Ltd, which is another company owned by Vard Group AS. He is Vice President in the Sales and Marketing Department of Vard. He promoted and facilitated Vard's technical and commercial responses to Prysmian's requests, including the design tender, the shipbuilding tender and subsequent design work.

23. Kjell Morten Urke is employed by Vard Design AS. His role was to monitor and control design development activities by Vard during the design tender, and the further design work from December 2017 onwards. Mr. Urke gave evidence as to the initial design process and as to the particular design features relied on by Salt in these proceedings.
24. Generally speaking, most of the factual witnesses sought to provide accurate evidence to the court, to the best of their recollection. Unsurprisingly, each of them had a tendency to give evidence which supported the positions taken by the companies for which they worked, and this means that I do not necessarily accept everything that each witness said. As will become apparent, I have particular reservations as to the reliability of Mr. Haugan's evidence. Fortunately, there was a very considerable amount of available documentary evidence as to the design process and the events which led to this litigation. This was not a case where there was a real conflict between the evidence given by the witnesses called by Salt and Prysmian respectively. There were, however some important areas of factual dispute, and in resolving those issues I have looked closely at contemporaneous documents and inherent probabilities: see in particular section E below.
25. In addition to the live evidence, Prysmian served a statement from Sebastiano Aleo. He is the Head of Submarine Systems Projects Operations Installation at Prysmian. He was involved in discussions with Mr. Taddei as to the specification of the new CLV, and his installation team was involved in the specification of the characteristics of the new vessel. That statement was short, and simply confirmed the evidence given by Prysmian's other witnesses. It did not therefore add materially to that evidence.
26. Prysmian also served a statement from Dario Brivio, a Project Director at Prysmian. He first became involved in the project for the new CLV in February 2019, and managed the construction of the vessel from the commercial side. Salt did not require Mr. Brivio to attend for cross-examination.

Expert evidence at trial

27. Each party served detailed expert evidence from naval architects. The expert reports addressed the overall design process for the CLV, and the specific particulars of the Salt design which were alleged to have been misused in the later Vard design for the CLV. Marcus Cave was Salt's technical expert. Michael Simpson was Prysmian's technical expert. Both experts were well qualified, and gave their evidence well. Despite the length of their reports, they were agreed on many important points as reflected both in their helpful joint report and in answers given in cross-examination. Where there was disagreement, this very often did not reflect a technical disagreement, but rather a different approach to the importance and relevance of the matters about which they were asked.
28. Both sides relied on accountancy expert evidence as to the calculation of the loss of profit arising from the breach of contract alleged by Salt in these proceedings. Salt's expert was Sturle Døsen of PWC. Prysmian's expert was Stephen Lewis of Mazars. Each expert was essentially addressing the volume of expense which Salt would have incurred in a counterfactual world which did not happen. For that purpose, each expert drew conclusions from available information, with each emphasising the importance of particular items of data. Each expert gave his evidence carefully and answered

questions fairly. Ultimately, however, I do not need to resolve disagreement between them, because Salt did not persuade me that substantial damages are to be awarded on the “vanilla” contract claim: see section D below.

Section B: Factual background

29. This section describes the contractual and factual background to the dispute.

The parties

30. Salt is an independent ship design consultancy based in Leirvik, Norway. Its work includes the design of specialist vessels, including complex supply ships for the energy industry. In 2015-2017, Salt designed the NKT Victoria. This was a CLV which won the prestigious ‘Ship of the Year’ prize in Norway in 2017. The evidence at trial indicated that Salt’s work is, and was in the present case, of high quality. Mr. Taddei in his evidence was extremely complimentary about the work that Salt had carried out. Indeed, his personal preference at the time was to continue with the Salt design. This is not a case where it is alleged that there was anything sub-standard about Salt’s approach to its work or its end-product. Indeed, as will become apparent, Prysmian were keen to take advantage of Salt’s work in December 2017 and thereafter.
31. In late 2016, the Prysmian Group had three cable laying vessels in its fleet. Laying cables and fibres under sea involves the use of a CLV. A CLV is an offshore support vessel that includes specialist cable laying equipment, often referred to as the “topside” or “mission” equipment. Broadly speaking, this mission equipment includes carousel(s) (for storing the cables), winches, loading arms, stern rollers/sheaves, tensioners, capstan, ROVs (remotely operated vehicles), hydro ploughs and A-frame and cable quadrant. Some of this equipment, such as ROVs or ploughs, are portable and can be switched between vessels.
32. In late 2016 or early 2017, Prysmian decided that it would have designed and built a new CLV. This was to be a purpose-built new build CLV, in contrast to the three vessels in Prysmian’s existing fleet which had been converted from second hand vessels. To that end, Prysmian used a company called V.Delta to contact design and engineering firms in preparation for a design tender in early 2017. V.Delta is a project management and technical advisory business for shipping and shipbuilding. It is based in Monaco. V.Delta is part of the V.Group, a diversified business in shipping services which operates in ship management and marine support services. V.Delta had provided Prysmian with information and documents to assist Prysmian’s internal assessment, even before any decisions within Prysmian had been made to move forward.

The formal engagement of V.Delta by Prysmian

33. Having made its decision to proceed, Prysmian engaged V.Delta as its consultant in relation to its new CLV pursuant to an agreement dated 9 January 2017 (“the V.Delta agreement”). The V.Delta agreement provided for project management consultancy services for “Design Project of a New Cable Lay Vessel”. The detail of these services was set out in Section 2 of the V.Delta agreement. This comprised the proposal which Mr. Lajolo of V.Delta had made. The services concerned the provision of “support by V.Group during the different phases of the project: design brief, concept design, basic design and for bidding/ awarding process of engineering firms, suppliers and yards with

the best possible economical, contractual and technical framework”. The “Scope of Work” was identified in Section 2 by reference to Phases 0, 1, 2 and 3. Under Phase 0, V.Delta was to carry out an assessment of “Engineering firms to determine the most suitable vendor list for the design of a New Cable Lay Vessel”. Phases 1 and 2 included the review of quotations from the engineering firms who had provided bids for the design work. Phase 3 concerned the provision of advisory services to support Prysmian during the “tender stage with the Yards”. It included a technical review of the tendering package which would be given to yards, and a review of the quotations from the shipyards.

34. Clause 10 of Section 2 provided that

“In relation any procurement activities to be carried out by V.Delta hereunder, procurement shall be arranged by V.Delta as agent only for and on behalf of Prysmian and V.Delta shall be entitled to utilize the services of its associated company MARCAS International Limited, which negotiates with selected suppliers, including shipyards, the best available price, terms and conditions for the bulk purchase of goods and services for the marine industry in respect of which MARCAS is entitled to fees and/or commission.”

35. The V.Delta agreement envisaged that V.Delta would have access to documents produced by the companies which tendered for the design work and to later documents produced for the purposes of obtaining quotations from shipyards. Subsequently, V.Delta was expressly identified in the SFA as the “Client’s Supervisor” appointed by Prysmian “for supervision and approval of the vessel Design”. There was no suggestion that Prysmian acted wrongly in providing documentation, including Salt’s design documents, to V.Delta.

The design tender

36. The design tender was put together by V.Delta, led by Mr. Davide Leoni who was a naval architect. The technical documents were prepared by V.Delta on the basis of discussion and instructions from Prysmian.

37. In February 2017, Salt signed a non-disclosure agreement which aimed to protect confidential information which was to be supplied to Salt in connection with the proposed project. Having done so, Salt was then sent (on around 14 February 2017) a Request for Quotation (“RFQ”). The RFQ was sent to a number of other designers. The RFQ requested the tenderers to provide their “best quotation for the preparation of a Concept and a Basic Design for a New Cable Lay Vessel including Outline Specification and other necessary information in accordance with enclosed documentation”.

38. The RFQ itself described the “target” of the Concept Design package as being “to develop an initial package including design and engineering activities to verify feasibility of all required features mentioned into provided Vessel Requirements and GA”. The “target” of the Basic Design package was to provide a “robust design that can be clearly understood, taken over and used for tendering among the Shipyards”.

The nature of a “Concept” design, and “Basic” design, are explained in more detail below.

39. The tenderers were provided with various documents annexed to the RFQ. These included the Prysmian technical specification and what was described as a “tentative” General Arrangement plan. Tenderers were asked to provide various documents and other information as part of their tender. These included a “Preliminary General Arrangement. Outline ship main dimensions, hull shape, accommodation arrangement, main machineries and back deck layout”. A General Arrangement or “GA” plan is a very important document in the context of ship design. It contains various diagrams representing different aspects of a vessel. It comprises a large fold-out sheet (now of course available electronically) comprising various scale drawings of the vessel or specific parts thereof. These will generally include the vessel as a whole in side view (with a longitudinal cross-section), and each of its decks (including the tank top) in top view. It also contains the principal particulars of the vessel, including its length, breadth (or “beam”) and drafts.
40. In addition to the Preliminary GA plan, tenderers were requested to provide comments on a draft “Technical Specification” which was submitted by Prysmian as part of the RFQ. Prysmian’s Technical Specification ran to 18 pages, and set out the “preferences and requirements” of Prysmian in relation to the vessel to be designed. It described the estimated length and breadth of the vessel, but indicated that the dimensions might be slightly modified and possibly reduced in order to match Prysmian’s preference to minimise length and breadth for more versatility. The tenderers were asked to “identify all requirements not mentioned in this specification, but needed to build the Vessel according to rules and best shipbuilding practices”. The specification included information as to the vessel’s dimensions, loading conditions, accommodation, propulsion, cargo gear and cable laying equipment as well as various “other requirements”.
41. Generally speaking, a vessel’s “Specification” is also a very important document in the context of ship design and construction. It will usually be annexed to a shipbuilding contract, where it describes the detail of the ship which is to be built. Mr. Simpson said that the Specification will list all of the fundamental aspects of the design and explain how the design is to work as a whole. It explains and describes the design features that the designer has created or contributed towards. A shipyard will understand from the Specification the requirements for the vessel and what it has to achieve. Part of its purpose is to elaborate on and explain what can be seen in diagrammatic form in the design documents such as the GA.
42. In general terms, the importance of the GA plan and Specification, in the context of ship design, is illustrated by the express provision, in clause 6.4 of the SFA which was later concluded between the parties:

“The Client is not entitled to send or make available the General Arrangement and/or Building Specification as a complete document to a third party, including any suppliers, but excepting the Yard, without the prior approval of the Designer”
43. Apart from the Preliminary GA and Specification, tenderers were asked to provide other materials as part of the tender package. These included the lump sum price, and the

resources foreseen on the proposed project for “concept design and basic design respectively”.

44. These expressions reflect the fact that the design of a vessel has a number of phases. It begins with “Concept design”. This is where the designer, or a shipbuilder’s design team, takes the client’s ideas and requirements and sets them down in a design drawing, the GA plan. This design would be sufficient for a shipyard to prepare a quotation for construction of the vessel, although it could not be used to start a construction project.
45. Thereafter, there are a number of further design stages. Those subsequent design stages were given different names by the two experts. Any dispute as to nomenclature of the various stages is, however, not of any significance, and it is convenient to use the different phases identified by Prysman’s expert, Mr. Simpson.
46. The second phase is “Basic design”. This is where the designer (or the shipbuilder’s design team) prepares a general construction plan for the vessel. This must be approved by the Classification Society. Drawings of the arrangement of spaces in the accommodation, the bridge, the galley, as well as cabins and lounges, are also prepared during the Basic design phase. It also includes other elements of construction detail, such as the pipework schematics. It therefore involves the designer adding considerable additional detail to its concept design and producing drawings to achieve Class approval of the designs.
47. The third phase is “Detailed design”. This is where all the details of the vessel are refined and finalised. For example, where the Basic design provides the pipework schematics, the Detailed design would provide for the routing of those pipes through the ship and the type and location of each pipe flange. This is a very detailed process, and it involves a suite of documents, information and work. The Detailed design phase is usually carried out by or led by the shipyard.
48. In response to the RFQ, a number of companies submitted quotations: Rolls-Royce, Salt, Vard, Damen and Royal IHC. All of the tendering companies were established reputable ship designers, with Royal IHC, Damen and Vard being shipyards as well as designers. Prysman did not share the documents submitted by the tendering companies with the others in the tender.
49. Having sent out the RFQ, V.Delta then held a series of clarification meetings by telephone with the various designers. They spoke to Salt on 20 February and 22 February 2017. They also spoke to the Vard design team on 22 February 2017. That team comprised a number of individuals who were involved in subsequent events, including Mr. Haugan, Mr. K V Rajagopalan and Mr. Vimal Vidya Kumar. Those three individuals were based in Singapore.
50. Following those calls, V.Delta issued a “Tender Alignment” document. This described its role as being “technical adviser for Prysman NB [ie Newbuilding] Project”. The document provided some additional information. In relation to the GA and Technical Specification, tenderers were asked to provide “as many details as possible, allowing for evaluation of new ideas and concepts”.
51. The tenderers submitted their first design proposals on 3 March 2017. Salt’s was accompanied by a number of documents, including a design presentation and Salt GA

rev 2, which documents set out the principal dimensions and layout of Salt's preliminary proposed design. For its part, Vard also provided with its quotation a design presentation, Vard GA rev 1, an outline building specification and an Appendix 3 document in which it provided details of its proposal to use batteries in the form of a "SeaQ Energy Storage System".

52. Prysmian, with assistance from V.Delta, then evaluated the initial design tenders. The result was that, of the 6 bidders, Vard, Damen, Rolls-Royce and Salt were short-listed to provide further tender information. The first step in that process was for each tenderer to answer certain specific queries which V.Delta had about their proposal. Each of the remaining tenderers was then invited to a face to face technical meeting with the V.Delta and Prysmian team. Accompanying that invitation was a second "Tender Alignment" document. This made a number of points clear, including (i) Prysmian's preferred engine room configuration ("2 x Engine Rooms shall include 3 off Diesel Generators each. The solution of 2 big gensets and 1 small per ER is preferred") and (ii) updated information about the vessel's draft ("The vessel shall operate in minimum 10m water depth (shallow water)"). The latter clarification updated the position set out in the initial RFQ in which Prysmian had stipulated that the vessel should operate in minimum 6m water depth.
53. Salt's technical meeting with V.Delta and Prysmian was held in Oslo on 11 April 2017. Salt produced a presentation dealing with the items arising from the second Tender Alignment document. The meeting minutes record, at item 3, that the parties discussed numerous items under the heading "GA Review". For example, Prysmian said that the solution of mooring winches below working deck was not ideal due to possible ingress of green water. Salt provided figures for the estimated cost of the vessel and the mission equipment. One point which Salt made was that:

"In case shipyards with design capabilities such as Ulstein or Vard are selected for the ship construction, Salt would require the mutual acceptance of a 'Non- Competition Agreement.'"
54. Salt submitted that this reflected a concern as to the need to protect the confidentiality of Salt's design work in case a yard with design capabilities was chosen. I accept that this is so, but the point was not further developed at that stage and in any event the parties' agreement in relation to confidentiality was in due course set out in the SFA.
55. The Vard technical meeting was held in Milan on 21 April 2017 (the Vard attendees included Mr. Haugan and Mr. Urke). As part of its presentation for that meeting, Vard produced a number of technical documents. Vard indicated that it was open to building vessels designed by others. A Powerpoint presentation by Vard showed its capabilities and organisation. The agenda for the presentation included "Vard Corporate Presentation", "Vard Design" and "Project Execution". The slides identified Vard Design AS (Norway) as one of the subsidiaries of Vard Group AS, and described Vard Design as one of a number of specialist subsidiaries. A series of slides gave details of Vard Design, including the number of employees and past designs.
56. The meeting minutes record that Vard raised a number of technical points about the dimensions of the proposed vessel on this occasion. These included (i) a description of Vard's design work on the CLV "Lewek Connector" which involved a widening of the beam at deck level to increase her deadweight and accommodate a bigger carousel; (ii)

suggesting that Prysmian should allow Vard to increase the vessel's draft and (iii) the pros and cons of using an energy storage system (batteries) on the vessel. The discussion of batteries covered two topics which feature in this case: (a) the use of batteries for "peak shaving", which essentially involves the use of batteries to assist at times when power demand is high, and (b) the use of batteries to replace an engine in dynamic positioning or "DP" mode. Dynamic positioning is a computerised system for keeping the vessel at a precise location using the vessel's propellers and thrusters.

57. Following these technical meetings, the various tenderers submitted further input on their designs to V.Delta and Prysmian. On 27 April 2017, Salt provided an updated Salt GA rev 3 and answers to a number of questions which had been raised at the 11 April meeting.
58. Similarly, Vard submitted further technical documents on 28 April 2017, including Vard GA rev 1(1), and an outline Specification. Vard sent further calculations on 2 May 2017.
59. V.Delta and Prysmian evaluated the updated proposals from Vard, Salt and Rolls-Royce on around 19 May 2017. Rolls-Royce and Salt were shortlisted as the final two tenderers. The Vard team, which had continued to work on their designs since 2 May 2017, was informed of this decision on 23 May 2017, at which point they stopped further work.

The selection of Salt

60. V. Delta and Prysmian's internal final evaluation of the two shortlisted designers (Salt and Rolls-Royce) gave Salt a weighted percentage score across a number of design criteria (such as main dimensions, DP capability, loading conditions and price) of 80%, and Rolls-Royce 65%. Salt was chosen as the preferred designer. On 13 June 2017, Davide Leoni of V.Delta informed Salt that it was the successful candidate in the design tender. Salt had been selected as "Preferred Supplier for the Concept and Basic Design of Prysmian New Cable Lay Vessel".
61. By the time of its selection on 13 June 2017, Salt had carried out a considerable amount of work, as illustrated by the fact that its GA plan sent to Prysmian on 13 June was revision 6. Revision 7 was produced on that day and revision 8 was produced a week later on 20 June 2017.
62. Following its selection, there was a period of a month before the parties signed the SFA. There is no claim for rectification or estoppel by convention relating to the terms of the SFA, and accordingly the negotiations between the parties are of little or no relevance to the issues of construction. Each side drew attention to certain features of that correspondence in their submissions. Prysmian referred in particular to a comment made by Prysmian that it was necessary to find a way "to be able to run tender for construction during 1st half of September (contract signature with yard must be within 31/01/2018)".
63. Prior to signature of the SFA, Salt sent Prysmian and V.Delta a copy of Salt GA rev 8 on 23 June 2017. This formed the basis of discussions at a kick off meeting held on 27 and 28 June 2017. The minutes record discussion of various points, evidencing the fact that the process of designing a vessel is (to use the word used frequently by the

witnesses during the trial) iterative, involving an exchange of ideas between designer and client. The minutes record that “[i]n general all cable related equipment (including aft sheaves) will be designed by Prysmian”.

The Short Form Agreement (“SFA”) dated 13 July

64. The SFA concluded between Salt and Prysmian was dated 13 July 2017. Its material terms are set out in Section C below. The SFA had three annexes: a list of Salt deliverables, the Prysmian ethical code, and an updated version of the Prysmian specification which had originally been attached to the RFQ.
65. The SFA contemplated four phases of work by Salt, with Salt to be paid, depending on the circumstances, by Prysmian or by the yard that was selected to construct the CLV for Prysmian. Those phases were: Phase 1 – Concept Design; Phase 2 – Tender Package; Phase 3 – Basic Design; Phase 4 – Delivery Documentation. Phases 1 and 2 both related to the Concept design phase, as described above. Phase 3 concerned the Basic design, also as described above. Since the Detailed design phase is usually carried out or led by the shipyard, there was no Detailed design phase in the SFA. The “Delivery Documentation” contemplated in Phase 4 would, as Mr. Simpson explained, be expected to refer back to calculations performed at the Concept design and Basic design phase; for example stability information/ calculations and the estimates for the vessel’s weight and centre of gravity. The original designer will check these points against the final known outcomes, and complete the task of preparing documentation that relies on these calculations. As reflected in the price breakdown for the 4 phases (see Section C below), the major element of payment for Salt’s design work was within phase 3.
66. The SFA contemplated that a further agreement would be concluded directly between the shipyard and Salt. Thus, clause 2.2 provided:

“It is understood and agreed that if the Project materializes and a shipbuilding contract is concluded with a shipyard (the “Yard”), a Design Contract shall be entered into between the Designer and the Yard and all the above compensation shall be paid by the Yard.”

Salt’s design work through to the construction tender

67. Much work on the design was done as part of the design tender process itself, which resulted in, first, a preliminary GA plan, and then further iterations of the GA plan in April 2017. These had reached revision 6 by the conclusion of the design tender process and the selection of Salt as Vessel designer in June 2017.
68. In the following months, Salt worked closely with Prysmian, refining its design in response to Prysmian’s feedback and requirements and also the many and lengthy discussions with suppliers as to what was technically feasible. Mr. Cave rightly described the design that eventuated as being the result of approximately 3 months of consistent collaborative effort between Salt and Prysmian. In his supplemental report, Mr. Simpson said that by definition collaborative work suggests a two-way process, which meant that it was generally not possible to tell where particular ideas came from, at least unless there was a document in which it was unambiguous. Mr. Simpson

therefore said that it was not possible to tell from the technical evidence in many cases where particular design ideas came from. That was because Salt, Prysmian and V.Delta were discussing different aspects of the ship and generating ideas collectively. In general the documents do not say who came up with what.

69. However, it is clear that Salt did a considerable amount of work over the period of 7 months between the original RFQ in February 2017, and the design documents which went to shipyards in September 2017 for the purpose of the construction tender. It is not possible precisely to assess the time that Salt invested in its work. It is, however, possible to gain some insight into the overall magnitude of the work by considering the “total editing time” which is available in the embedded data for the GA plans in the AutoCAD (computer-aided design) software that Salt was using. This shows a total editing time of 227 hours between the first GA plan and revision 6, which was sent to Prysmian shortly before the tender award. Subsequently, the total editing time was an additional 544 hours between revision 6 and revision 14, which was the GA revision sent to the shipyards in September. This included some 265 hours of editing time on revision 14 itself. A further 85 hours of editing time was shown for revision 15 dated 21 November 2017, for a total of 856 hours by that time equating to 107 continuous man days assuming an 8 hour day.
70. Mr. Cave’s evidence (which was not challenged in this regard and which I accept) was that it was clear from the GA plan and its revisions that Salt was consistently developing their design from the outset of the Prysmian RFQ, with significant additional hours being expended prior to and immediately after client meetings, of which detailed minutes were kept.
71. There was also a consistent flow of correspondence surrounding specific items being discussed. By way of example, there was correspondence in late July 2017 concerning the mooring arrangements. On 25 July 2017, V.Delta asked Mr. Costantino a series of detailed questions directed at ascertaining Prysmian’s requirements, such as if they preferred a “single mooring winch with warping head rather than capstan”. Salt then developed a suitable arrangement which was incorporated into the GA plan. The exchanges in relation to the mooring arrangements involved Mr. Davide Leoni of V.Delta. The evidence showed that much of the liaison between Prysmian and Salt was, at the time, between V.Delta, with Mr. Leoni as its main representative, and Salt.
72. Salt submitted that, during this period, Salt had a proactive and tailor-made approach to its work, ensuring that Prysmian’s requirements were satisfied; and that Prysmian developed its specifications in large part with the assistance and relying on the input of Salt. I consider that these submissions were supported by the evidence at trial.
73. The overall process involved the exchange of numerous e-mails, with material also being exchanged through Salt’s online system called “Pepper”. There were also two substantial meetings. The first was a conference call on 17 August 2017. The second was a two day meeting with Prysmian and V.Delta on 23 – 24 August 2017 in Milan. The detailed minutes of both meetings identify those who were to take action in relation to each point: usually this was Salt, but on some items it was Prysmian or V.Delta and sometimes a combination of parties. Consistent with the evidence of Mr. Simpson, the minutes do not usually record which party came up with a particular point. An exception to this is the discussion of the mooring arrangement at the 23-24 August meeting, where Prysmian had said that it required “anchor lines with no possibility to cross the mooring

lines”. The minute continued: “Salt to improve proposal made”. The discussions reflected in the minutes ranged across the whole design of the vessel, with Prysmian indicating what it wanted and Salt making suggestions as to how this was best achieved. As far as the mission equipment was concerned, Mr. Costantino’s evidence was that this had not been finally chosen at this stage, and was not until the start of 2019. However, Mr. Costantino’s evidence indicated that Salt would need to understand the footprint of the mission equipment and the loads of the items that needed to be housed on the vessel, so that appropriate inputs and structures could be drawn into the designs.

The construction tender documentation

74. On 22 September 2017, Salt sent a full set of the construction tender documentation to Prysmian and V.Delta. The construction tender documentation comprised: (1) General Arrangement revision 14; (2) Building Specification with attachments including steel/weight; (3) Makers List; (4) Demarcation matrix; (5) Single line diagram for mission equipment; and (6) Salt’s Design Offer. It was of course contemplated that these documents would be sent to shipyards for the purposes of providing quotations for building the vessel. There was no dispute that Salt consented to Prysmian and V.Delta sending all of these design documents to the yards which were being invited to participate in the ship construction tender process.
75. The General Arrangement revision 14 included the various drawings which I have already described, comprising a side section of the vessel and top views of each of the decks. It included cross-sections of specific parts of the vessel as well as the principal particulars. The Building Specification ran to 174 pages. The Makers List was a compilation of potential third party suppliers of equipment, with the preferred supplier of each item listed in bold. The Single line diagram for mission equipment was a diagram of the electrical power system.
76. Salt’s design offer, which was contemplated by clause 2.2 of the SFA, was an offer to provide design documentation relating to the Initial design and Basic design, with an option price for Detailed design to be given on request. The price for the standard scope, comprising Initial design and Basic design, was NOK 31.9 million. Clause 6 of the Design offer provided that “the design, data, Design Documents, any Know How and all relevant copyrights, patents or other intellectual property rights shall remain the property of” Salt.
77. In his covering email sending the materials to Mr. Taddei (with the e-mail being copied to Mr. Leoni), Mr. Vestbøstad described the materials as comprising the full set of tender documentation normally issued to shipyards for tendering.
78. On around 27 September 2017, Prysmian sent an RFQ to various shipyards. A later presentation by V.Delta shows that 8 shipyards were approached: Vard, PaxOcean, Damen, Royal IHC, Lloyd Werft, Havyard, Remontowa and Safeyards. The RFQ specified an owner “target date” for shipbuilding contract award no later than 31 January 2018. This was the same date as provided for in clause 2.3 of the SFA described below. The RFQ advised the shipyards that Salt was the appointed designer for the “development of the Concept and Basic Design of the vessel”. It provided that the shipyard must subcontract Salt for the “Basic Design Package”:

“The Builder must sub-contract Salt Ship Design for the Basic Design Package; for this specific purpose, please see enclosed Salt Ship Design contract template which the Awarded Shipyard shall discuss and agree directly with Salt in proper due time. The Builder shall endorse the provided design to further develop the detail engineering.”

79. In keeping with this, Prysmian required the tendering yards to provide a written confirmation that they would sub-contract the design work to Salt. For its part, Vard provided such a document dated 27 October 2017. The footer of the document indicated that the confirmation was provided by Vard Singapore Pte Ltd. The footer on the first page stated that the document was the property of Vard Group AS, and that it should not be copied or information imparted to a third party without written consent.
80. The documents sent to the shipyards were only provided in PDF file format (including Salt GA rev 14): no files were provided in AutoCAD format.
81. In the event, only 3 yards submitted tenders in response: Vard, PaxOcean and Damen. Vard submitted its tender on or about 27 October 2017. The tender document was signed by Mr. Haugan for Vard Singapore Pte Ltd. The first page also carried the same footer described above; ie that the document was the property of Vard Group AS. Vard’s offer was much more expensive than those from the other two yards, although significantly better in other respects.

The 16 November 2017 evaluation

82. Prysmian and V.Delta met on 16 November 2017 in order to consider the proposals. For that purpose V.Delta produced a well-presented set of slides which compared the proposals and the qualities of the tendering yards. The slides also included a “Technical Evaluation and Scoring System” which compared the offers by assigning weighted percentages to different aspects of the various offers: these included price (35% weighting), shipyard facilities (10%), delivery time (25%), build quality and record (10%) and “Proposal Confidence”. The evaluation showed that Vard was ahead of the other two tenderers on every metric apart from price. The only comment at the foot of the slide in relation to Vard was: “Price is significantly higher than rivals”. A number of negative points were referred to in the context of Damen. These included “Uncertainty of shipyard integration”. This had been explained in an earlier slide: Damen’s proposal was to build at a yard at Mangalia, which at this time was in the process of acquisition but had not yet been acquired. This led to the concern over integration. As far as PaxOcean were concerned, the slides looked separately at PaxOcean Singapore and PaxOcean Graha (also in the Far East). In relation to the former, the slide noted that there were “few similar reference vessels”. In relation to the latter, there were “questions over quality”.
83. Vard was significantly ahead of the other yards on both “Build Quality & Record” and “Proposal Confidence”. A slide relating to “Vard Quality” identified various pros, including: wealth of experience with large offshore complex vessels with DP3 capability, very high level of quality, excellent reputation and “V.Ships Offshore expert recommends VARD due to high quality”. However, Vard’s overall rating – applying V.Delta’s evaluation and scoring system – was 68%, marginally behind PaxOcean Graha (71%) and further behind PaxOcean Singapore (75%). The reason that it was

behind on this scoring system was because of the 35% weighting attached to price. If this had been lower, and other factors such as build quality and proposal confidence higher, then Vard would have been ahead.

84. This slide presentation is significant, in my view, in the context of a central issue which is further addressed in Section E below. That issue concerns the origins of the work which Vard in due course carried out on their alternative design over the 2017 Christmas and new year period following discussions between Vard and Prysmian at a senior level, as further described below. Prysmian's case in closing was in substance that Prysmian had no motive to request Vard to do this alternative design or to encourage it: its favoured shipyard was PaxOcean because Vard was too expensive. The slide presentation shows, however, that on all aspects apart from price, Vard was ahead of the other yards including on metrics such as quality and proposal confidence. As matters developed, over the few weeks before Christmas, the documents show that Vard was very far from being out of the running. In the light of Vard's position as front-runner on all the other metrics, it is in my view apparent that Prysmian had an obvious commercial motive for the request or encouragement which (on Salt's case) came about in December 2017, namely to reduce Vard's price to a more attractive level: this being the only metric where Vard was behind the others. Whether or not Prysmian took steps which reflected that motive is an important issue in the case: see Section E below.
85. One other feature of the slide presentation should be noted. A number of slides referred to "aligning" the various shipyard quotations, with different "aligned" and "not aligned" figures being given for various phases of the work. The word "align" (or derivatives) appears regularly in later V.Delta/ Prysmian documents. In the present context, it reflected an attempt to ensure that V.Delta were comparing like with like, in circumstances where the different quotations had not been prepared on precisely the same basis.
86. Minutes of a meeting between Prysmian and V.Delta on 16 November 2017 record the discussion and outcome of the meeting. Under the heading "Until 22nd December", the minutes recorded that the assessment of the shipyard facilities was to be completed before Christmas. There would also be:

"Preliminary decision on the shipyard shall be taken before Christmas in order to ask Prysmian CEO for preliminary approval for the investment."
87. The anticipated involvement of Prysmian's CEO is of relevance in view of subsequent developments around the Christmas period.
88. The minutes record that visits to shipyards in the Far East were planned to start on 11 December, and in Romania on 18 – 20 December. The minutes also contained a review of the offers from Vard, Damen and PaxOcean. In relation to Vard, there was reference to the price being too expensive compared to the others and: "To investigate any margins for price reduction". In relation to Damen, there was reference to the acquisition of the Mangalia yard by Damen, who were to be asked when the deal would be officially closed. The potentially negative impact of integration/ transition in relation to that yard was noted. In relation to PaxOcean, there was to be an investigation "on level of confidence against Paxocean shipbuilding".

89. The minutes also record that Vard and PaxOcean were the only shipyards using Salt for the detailed design (ie the stage beyond basic design) and that this was considered a “plus value in the development of the project”. At this point in time, it is clear that the idea of an alternative design from Vard, or the possible replacement of Salt as designer, was not being considered. There was no suggestion by Salt that, at this stage, this had happened. Indeed, during the period after the quotations had been sent out, a meeting was held between Salt and Prysmian at which Salt proposed that it undertake “early engineering” design work. This was work that would normally be part of Phase 3 under the SFA, but which Salt recommended should be done during the period of the construction tender on the basis that it needed to be done anyway, and it would speed up the next stage of the design phase. This was in due course agreed on the basis that Salt’s fees for this were capped at €200,000, and it was completed by 31 January 2018.
90. After the 16 November 2017 meeting, the ship construction tender process continued in earnest with substantial liaison between Salt, Prysmian, V.Delta and the three bidders.

December meetings with Vard

91. Prysmian and V.Delta met with Vard in Singapore on 15 December 2017 when Vard provided a shipyard presentation. Mr. Haugan was present for Vard, as were two naval architects from Vard, Mr. K.V. Rajagopalan and Mr. Ashish Kumar. Mr. Costantino and Mr. Taddei were present for Prysmian, as were representatives of V.Delta. There was discussion as to where the ship would be built. Vard’s high quoted price was the subject of discussion. As the Minutes record, under the heading “Design Interface”, Vard explained that it had included a contingency in its offer because it might face penalties if technical characteristics such as speed and weights (these are usually the subject of a liquidated damages regime in a shipbuilding contract) were not met and, given Salt was designer, these were not properly under its control.
92. However, at this stage it appears that there was no question over Salt’s role as the designer. The Minutes record Prysmian saying that: “At present stage the cost of the investment, assuming to proceed with Vard quotation, could not be approved by Prysmian”. Vard was invited to provide a revised quotation, which it indicated it would do in advance of Prysmian’s scheduled visit to inspect Vard’s shipyard at Tulcea, Romania. This was where Vard was planning to build the hull, with outfitting then to be carried out in one of Vard’s Norwegian yards.
93. The inspection of the Romanian yard took place on 19 December 2017. Vard presented a revised quotation (dated 19 December 2017) to Prysmian during this meeting, again on the basis of the Salt design which included the replacement of engine and propulsion make with alternative suppliers and different financial security instruments as cost-saving measures.

The circumstances leading to Vard’s alternative design

94. As described above, Vard’s quotation for the shipbuilding contract was made on the basis that the vessel would be built in accordance with the Salt design. However, at some stage in December 2017, Vard began to consider the possibility of building the vessel with a Vard design. The precise circumstances in which this came about, and in particular the extent and timing of Prysmian’s knowledge of Vard’s thinking –

including whether it was encouraged by Prysmian itself – are controversial. The issue is addressed in further detail in Section E, but I here describe the broad shape of the evidence.

95. Mr. Taddei’s evidence in his witness statement was that “sometime in late 2017, there was an informal discussion between management of Vard and Prysmian, which touched on the construction tender” and that during the discussion “Vard indicated it could provide its own vessel design, which would reduce the risk and cost...”: Mr. Taddei was not involved in the discussion, but learned about it subsequently from Mr. Aleo. Mr. Taddei said that he was himself focused on the Salt design. Mr. Aleo did not give oral evidence: he was not tendered for cross-examination. His brief witness statement contains no account of the conversations that took place.
96. Mr. Haugan’s evidence in his witness statement was that he responded to requests for cost reduction by exploring other means of reducing costs beyond those already proposed. This resulted in him identifying that replacing an external vessel design with an in-house Vard design would significantly reduce costs. To that end, he reached out to Mr. Urke and asked if Vard could propose an alternative package with Vard undertaking the necessary design and “independently resuming the design work for the VARD 9 04 design and updating the design according to the new technical requirements”. He said that after a careful evaluation, they found that Vard had the capacity and capability to carry out the work within the required timescale.
97. Mr. Urke’s evidence in his witness statement was that, from his perspective, the possibility of Vard doing the design work arose as a result of a phone call from Mr. Haugan in which the latter described Vard’s participation in Prysmian’s construction tender. Mr. Haugan said that he had been challenged by Prysmian to reduce Vard’s quote for the construction tender. He was then asked by Mr. Haugan “if it was a possibility for Vard to propose to Prysmian, as an alternative package, that Vard (through Vard Design AS) also undertook the necessary design in addition to constructing the Vessel”.
98. Prior to this point in time, Mr. Urke and Vard Design AS had not seen the Salt design documents. In fact, his evidence was that Vard Design AS would never be provided with the design work of another designer. Nevertheless, Mr. Haugan gave Mr. Urke a thumb-drive which contained the various materials which Salt had produced for the construction tender, including the GA plan and the Specification. Those materials were subsequently provided, either by Mr. Urke or Mr. Haugan, to three naval architects in Singapore. They were employed by Vard Singapore Pte in Singapore, and their work involved them carrying out design work for Vard Design AS. The senior naval architect, Mr. Ashish Kumar, had previously seen these materials, since he had been asked to assist on the work on the construction tender to be provided by Vard Group AS.
99. Mr. Urke’s evidence was that in order to ensure that it was feasible for Vard to offer to do the design work, he carried out an evaluation of what he described as the “new functional and operational requirements put forward by Prysmian” in order to see if Vard was in a position to resume, independently, the design work which had previously ended in the first half of 2017 and “to update the Vard Design according to the new requirements”. This evaluation was carried out by Mr. Urke in conjunction with, amongst others, Mr. Haugan.

100. In order to identify what he described as the “new functional and operational requirements” put forward by Prysmian, it is clear (as Mr. Urke acknowledged in his witness statement) that Mr. Urke used the Salt design documents. Prysmian did not provide any documents which identified any new requirements. Rather, the Vard Design AS team reviewed the Salt design documents enclosed with the construction tender in order to try to understand Prysmian’s requirements, which were by now fully reflected in the Salt design documents. There was no meeting which took place between Prysmian/ V.Delta and Vard, during the Christmas period, where Prysmian’s “new functional and operational requirements” were discussed or explained.

21 December 2017 – 2 January 2018

101. During the period 21 December to 2 January 2018, Vard worked on its alternative design. Their designers used, as a starting point, a “reference vessel” which had previously been built by Vard. The design for this vessel was in Vard’s archive, and was easily accessible. This vessel was the Skandi Africa, which had been labelled as VARD 3 12 design. Skandi Africa is an offshore subsea construction and pipe-lay vessel, not a CLV. Whilst Vard’s alternative design continued to be referred to as the “Vard 9 04” design, which was the designation used in the work carried out in the first part of 2017, it was in fact based on a different reference vessel which had not been used at that time.
102. The work carried out in December 2017 to January 2018 involved a small design team, being Mr. Urke, Mr. Haugan, a technical manager at Vard Design and the three naval architects at Vard Singapore. There is no dispute that these individuals had access to the Salt design documents, provided for the construction tender, for the purpose their work. It was only from February to April 2018 that Mr. Urke mobilised a large design team of around 20 personnel to work on the design for the Vard project.
103. The first GA plan generated by Vard, once the proposal was discussed in December 2017 between Prysmian and Vard, was Vard GA Rev 2. This was produced together with Vard’s quotation on 3 January 2018. GA Rev 2 was last edited on 3 January 2018 and first edited on 21 December 2017. Salt described GA Rev 2 at trial as the “Christmas miracle”, reflecting its case that Vard could not have progressed its earlier design, then abandoned it for the Skandi Africa, then independently carried out all the research and negotiation with suppliers, carried out the relevant calculations for stability and engineering purposes, taking into account the Christmas and New Year period, and arrived at the GA Rev 2 by 3 January 2018. Salt submitted that the period of time in question was too short for Vard/Vard Design to have produced such a step change from Vard’s GA Rev 1(1) to Rev 2 in 8 working days without using, and piggy-backing off, Salt’s design work. Salt therefore contrasted the work done during that short period with the very substantial level of collaboration and innovation that went into Salt’s design, working with Prysmian, arriving at Salt’s GA rev 14. They said that there was no evidence of the collaboration required to develop the Vard design, and that there is no evidence of the great deal of time working through ideas and requirements with Prysmian and third parties, as Salt had done. The only reasonable and proper conclusion, on Salt’s case, is that Vard piggy-backed on Salt’s design, which Vard knew Prysmian was happy with, and which reflected months of back and forth between Prysmian, suppliers, Class and Salt. Therefore Vard must have relied upon the Salt design documents as the basis and springboard for their work. As will become apparent from Section E below, I accept Salt’s case on this point.

104. By contrast, Prysmian contends that there was no Christmas miracle. Vard had carried out significant design work as part of its response to the original RFQ sent out in February 2017, had its work on the Skandi Africa to build on, and ended up with a design in GA Rev 2 which was at a far earlier stage of development than Salt Rev 14. Mr. Urke did, however, accept in his written evidence that he had extracted Prysmian's "functional requirements". His written evidence was not specific as to the materials used in order to extract these requirements, but he readily accepted in his oral evidence that he had used the Salt design materials for this purpose.
105. In any event, on 3 January 2018 Mr. Haugan of Vard sent Mr. Leoni of V.Delta, and others, a revised offer which included a €5 million reduction to the shipbuilding price if Vard replaced Salt as the designer. The e-mail enclosed, as Annex 2A, Vard Quotation revision 3. The supporting document set out a revised price for building a CLV using the Salt design of €162,900,000 and then set out various "Options for price reduction". The final listed "option" was to replace the Salt design with a Vard alternative design giving a price reduction of €5 million.
106. In his covering email, Mr. Haugan listed 3 items that had been changed in his offer, with item 3 being "Additional option included to replace Salt Design with Vard Design". He said of this "additional option":

"Regarding item 3) above, for better comfort and understanding, please find attached our preliminary General Arrangement... for your review and consideration. Although the attached GA still need to be further developed until completion, please rest assured that in the event Prysmian choose to go with Vard design, Vard GA and Specification will be finalized without compromising on the vessel specification...with the vessel delivery schedule to remained as already agreed subject to contract award no later than by 31st Jan 2018".

This was a reference to Vard GA rev 2, which Mr. Haugan sent attached to his email.

107. Mr. Taddei's evidence was that he had not been expecting the offer of the Vard alternative design, since Prysmian had only requested quotes for the Salt design. I discuss this evidence in Section E.

8 January 2018 meeting

108. Prysmian and V.Delta reviewed the Vard offer and the option of an alternative Vard design, together with the latest offers from Damen and PaxOcean, at a meeting on 8 January 2018. For that purpose, V.Delta prepared a 52 page Powerpoint presentation entitled "Prysmian NB CLV Shipbuilding Tender Review 08.01.2018".
109. This presentation assessed the overall Vard offer viz. the offer to build a CLV to the Salt design, and also referred to the alternative of "having VARD Design completing both the basic and the detailed design, replacing SALT Design completely" in the context of Vard options for cost saving. V.Delta noted that the alternative Vard design could yield a significant cost saving but "this could result in legal issues with SALT" and went on to recommend retaining Salt for the basic design and engineering, since

the design and engineering stage of a project is the most likely to cause delays, and it was advisable to avoid this as much as possible.

110. The presentation contained V.Delta's evaluation of the three shipyards, with PaxOcean now planning to build the vessel in Singapore. Although Vard's price was higher than the other tenderers, Vard was V.Delta's recommended shipyard. V.Delta's evaluation was based on Vard's price of € 162,900, which was the price for building with the Salt design, rather than the reduced price available if Salt were to be replaced. The essential reasons for V.Delta's recommendation were those which had been identified in the earlier Powerpoint for the 16 November 2017 meeting: the higher quality and assurance attached to Vard as compared to the other yards. V.Delta's view, as expressed in the Powerpoint, was that when price was removed as a point of comparison, Vard had the best offer by a significant margin. Vard had the "most rounded offer". PaxOcean had the second best offer, but their high score was largely due to their extremely favourable price. Slides addressing the positives and negatives of each tenderer showed more positives than negatives for Vard, the principal negative being price. For PaxOcean, there were more negatives than positives. A comparison slide referred to their limited space available, the low proportion of indoor facilities and cranes, the low level of automation and machinery sophistication. It is apparent that V.Delta had continuing concerns as to the quality of PaxOcean, whereas it had no such concerns in relation to Vard. Damen was the least preferred tenderer, with various negatives including that the proposed yard had not yet been acquired.
111. The minutes of the meeting record that the deadline for contract signature should be kept at 31 January 2018, even if there was a possibility of a slight postponement. Under the heading "Shipyards presentation", the minutes identified and discussed a number of matters relating to each shipyard, including Vard's pricing. Prysmian relied upon one passage in that section in support of its argument that, at that stage, Prysmian was not interested in replacing Salt with Vard, and hence that the Vard alternative design proposal had been put forward by Vard without prior discussion or approval. The passage reads:

"To align the offer all other price reduction ideas proposed by Vard to modify makers list have been ignored, apart from those mentioned in the above two points. At present stage the best price achievable at Vard would be approximately 160,000,000 EUR"
112. I do not accept that argument. I have previously discussed V.Delta's concept of "alignment" of shipyard offers. The process of alignment involved decisions being made by V.Delta as to how to compare like with like. It did not, or did not necessarily, denote that proposals had been accepted or rejected. However, it is fair to say that, at this stage at least, there is nothing to suggest that Prysmian was inclined to accept the proposal of replacing Salt with Vard.
113. In fact, the minutes indicate that – notwithstanding V.Delta's recommendation and concerns as to PaxOcean's quality – Prysmian was more attracted by the PaxOcean offer. It seems that Prysmian's commercial decision, or at least inclination, was that what really mattered was the bottom line. Hence the concluding section of the meeting notes record that Prysmian required an adjustment to be made to V.Delta's weighting system. The conclusions were:

“Prysmian requires that to the price should be assigned a 50% weighting within the scoring system. 35% should be assigned to delivery time. The remaining 20% to be distributed within the other evaluation parameters.

From the updated scoring system PaxOcean results to be the best combination.

Vard would be given the contract only if the price different between Vard and PaxOcean were to be 15.000.000 EUR. Despite the higher quality of Vard the price different currently is far too large to be feasible.

Most important action is to clarify with PaxOcean the max quantity of steel that can be processed by their Singapore shipyard. If the quantity is acceptable or a proposal to involve other shipyards to reach an acceptable level is feasible, then a request for best and final quotation will be sent within week 3 to all yards.”

114. The conclusion therefore indicates that Prysmian was prepared to consider paying a higher price for the CLV if built by Vard, provided that the gap between Vard and PaxOcean was no greater than € 15 million. To that extent, the bottom line was not all that mattered. It also indicates that the process was to continue, with best and final offers being obtained.
115. The minutes do not suggest that any final decision had at this stage been taken by Prysmian as to how to proceed, and I consider that no such decision had been taken. It could not be taken until after best and final offers had been received. At that stage, Prysmian would look at the gap between PaxOcean and Vard, and decide what to do. One possibility was the replacement of Salt as designer with Vard. It was a potential option, but its attraction would at least to some extent depend upon the best and final offers from the respective parties that came back, and such gap as existed between PaxOcean and Vard.
116. Against this background, it is unsurprising that no further detailed work was carried out by Vard on its GA Rev 2 during the remainder of January. Mr. Byam-Cook QC relied upon this point in support of the proposition that Prysmian was not interested in Vard’s alternative design. I disagree. Prysmian in my view remained potentially interested in that design – as in my view is confirmed by the offer that was in due course made by Vard at the end of January. However, it was far from clear that Prysmian would use Vard at all. If the best and final offers remained as they stood as at the time of the 8 January 2018 meeting, then the likelihood was that Prysmian would choose PaxOcean and the Vard alternative design would be academic, because the gap between PaxOcean’s offer (€ 127,800,000) and Vard’s offer would not be bridged to within € 15 million by the € 5 million reduction which Vard had proposed.

Salt specification of 8 January 2018 and other developments in January

117. In December 2017 and January 2018, V.Delta had been working on its process of quotation alignment with the candidate shipyards. For this, Salt had produced a new

draft version of the Building Specification dated 3 January 2018, intended for a meeting with Prysmian in Milan on 9 January 2018. The parties discussed potential changes to the design of the CLV, as well as commenting on the various construction tender responses. After that meeting, and during January and February 2018, Salt continued to assist shipyards, including Vard, with their tender responses, and by providing input as to the scope of design. Salt was unaware that Prysmian and Vard were, as described below, considering the possibility that the construction project would proceed with Vard taking over the design work.

118. On 18 January 2018 V.Delta sent Prysmian's invitation for Best and Final Offers to Vard. The same invitation was also sent to PaxOcean and Damen. The attached invitation letter expressly stated that: "The Builder must subcontract Salt Ship Design for the Basic Design Package". The invitation also enclosed updated Salt design documents, including Salt GA rev 16 and an updated Building Specification.
119. Vard's Best and Final Offer ("BAFO") submitted on 30 January 2018 quoted a price to build a CLV expressly on the basis of Vard's alternative design, and again attached a copy of Vard GA rev 2. The price quoted by Vard was €154,900,000. In his covering e-mail, Mr. Haugan said:

"Reference to above subject and below trailing emails. Hence, please find attached our revised offer "Annex 2A-Quotation Rev 4" to be considered as our best and final offer along with our VARD 9 04 General Arrangement for your review and consideration. As communicated earlier and although the attached GA still need to be further developed until completion, please rest assured that in the event Prysmian choose to go with Vard design, Vard GA and Specification will be finalized without compromising on the vessel specification e.g. layout, performance, capacity etc. with the vessel delivery schedule to remain as already agreed subject contract award no later than by 16th February 2018."
120. An important feature of this Best and Final Offer was that it gave no price responsive to the basis of Prysmian's requirement that Salt should be subcontracted for the Basic design package. Mr. Haugan's evidence was that Vard had submitted the offer with the expectation that it would be disqualified. As will be apparent when I discuss Mr. Haugan's evidence in more detail in Section E below, I do not consider that this evidence was reliable or plausible. It is in my view inherently probable that Vard was given by Prysmian to understand, notwithstanding the terms of the BAFO invitation letter, that it should tender on the basis of its design, in order to make its offer more competitive vis-à-vis PaxOcean.
121. On 30 January 2018, PaxOcean also submitted a revised quotation and documents in reply to the request for its BAFO. It stated that it had amended its offer upwards because of various factors. PaxOcean also indicated its concerns at accepting liability for the Salt design, and made various points concerning Salt's past performance. Its relevant comments were passed on by V.Delta to Salt for a response.
122. Prysmian scheduled a call to discuss the BAFOs on 31 January 2018. The meeting invitation includes a summary of where the tendering process had now reached. This

document identifies that Damen was “now the most competitive in terms of price but has the worst delivery and does not yet own the yard”. It indicated that Vard had not yet made any significant discounts, and that the decrease in price was due to the elimination of Salt. The increase in PaxOcean’s price was noted, as was the fact that they had “mainly” said that at the moment they could not take responsibility for the Basic design. There is nothing in the text, which discusses the offers received, which indicates any surprise that Vard’s price (€ 154,900,000) was on the basis of eliminating SALT, nor that it had not responded to the tender in the way proposed in the BAFO request. Instead, the document simply proceeds to give Mr. Taddei’s “first comments” on the proposals, without any suggestion of surprise or that Vard should no longer be considered, because it should be disqualified.

123. The document also contains various figures under the heading: “Additional Costs to be considered”. This included, in relation to the “Basic Design” costs, a figure of € 2 million in respect of the Vard proposal. It was submitted by Salt that this showed that Mr. Taddei recognised that, if the Vard alternative design was chosen, Salt would still be paid for its design work. Whilst that is a possible reading of the document, I think that it is reading rather too much into figures which may have been prepared at speed. The various figures for “Basic Design” lack consistency, with there being a figure of € 3 million for PaxOcean, and no figure for Damen, even though both would be using and paying for the Salt basic design. Mr. Taddei in his evidence could not really understand the figures. As will become apparent in Section E, I consider that Salt can rely upon stronger points in support of its case.

124. On 1 February 2018, Mr. Leoni asked Vard whether the cost of Salt’s basic design was included in its BAFO. His question was:

“Confirmation that the cost of Salt basic design is included in your best and final offer.

Vard’s response to that question was:

“Cost same as in tender package (price matrix) equal to EUR 1,72 mill. is included in our offer.”

125. Salt submitted that the e-mail indicated that Vard should include in its overall price to build the vessel on the basis of a Vard design a figure of €1.72m as compensation to Salt, to be paid by Prysmian as part of the overall price. That was, Salt submitted, the objective interpretation of the document. Support for this proposition was provided by Mr. Taddei’s oral evidence:

“Q. The idea here, what was being confirmed, Mr Taddei, was that if Vard was awarded the construction project, and proceeded to build the vessel on the basis of the Vard design, then it must pay Salt the €1.72 million amount, in order to take over the basic design. That is what you were asking for confirmation of and that is what Vard were telling you, correct?

A. Correct.”

Mr. Haugan in his evidence placed a different interpretation on the e-mail, and said that Mr. Taddei's evidence was mistaken. I will return to that issue in Section E.

126. In his e-mail of 1 February 2018, Mr. Leoni also asked Vard to attend a meeting with Salt at Salt's head office in order to discuss vessel engineering and clarify any doubts about the vessel's design. He was proposing to arrange a meeting early in the week. Vard's response from Mr. Haugan indicated that there had been high level dialogue between the chairman of Vard (Mr. Coronella) and the CEO of Prysmian (Mr. Battaini), in which it had been agreed that there would be a meeting between Prysmian/ V.Delta and Vard in Milan on 7 February 2018. This meant that the meeting at Salt's offices could only be held on the following Thursday or Friday at the earliest. The e-mail therefore provides confirmation, consistent with Mr. Taddei's evidence of the December discussions, of the involvement at this time of the most senior individuals within Vard and Prysmian in relation to the CLV project. The implication of Mr. Haugan's comment was that this meeting would have an impact on Salt's continued involvement in the project.
127. In an email sent on 2 February 2018, and in a further email on 6 February 2018, Salt addressed PaxOcean's concerns as to the impact of Salt's role as a designer. A call involving V.Delta, Prysmian and PaxOcean on 2 February indicated that Prysmian was not happy with the position being taken by PaxOcean: Prysmian pointed out that it was only PaxOcean which had raised such a wide range of concerns about Salt. PaxOcean withdrew from the ship construction tender process on 5 February 2018.
128. This was obviously an important event. The concerns as to Damen, which was the least preferred tenderer and at this stage had not yet acquired its proposed yard, meant that Vard now represented the obvious way forward for Prysmian. There is nothing to suggest that, following PaxOcean's withdrawal, Prysmian and V.Delta gave serious consideration to Damen. Instead, work started in earnest with Vard and on its alternative design.
129. The documents indicate that, in February 2018, Prysmian, V.Delta and Vard engaged in a process of comparing and contrasting the Vard design and the Salt design. Salt submitted that it is clear that Prysmian and V.Delta were encouraging Vard to consider the Salt design documents and to improve its design by reference to them, requiring Vard, for example, to justify any departures from the Salt design. As discussed in more detail in Section E below, I consider that this submission was borne out by the documentation. I summarise the position here and introduce the important documents.
130. On 2 February 2018, V.Delta prepared a list of questions for VARD regarding its GA. These questions arose, at least in part, from a comparison between Salt's Rev 14 design and Vard's Rev 2 design. For example, question 2 was:

“Reason behind change to helideck position? Not favourable in terms of vessel pitching motion in comparison to position on SALT design, more favourable in terms of roll. Do they think roll motions are more of a concern than pitching motions?”
131. This list of questions was then revised and supplemented for the purposes of a meeting between Prysmian and Vard on 7 February 2018. At the 7 February 2018 meeting Mr. Haugan gave a Powerpoint presentation on the merits of using “Vard Design” for the

CLV. The Powerpoint was headed “Risk Mitigation in Project Execution” and discussed the risks flowing from using a third-party designer, like Salt, as compared to using Vard as the concept, basic, detailed and production designer. Each risk was addressed with a responsive statement headed: “Mitigation with Vard Design”. Some of the slides within the Powerpoint had previously been used in the earlier Powerpoint used at the 21 April 2017 meeting, discussed above. The reference to “Vard Design” throughout the 7 February 2018 Powerpoint was a reference to the company Vard Design AS, rather than a generic reference to the benefits of a “Vard design”. For example, it referred to the “Vard Design team” and to the fact that “Vard Design is also responsible for monitoring weight, stability and critical aspects with the performance of vessel during all phases. Vard Group do not have that competence at the shipyards”.

132. The meeting was described in the evidence of Mr. Taddei. Vard explained the problems of having a separate designer and shipyard design team, and the efficiencies that could be achieved with a single provider. Prysmian indicated that it would need to understand further details about Vard’s design, to ensure that it could meet Prysmian’s requirements and information about proposed costs and timelines. Mr. Taddei described challenging Vard to say why their design would be better than the Salt design. A note from the 7 February 2018 meeting sets out 46 questions and issues which were to be discussed. These included the following:

“GENERAL

Reason behind the proposal of a Vard design?

At what stage is the Vard design?

What makes Vard design better than SALT design?

Would Vard indemnify Prysmian and V.Delta in case we go for Vard design. Vard to revert.

SALT, V.Delta and Prysmian have worked together on the fine tuning of design for about eight months, how long would Vard expect it to take achieving the design aligned?

MARINE

13. SALT design has lower beam at midship (first deck) driving lower double bottom (1650 against 2000) and equipment number (3164 against ????)

14. Beam extends to widest point at frame ~129, as opposed to at frame ~100 on SALT design. What are the effects on equipment number?

15. Reason behind change to helideck position? Not favourable in terms of vessel pitching motion in comparison to position on SALT design, more favourable in terms of roll. Do Vard consider roll motions more of a concern than pitching motions

for the helideck positioning? The proposed helideck design limits the visibility from wheelhouse, please comment.

Vard: helideck position for roll reduction purposes

GENERAL ARRANGEMENT

27. Captain's cabin and other officer cabins are situated right next to Helideck and Helideck Lounge.

28. Captain's cabin is significantly smaller than that in SALT design. Likewise for other senior officers and client cabins. No double beds and arrangement looks less comfortable.

29. Restricted light due to superstructure change for officers and captain?

30. Only seating for 82 in mess.

VARD:

31. Mess is positioned further forward than in SALT design. Not favourable for crew comfort. Justification?

VARD:

36. No MOB boat aft?

42. Justifications behind having a pantry separate the Control Room and the Control Cabin?

43. The cable laying hangar has been slightly shortened from SALT design (about 0.65m) and the capstan has been moved afterwards, can you please justify.

44. Change from SALT design: TT fwd. no.2 and Azi fwd. no.3 are now in same compartment. This changes DP plan as now only 4 DP zones.

45. Only one control cabin for rear Pick up arms (on the starboard side), VARD justification for this?

46. Need for two conference rooms in accommodation block?"

133. Salt described the exercise then being carried out, with justification, as a "benchmarking" exercise.

134. Following the 46 questions and issues, the document contained a section headed "MOM", or Minutes of Meeting. This referred to the Vard Powerpoint presentation, and then had a section headed: "Concerns with Salt design". The minutes record:

“Not about Salt, but just external designer.
In principle no issue.
We don’t believe there is any issue with the designer
performance. Vard has not looked into Salt design”

135. There were various action points listed at the end of the 7 February 2018 meeting document, including the quotation and delivery schedule for the Vard design. They also included a reference to meeting with Salt “to go thru the deliverables”.
136. In the meantime, on 6 February 2018, Salt had sent an updated design offer to Mr. Haugan at Vard, and then met Vard at their design office in Norway. Mr. Haugan did not reveal to Salt that Vard had by now undertaken substantial work on the design of the CLV resulting in the production of Vard GA Rev 2, or that a meeting was about to take place where Vard would (as can be seen from the Powerpoint described above) be advocating for Vard Design AS as designer in place of Salt. The conclusion of that Powerpoint was:
- “Considering a very ambitious Ship construction schedule and complexity of Prysmian CLV, in our opinion, we feel it is more of Prysmian’s benefit to go with Vard Design as it involves less risk and uncertainty.
- As communicated earlier, please rest assured that in the event Prysmian choose to go with Vard design, Vard GA and specification etc will be finalized without compromising on the vessel specification e.g. layout, performance, capacity etc. with the vessel delivery schedule to remain as already agreed subject contract award no later than by 28th February 2018.”
137. It is to be noted that at this stage, Vard had not produced a specification of its own as part of its design efforts since December. A Prysmian specification had been used as part of the design tender process in early 2017, but this was now clearly out of date. The relevant specification, which identified what Prysmian were looking for by February 2018, was the specification produced by Salt and sent to proposed shipbuilders in September 2017, and then revised by Salt in January 2018 as described above.
138. On 14 February 2018, and having been asked to submit a revised updated design offer deducting the costs of Phases 1 and 2 (which were to be paid by Prysmian in any event), Salt sent the further revised ship design offer to Mr. Haugan at Vard.
139. On 15 February 2018, Vard circulated a revised Quotation Rev 5 to Prysmian, with an updated design, which gave prices for the construction of a CLV vessel to suit Prysmian’s needs based on a Vard design and also based on a Salt design, with the vessel description being the same for both cases. The quotation based on the Vard design was €154,565,000 with delivery by 15 April 2020. The quotation included Vard GA rev 3. The quotation based on the Salt design was €160,275,000 with delivery by 22 May 2020.
140. Salt drew attention to a paragraph which set out the “Scope of Construction”:

“In general, the vessel shall be constructed according to the agreed GA & Construction Specification for cable lay vessel and delivered as a turnkey project. All the items mentioned in the specification shall, in general be included in builder scope of supply unless otherwise stated.”

Salt’s point was that, at this stage, the only material “specification” in existence was that which formed part of Salt’s design documents.

141. The covering e-mail indicated that Vard’s price took into account updated basic design pricing and timetable information which Salt had recently provided to Vard, including an increase in the cost of the Salt Basic design package from € 1,721,600 to € 2,431,489.

142. In his covering email enclosing that design, Mr. Haugan noted that the Vard design would be finalised “without compromising on the vessel specification”. At the end of the covering e-mail, he said:

“As for the legal matters raised during our last meeting and in the event Vard is chosen as the vessel design, Vard [sic], due to our confidence that this is not a concern, Vard will formally address this matter if and as required to indemnify Prysmian as relevant.”

143. No documents have been disclosed by Prysmian which explain the legal matters discussed as between Prysmian and Vard. It is clear, however, that there was concern on the part of Prysmian at this early stage as to the possibility that Salt might make claims in the event that the design work was taken over by Vard.

144. On 20 February 2018 Vard provided its further revised GA (GA rev 4) and a preliminary Building Specification to Prysmian. The experts were agreed that the technical documents produced by Vard in the period following its 15 February quotation show that Vard did deploy a large team to work on the design, and this design work was reflected in incremental changes to the Vard GA plan as it progressed through revisions 5, 6 and 7.

145. On 21 February 2018, Vard sent Prysmian and V.Delta by e-mail a “brief and high level GAP analysis between the Salt and Vard GA and specification believed to highlight the main differences with remarks made in attachment as relevant”. A GAP analysis is a process used to compare current performance with desired/expected performance. When the case was opened, Salt drew attention to Prysmian’s failure to disclose what was believed by Salt to be a “crucial attachment” to the 21 February 2018 e-mail. Salt submitted that the document would likely have proven beyond doubt that Salt’s complaints about the misuse of its confidential information were well founded. The reason that the document had not been disclosed was that the relevant link was broken or expired, and Prysmian had not been able to retrieve it. However, a request was promptly made by Prysmian of Vard for the attachment, and this was produced during the trial. It was, as the e-mail indicated, a brief high level GAP analysis between the two designs, including some relatively limited remarks in a remarks column. I will return to that document, and its significance, in Section E.

146. Later that day Mr. Taddei reported internally to his Prysmian colleagues and V.Delta as to what had been agreed with Mr. Aleo and Mr. Battaini (Prysmian CEO). He identified five points: (i) the contract award had been moved to the end of March 2018, (ii) between now and then “we need to achieve the same level of detail in building specs with Vard as we have with Salt” and asked V.Delta for a quote for this additional work, (iii) “Design Salt remains valid but as option B”, (iv) Vard would be asked to lower the construction price if they did design and construction and (v) “Salt must meet Damen and provide all the information that allows Damen to have a clearer idea of the project (and the cost + timing)”.
147. The need to achieve the same level of detail in the two building specifications may have been the origin of work that was then carried out, and which resulted in a document which was disclosed to Salt very late in the proceedings. This is a “Compliance Matrix”, whose final version (or at least the version to which I was referred at trial) was produced in April 2018. I discuss this document in Section E below.
148. The position at the end of February, as Mr. Taddei explained, was that the decision was taken by Prysmian to drop the Salt design and more seriously investigate the Vard design.

March 2018

149. On 5 March 2018, Prysmian and Vard Group AS entered into a Letter of Intent. The recitals to the Letter of Intent were as follows:

“WHEREAS

The BUYER has launched a tender process for a shipbuilding contract (hereinafter also referred to as the "Contract") of one (1) Cable Lay Vessel (hereinafter the "Vessel") based on the design provided by SALT Ship Design AS (the "SALT Design") as detailed in the tender package and invited the BUILDER to such tender (hereinafter called the "Project").

The BUILDER is participating in the tender process and proposed to develop a new design for the VESSEL, based on its design type VARD 9 04 (the ‘Alternative Design’)

The BUYER has agreed to evaluate the Alternative Design with intention to sign the Contract based on the Alternative Design provided that Alternative Design fully meets the BUYER’s requirements and expectations as set out in tender documents, at its absolute discretion.”

150. Clause 1 of the Letter of Intent identified its purpose: to provide the terms on which the parties would continue to negotiate on an exclusive basis, and if possible, conclude a shipbuilding contract. Clause 2.1 contained an obligation on the parties to continue to negotiate until 31 March 2018. If the shipbuilding contract had not been concluded by that time, the Letter of Intent would “terminate forthwith with no binding effect on each of the Parties” except for the confidentiality obligations set out in clause 6. Clause 8.1

contained mutual obligations not to engage in negotiations with any third party with regard to the Project.

151. On 8 March 2018, Mr. Taddei spoke to Mr. Vestbøstad and told him that he would shortly be sending an email terminating the contract, and confirming that one of the bidding yards had offered their own design. Mr. Vestbøstad's note of the conversation indicated that Mr. Taddei was apologetic and also that V.Delta did not agree with the decision. Salt guessed that the yard in question was Vard, but this was not confirmed, as far as Salt was concerned, until the press release confirming that the contract was awarded.
152. Mr. Taddei followed up by email on the same day, advising that recently a yard "in an effort of getting to a lower price which could incentivize us to negotiate suggested a considerable reduction of the purchase price if, among others, they make the design in-house". He said that Salt should invoice Prysmian for any Phase 3 work done (referring to the early engineering work), and also indicated that Prysmian reserved the possibility of coming back to Salt and "reconsider any further cooperation" should Prysmian not enter a contract with the yard. Mr. Taddei did not in fact terminate the SFA. It has in fact never been terminated by either party.
153. Mr. Stenersen of Salt responded on 13 March 2018. His e-mail made various points, including that Salt was prepared to support an initiative to bring down the vessel's cost. He expressed Salt's surprise that one or more yards, after receiving a Salt proprietary design and comprehensive design information, were requested to offer their own design for the same project. Salt said this was in general highly surprising and unusual and a breach of the SFA "where Salt is engaged as an exclusive designer for the Project". Salt said that it would do what was appropriate to protect its intellectual property rights. Salt also pointed out that there was nothing in the SFA which entitled Prysmian to terminate it.
154. On 16 March 2018 Mr. Taddei of Prysmian replied. He said that it was not Prysmian who had requested the yard "now pushing us to offer its own design but we were offered". He said that considering their constraints in terms of budget and delivery time this solution was deemed the best when looking at associated risks. He denied breaching the SFA. He said that, in circumstances where a shipbuilding contract had not been concluded by 31 January 2018, "we are then entitled to terminate the Agreement with you". He said that if Prysmian did go ahead with the proposal recently received, "your design will not be used". Prysmian said that it was fully aware of Salt's intellectual property rights under clause 6.4 of the SFA and had no intention to breach them. Finally, he expressed the hope that Salt would not wish to engage in a dispute but would rather take a pragmatic and commercial approach.
155. On 20 March 2018 Salt responded. It denied that there was any right for Prysmian to terminate the SFA after 31 January 2018, with this date being merely linked to payment, and emphasising that the contractual termination clause (art. 6.5) was not linked to 31 January 2018 or other certain dates. It noted that Salt was appointed as the exclusive designer and that Prysmian was therefore not permitted to explore "any yard design, regardless if it is promoted by the yard or proactively requested by Prysmian". Finally, Salt offered a commercial settlement, without prejudice to their contractual rights, to accept € 1,656,000 as compensation with Prysmian gaining the right to use all of the

scope of supply delivered by Salt for the project. The parties' correspondence thereafter proceeded on a without prejudice basis, but they were unable to reach agreement.

156. Alongside this correspondence with Salt in March 2018, Prysmian and V.Delta were working closely with Vard to progress the Vard design. This involved numerous email exchanges, calls, and joint meetings with key third-party suppliers and Class. Thus, Vard produced Vard GA rev 5 on 9 March 2018 and on the same day held a meeting with Prysmian's proposed Classification Society, RINA.
157. Vard held a series of detailed meetings with Prysmian and V.Delta at its offices in Aalesund, including a meeting on 12 March 2018 at which they discussed 144 different items in the Vard design. As recorded in Item 86 of those minutes, Prysmian was now indicating that it wished considerably to increase the capacity of the carousels on the CLV. These are the circular structures into which the cables are loaded on the vessel and as such are a primary feature of a cable lay vessel – the Prysmian CLV was to have two such carousels which were to be designed and built by Prysmian. More particularly, Prysmian had decided to increase the capacity of the forward carousel from 5,500t to 7,000t and the capacity of the aft carousel from 8,000t to 10,000t. That change had an impact on the Vard General Arrangement and the supporting hydrostatic/hydrodynamic calculations supporting the Vard design.
158. Vard thereafter performed the necessary revised calculations (freeboard calculations, seakeeping calculations, initial damage stability report, initial intact stability and loading conditions), producing the results in the period 23 to 27 March 2018, together with a further update of the General Arrangement, Vard GA rev 6, illustrating the larger carousels. The General Arrangement went through two further iterations, Vard GA rev 7 on 6 April and Vard GA rev 8 on 13 April 2018. Vard performed numerous design calculations in support of its developing concept design throughout the month of April.
159. The upshot of this process was that Prysmian were content to proceed with the Vard design.

April 2018

160. The shipbuilding contract was concluded between Prysmian and Vard on 24 April 2018. Under that contract, Prysmian engaged Vard to design and build a CLV in accordance with the terms thereof and the specification attached to the contract. The shipbuilding contract included the schedules thereto, and thereby Vard GA rev 8. The experts were agreed that this shows the Vard design at a comparable stage of design as Salt's GA rev 14. The specification was also attached to the contract, and ran to 159 pages.
161. On the same date, a separate indemnification agreement was also concluded between Prysmian and Vard in relation to a claim by Salt for intellectual property infringement by Prysmian. The indemnity agreement was signed by Mr. Haugan and Massimo Battaini, the CEO of Prysmian. No documents have been disclosed as to the involvement of Mr. Battaini, or how the legal risks were explained to him.
162. Preamble (G) of the Indemnity Agreement required that "Prysmian shall terminate the Salt Contract and shall undertake vis-à-vis Salt not to use the Salt Design for the Vessel, for other vessels and/or for any other purpose." In fact, the SFA was not terminated

and there is no evidence of any undertaking from Prysmian as contemplated by Preamble G.

163. Pursuant to clause 4 of the Indemnity Agreement, Prysmian agreed to “use all reasonable efforts to progress negotiations and to enter into a full and final settlement agreement towards Salt for any alleged rights and claims arising out of the termination by Prysmian of the Salt Contract”. Vard was to have no obligation or liability with respect to any claim if Prysmian failed to use reasonable efforts to enter into a settlement with Salt.

The design of the Leonardo da Vinci

164. Prysmian and Vard have since proceeded with the design and construction of a CLV based on the Vard design, although commencement of construction was delayed by agreement due to other circumstances affecting Prysmian. To that end, Vard performed the Basic design for the CLV (equivalent to phase 3 under the SFA), producing a series of further iterations of the Vard GA ending with Vard GA rev D dated 7 January 2019.
165. The CLV is now named *Leonardo da Vinci*. After construction and launch at Vard’s shipyard at Tulcea, Romania, it moved to Vard’s shipyard in Brattvåg, Norway for fitting out, installation of main laying equipment and finishing. As at the start of the trial, it was on the point of delivery to Prysmian.

Commencement of proceedings

166. The present proceedings were commenced promptly, on 12 July 2018. Pleadings, witness statements and expert evidence were in due course exchanged. It is not necessary to describe this process. The trial was postponed in 2020, by agreement between the parties, in light of the Covid-19 pandemic and lockdown in the UK. The parties did not consider it desirable for the trial to take place remotely, and at the time of the adjournment there was comparatively little experience of substantial trials taking place in that way. The trial took place in May 2021, with closing submissions in early June 2021. All factual evidence at the trial was given by witnesses using a video-link, as was the evidence of Salt’s accounting expert. The other expert witnesses gave evidence in court.

Section C: The terms of the SFA

167. The material terms of the SFA were as follows.
168. Section 0 contained a series of definitions, including the following:

“Client’s Supervisor: V.Delta by Martinoli S.A.M. with registered office in Monaco, 2 Rue du Gabian, Les Industries
Third party appointed by the Client for supervision and approval of the vessel Design.

Contract: means this Agreement between the Client and the Designer for the provision of the Services as specified in Article 1 hereof.

Design: means all drawings, specifications and other documentation that will be produced by The Designer for this project.

Designer: Salt Ship Design, Company appointed by the Client to sell and deliver The Design.

Main Functional Documents: are the main design deliverables, including but not limited to: General Arrangement, Tank and Capacity Plan, Stability Calculation (Intact and Damage), Loading Conditions, CFD Analysis, Longitudinal Strength Analysis, Scantling Plans, FEM Model, Electric Load Balance, Single Line Diagrams, DP FMEA, Fire Control and Safety Plans, Noise and Vibration Analysis, Mission Equipment interface documents.

Project: means the planned collaborative enterprise to achieve the Design of Prysmian New Build cable laying vessel.

Specification: means the provided technical documents containing the instructions for the ship design, as detailed in the following Annexes:

04. Annex 1_PPL_NB_Technical Specification_v01

Vessel: means New Build Cable Laying Vessel to be designed for the Client.

Works: means all the activities carried out by the Designer to deliver the Design.”

169. Section 1 was headed: “Purpose, Scope of Work and Schedule. This section contained the following provisions:

“1.1 Purpose

For the purpose of developing a Vessel type (the “Project” or the “Vessel”), Client (the “Client”) has the firm intention to build a Vessel based on a design by XXX (the “Designer”). The Client appoints the Designer as the exclusive designer for the Project and the Designer grants the Client the right to build the Vessel based on a Designer’s developed ship design package and under terms as set out in this Contract.

1.2 Agreed Scope of Supply

The Scope of Supply under this Short Form Agreement is agreed to be:

Phase 1: Concept Design

Phase 2: Tender Package

Phase 3: Basic Design

Phase 4: Delivery Documentation

Details of the Scope of Supply for each of the above Phases are set out in Annex 1.

1.3 Schedule

Project start: At the date of signing this Contract

The Design shall be delivered to Client by the Designer on the Delivery Date as per following schedule:

Delivery of Phase 1 Supply: As set out in Appendix 1

Delivery of Phase 2 Supply: As set out in Appendix 1

Delivery of Phase 3 Supply: As set out in Appendix 1

Delivery of Phase 4 Supply: As set out in Appendix 1

On delivery of each Phase of the design, Client and the Designer shall sign the Protocol of Acceptance of the design.

On delivery of each Phase of the design, Client and the Designer or its advisor shall carry out a review of deliverables.

Any remark shall have to be reported in the Protocol of Acceptance which Client and the Designer shall sign on delivery.

1.5 Approval of plans and drawings

Submission by the Designer of each of the drawings and plans shall constitute a warranty by the Designer that the drawings are in compliance with the Contract and the Specification.

The Designer has to provide to the Client all drawings in .dwg format, Stability Model in NAPA or equivalent, FEM, CFD models in ANSYS or equivalent.

Client will be given 10 working days to review the drawings and plans produced by the Designer, except for the Main Functional Documents for which Client will be given 20 working days. If the Client fails to review submitted documents within agreed timeframe after receiving the documents, the Client shall be notified in written by e-mail and, if no action is taken within the next two working days, the Design Documents shall be deemed approved by the Client. The Designer shall submit at project Kick Off the complete list of deliverables and relevant documents delivery schedule, to be agreed upon prior to commencement.

1.8 Subcontractors and Suppliers

The Designer is entitled, subject to the Client's approval, to subcontract part of the Works to subcontractors. It must give Client at least 5 days' notice in writing, giving the reasons for such subcontracting. The Client shall evaluate the Designer proposal and revert with acceptance or rejection in writing. However, it is agreed that the Client cannot unreasonably refuse such acceptance. Subcontracting to the following companies are preapproved at the date of entering into the Contract;

3. Albatross Ship Design doo, Novi Sad, Serbia: Assistance with engineering resources for part of basic design engineering. [Only relevant for basic design/ detail design phase if increased capacity for engineering is required]

4. Seacon Engineering, Gdansk, Poland: Assistance with engineering resources for part of basic design engineering. [Only relevant for basic design/ detail design phase if increased capacity for engineering is required]"

170. Section 2 was headed: Price. This contained the following provisions:

"2.1 The Designer's compensation for the Scope of Supply, as set out above, is agreed to be EUR 1,910,000.00 in total, out of which EUR 153,000.0 for Phase 1, EUR 35,000.00 for Phase 2, EUR 1,652,600.00 for Phase 3 and EUR 69,000.00 for Phase 4.

2.2 It is understood and agreed that if the Project materializes and a shipbuilding contract is concluded with a shipyard (the "Yard"), a Design Contract shall be entered into between the Designer and the Yard and all the above compensation shall be paid by the Yard.

2.3 In case the project does not materialize and a shipbuilding contact is not concluded within 31st of January 2018, the Designer shall be compensated by the Client for the Phase(s) of Supply completed in the amounts indicated above. In case the Client to request the Designer to complete the Scope of Supply for Phase 3 and 4, a separate payment schedule shall be agreed.

171. Section 3, headed Agreement on Change Order, provided as follows:

"Any agreement for Additional Works shall be evidenced by a Change Order signed by the Project Manager and Client' Supervisor. Any Change Order that increases the Total Price and/or extends the Delivery Date shall in addition be countersigned by Client' Representative. Change Orders shall constitute amendments to the Contract and shall be deemed to be

included in the Contract (and for the avoidance of doubt, the cancellation of any Change Order shall only be effected by a further Change Order executed in accordance with this Clause). Upon the execution of any Change Order in accordance with this Clause, the Designer shall without delay alter the Works in accordance with the terms of the Change Order.

In Order to give evidence of the price, any invoice issued by the supplier shall have to be submitted by the Designer to the Client.”

172. Section 4 headed Confidentiality provided as follows:

“The Designer shall ensure that its employees, officers, directors, shareholders, legal counsel, accountants, Designers and any other person or persons within the control of the Designer shall – subject to any mandatory provision of law or order of a competent Court – keep entirely confidential and secret, and will not disclose, describe, distribute or otherwise communicate to any person or persons, except to Client and its designated representatives, or employees or to persons employed by the Designer but only to the extent that they have an absolute need to know any information whatsoever regarding any of the terms of the Contract or any information regarding Client or the Vessel, the cost of design, Specification, plans, drawings, technical information, test results or data, or any other information whatsoever relating to the Vessel without the express written consent of Client.”

173. Section 6 headed “General Terms and Conditions” included the following terms:

“6.2 The Client engages the Designer based on its firm intention to contract a new Vessel. In case the Client enter into a Shipbuilding Contract for this Project based on Scope of supply under this Contract, the Designer grants the Client and the Yard a right to use the Design Documents on the terms and conditions set out in a separate Ship Design contract to be entered into between the Designer and the Yard, and the designers minimum scope of supply shall be a basic design package.

6.3 If however, no shipbuilding contract is concluded between the Client and the Yard within the date indicated at Clause 2.3 above, the Client shall be entitled to request the Designer to complete the Scope of Supply, including Phase 3 and 4, by paying the corresponding compensation.

6.4 The design, data, documents and know-how and all relevant copyrights, patents or other intellectual property rights related to the Scope of Work supplied by the Designer under this Contract shall remain the intellectual property of the Designer, even if not specifically so marked. However, any relevant copyrights,

patents or other intellectual property rights supplied by the Client shall remain the property of the Client.

Both parties acknowledge that secrecy related to proprietary design solutions is of outmost importance, and no documents describing design solutions based on input provided by the Client, related to topside layout details, mission critical equipment or interface of such equipment into the Vessel, can be made accessible to third persons without Client's and Designer's prior consent – unless such design solutions are, or in the future comes into public domain. For the avoidance of doubt, the aforementioned shall not prevent the Client to use such documents for the purpose of marketing the Vessel to its client(s) or for tendering purposes. Furthermore, the parties will agree on a design presentation, including 3D rendering of the Vessel and key vessel information which can be used by both parties when presenting the vessel to third persons.

The Client may disclose relevant documentation only to its suppliers and employees on a need to know basis. The Client is not entitled to send or make available the General Arrangement and/or Building Specification as a complete document to a third party, including any suppliers, but excepting the Yard, without the prior approval of the Designer”

6.5. The Client is entitled to withdraw from this Contract if it is proved that the conditions of the Contract are not fulfilled by the Designer and remedial actions by the Designer have not been put in force for a period of 14 working days following receipt of written notice from the Client. Deliveries, partial deliveries and preparatory work, as well as work already in hand or completed, shall be paid in full.

6.6 This Contract shall be governed by and interpreted under the laws of England. All litigation arising out of the Contract shall be within the exclusive jurisdiction of the Courts of London.”

Section D: Breach of the agreement as to exclusivity

D1: The parties' arguments

Legal principles

174. The basic legal principles as to the interpretation of contracts were not in dispute. They are conveniently summarised in the judgment of Popplewell J. in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd* [2018] EWHC 163 (Comm), which is quoted in *Chitty on Contracts* 33rd edition paragraph 13-047:

“The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and

ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.”

175. This summary is a synthesis of the principles that have been authoritatively stated in a trilogy of Supreme Court decisions in the past 10 years: *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; *Arnold v Britton* [2015] UKSC 36; *Wood v Capita Insurance Services Ltd.* [2017] UKSC 24.
176. In *Rainy Sky*, Lord Clarke described the exercise of construction as being essentially a “unitary exercise” in which the court must consider the language used and ascertain what a reasonable person, with the relevant background knowledge, would have understood the parties to mean. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Where the parties have used unambiguous language, the court must apply it: *Rainy Sky* paragraphs [23] and [25].
177. Whilst this unitary exercise of interpreting the contract requires the court to consider the commercial consequences of competing constructions, commercial common sense should not be invoked retrospectively, or to rewrite a contract in an attempt to assist an unwise party, or to penalise an astute party. This is clear from the judgment of Lord Neuberger in *Arnold v Britton*. At paragraph [20], Lord Neuberger said:
- “Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term

for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party”.

178. In *Wood v Capita*, Lord Hodge set out the applicable principles following *Rainy Sky* and *Arnold v Britton* as follows:

“[10] The court’s task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381, 1383H-1385D and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen – Tangen)* [1998] 1 WRL 896, 912-913 Lord Hoffmann reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham of Cornhill in an extrajudicial writing, “A New Thing Under the Sun? The Interpretation of Contracts and the ICS decision” (2008) 12 Edin LR 374, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.

[11] Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the *Rainy Sky* case [2011] 1 WLR 2900, para 21f. In the *Arnold* case [2015] AC 1619 all of the judgments confirmed the approach in the *Rainy Sky* case: Lord Neuberger of Abbotsbury PSC, paras 13-14; Lord Hodge JSC, para 76 and Lord Carnwath JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the *Rainy Sky* case, para 26, citing Mance

LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299, paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

[12] This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the *Arnold* case, para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

[13] Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corpn* [2010] 1 ALL ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of the disputed provisions.”

Salt's case

179. Salt submitted that the key issue on the contract claim was whether Prysmian was, or was not, obliged to procure that Salt would be the designer of the vessel to be constructed by Vard. Salt put its case in two ways. First, that, properly construed, “the Project” materialised such that Prysmian was obliged to procure that Salt would be the designer of the CLV and be paid accordingly by Vard. Secondly, and in any event, whether or not “the Project” materialised, Prysmian committed repudiatory and renunciatory breaches of the SFA by purporting to terminate the SFA and/or by indicating an intention not to perform it (including by using Vard as the designer going forward) and these breaches have caused the losses that Salt claims. Accordingly, if “the Project” did not materialise, as Prysmian contends, this was due to Prysmian’s breaches, and Prysmian could not benefit from its own breaches of the SFA.
180. In support of its arguments, Salt submitted that the construction of the agreement should take into account the fact that it was not drafted by lawyers, but rather by skilled professionals in the field of naval engineering and procurement, and who did not have English as their first language. The relevant factual matrix included Prysmian’s awareness, as a result of an e-mail sent prior to the conclusion of the SFA, that Phases 1 and 2 of the work under the SFA were going to be done by Salt as a loss-leader, with the idea being that Salt would make its money from Phases 3 and 4, as exclusive designer once the construction project was awarded to a Yard, if it was so awarded. It also included the fact that the SFA followed upon a competitive tender which Salt had won against other designers.
181. Salt referred to various provisions of the SFA, but most importantly its appointment as exclusive designer under clause 1.1 of the SFA.
182. Having appointed Salt, Prysmian could not cut Salt out of the “Project”. Clause 2.2, which provided for the conclusion of a Design Contract between Salt and the Yard, was not time limited in any way: there was no date by which that clause ceased to apply.
183. Prysmian’s contention, based principally on clause 2.3 of the SFA, that 31 January 2018 was a critical date, enabling Prysmian to go elsewhere if the Project had not materialised and a shipbuilding contract had not been concluded by that time, was wrong. There was nothing in clause 1.1 of the SFA which limited the appointment as exclusive designer to a period ending on 31 January 2018. That would involve reading words into that clause. There was also nothing in clause 2.2 of the SFA, which concerned the materialisation of the Project and the obligation on Prysmian to procure a contract between the Yard and Salt, which provided a time limit. Neither of these critical obligations was time limited. Accordingly, for so long as the SFA remained in existence, Salt remained the exclusive designer for the development of the “vessel type” (as provided for in clause 1.1), and was entitled to payment whenever the Project materialised and a shipbuilding contract was concluded with a shipyard. Neither clause 1.1 nor clause 2.2 was limited by clause 2.3, which did not cut down previously defined rights and entitlements. Clause 2.3 merely conferred additional rights on Salt to ensure that Salt received cash flow by way of payments from Prysmian if the shipbuilding contract was not concluded by 31 January 2018. Clause 2.3 was therefore about conferring additional rights on Salt, not cutting down previously defined rights.

184. Similarly, clause 6.3 did not assist Prysmian’s argument. This clause was to be read simply as giving Prysmian the option, after 31 January 2018, to ask Salt to carry out the Phases 3-4 design work upon payment of the compensation due under clause 2.1 of the Contract. The reasons why Prysmian would want Salt to do this were for Prysmian, but might include ensuring momentum was maintained for the Project. This clause also acknowledged implicitly that, if Prysmian never did conclude a shipbuilding contract with a Yard, then Salt would not be obliged to carry out the further design work under Phases 3-4 (and accordingly Prysmian would not be obliged to pay Salt for those phases). The corollary of that position was that if the shipbuilding contract was concluded, then Salt would be required, as exclusive Designer, to carry out the relevant design work and be paid for it.
185. In relation to the core issue of whether the “Project” materialised, or was prevented from materialising by Prysmian’s act or default or breach, Salt’s primary case was as follows: The “Project” is simply any new build CLV being constructed for Prysmian. On this basis, there was no need to compare designs or designers. Given Prysmian’s desire to have designed and built a new cable laying vessel, the “Project” was that new CLV. Therefore, once Prysmian continued the work on the design and the shipbuilding contract with Vard, the Project itself was continued and “materialised” to use the phraseology of the SFA.
186. Salt submitted that this was the most sensible interpretation of the “Project” as used in the SFA. The approach for which Prysmian contended – namely that the “Project” under the SFA was for a CLV designed by Salt, and not for a CLV designed by Vard – was artificial and absurd. It led to the circular result that Salt’s appointment as exclusive designer under the SFA amounted to exclusivity only in relation to the Project in which it was said to be the exclusive designer. This exclusivity was meaningless and contentless. It was nonsensical to say: ‘I appoint you as exclusive designer for this project’ and, with the same breath, contend that Prysmian could appoint any other designer because, by reason of the appointment of a new designer and/or with any (even slight) variations in design from the new designer, one could say that there was now a different project. If that was what the SFA meant, it would be in Prysmian’s gift at any time to prevent the fruition of the Project. An interpretation, based on clause 2.3, that exclusivity only lasted until 31 January 2018, was wrong for reasons already given: that was not what the contract said.
187. In support of its primary case as to the identification of the relevant “Project”, Salt recognised that there was a certain amount of circularity in the drafting of the SFA. In particular, the word “Project” was defined, in part, by reference to “Design”; and “Design” referred back to the “Project”. A broad construction, that “Project” referred to the overall newbuild CLV, not just the design devised by Salt, was appropriate. It fitted entirely with the somewhat different definition of Project in clause 1.1, which referred to the “purpose of developing a Vessel type (the “Project” or the “Vessel”)”. Mr. Ashcroft QC placed particular emphasis on the very wide definition of the word “Project” in that clause. The appointment of Salt as exclusive designer “for the Project”, as set out later in clause 1.1, was therefore to be read as being an appointment in respect of developing a “Vessel type” described in the opening words.
188. The objective intention was never that Prysmian could cut Salt out of the work by the simple expedient of appointing another designer to produce a slightly different design that would suit Prysmian’s purposes equally well. All the CLV designs in this case are

well within the penumbra of what must have been intended to be the Project. This is confirmed by the Letter of Intent signed by Vard and Prysmian, which makes it clear that Prysmian and Vard regarded it all as the same Project, just with Vard's alternative design.

189. In the event that its primary case was not accepted, Salt advanced two alternative constructions of the SFA.
190. The first alternative was that the "Project" consisted of the design and construction of an advanced cable laying vessel capable of carrying a market leading payload of cables in two carousels, and laying cables to a market leading water depth. If the parties did not intend the "Project" to mean any CLV, then they must have intended the CLV to be market leading in terms of payload and operating depth. This alternative therefore gave further particularity to the definition of CLV under the Project.
191. The second alternative was that the Project consisted of the design and construction of any vessel with a materially similar specification to the contract specification. This was a reasonable alternative position given that the design process would inevitably adjust and amend the CLV away from the initial specification by Prysmian. One could never have expected the parties to have intended that the Project would be narrowly defined as the exact features and dimensions as set out in the client's specification.
192. Salt submitted that its position overall fitted far better with the matrix of the SFA, in particular the fact that Salt was prepared to do Phases 1-2 at a loss in return for its appointment as exclusive designer, and the fact that Salt had been selected as designer after a competitive tender. Reasonably-minded parties agreeing to the SFA cannot have intended that Prysmian could simply eliminate Salt from its continuing plans to design and build a CLV in March 2018 by appointing a rival designer. All of Salt's interpretations of the "Project" were preferable to the extremely narrow and uncommercial interpretation espoused by Prysmian.
193. Accordingly, Salt submitted that the Project had materialised or, if it had not, this was due to Prysmian's act or default or breach. In either case, Prysmian was liable for the loss and damage flowing from its breaches of contract.

Prysmian's case

194. For Prysmian, Mr. Byam-Cook submitted that clause 2.1, which set out the amounts payable to Salt, had to be read with clause 2.3. There were two alternative outcomes: payment of compensation by the Yard (clause 2.2) or payment of compensation by Prysmian (clause 2.3). The natural and ordinary meaning of those two clauses was that the 31 January 2018 date governed in clause 2.2. The result was that the obligations (if any) imposed on Prysmian by clause 2.2 were limited as to time.
195. Accordingly, 31 January 2018 was a critical date. Once that date had passed, Prysmian was entitled to go back to the drawing board. On the facts, the Project had not materialised: the commercial and technical feasibility of proceeding with the Salt design had proved to be unfeasible, and Prysmian was entitled to think again. This conclusion that under the SFA Prysmian was entitled to re-visit whether or not to work with Salt as the designer, once the 31 January 2018 deadline had passed, was consistent

with the words of clause 2.2, the context of the SFA as a whole, the factual matrix and commercial common sense.

196. Prysmian placed particular emphasis on the absence of any promise on Prysmian's part that it would, come what may, engage a shipyard to build a CLV using Salt's design. A striking feature of clause 2.3 was that if the Project did not materialise, and a shipbuilding contract was not concluded within 31 January 2018, Prysmian was not obliged to use Salt to complete the Phase 3 and Phase 4 design work. The appointment of Salt as exclusive designer under clause 1.1 had to be viewed in the light of clause 2.3 and the SFA as a whole. Any exclusivity granted to Salt came to an end if the Project did not materialise or a shipbuilding contract was not concluded within 31 January 2018.
197. In relation to the definition of "Project", Prysmian submitted that this was not any CLV. The definition of Project in clause 0 referred to the drawings, specifications and documentation produced by Salt for this Project. The parties were therefore referring to building a CLV to the Salt design.
198. On the facts, Prysmian did not bring about the failure of the pre-conditions to clause 2.2. Prysmian sought tenders from yards on the basis of the Salt design. In the event, however, for reasons outside its control, Prysmian was not able to conclude a commercially and technically acceptable shipbuilding contract within 31 January 2018.

Discussion

199. I accept the submissions of Prysmian as summarised above.
200. It seemed to me that the parties' arguments identified three related issues: (i) whether Salt's appointment as exclusive designer was in respect of the period to 31 January 2018, or was more open-ended and (as Salt contended) could be terminated upon reasonable notice; (ii) whether, if the appointment was more open-ended, the "Project" has in fact materialised and a relevant shipbuilding contract has been concluded; and (iii) whether, if it did not materialise prior to 31 January 2018 or thereafter, that was a consequence of the actions of Prysmian.
201. The contract must be read as a whole, with each clause being considered in the context of the overall contract and the factual matrix.
202. Clause 1.1 provides for the appointment of Salt as "exclusive designer for the Project". The term "the Project" has a detailed definition in clause 0, and I do not think that the much briefer reference in clause 1.1 to "Vessel type" should be read as expanding or changing that detailed definition. There is in my view no difference in substance between the two definitions, particularly when one bears in mind the remainder of the first sentence of clause 1.1. This refers to Prysmian's "firm intention to build a Vessel based on a design by XXX (the "Designer")". The second sentence of clause 1.1 also refers to the appointment of "the Designer". These words in both sentences lead directly into the definition of Designer in clause 0: "Salt Ship Design, Company appointed by the Client to sell and deliver The Design". Those words in turn relate to the definition of Design; which "means all drawings, specifications and other documentation that will be produced by the Designer for this Project". The word "Design" is also used in the clause 0 definition of the Project. There is therefore a clear inseparable interrelationship

between the words used in clause 1.1 and the definitions of Designer, Design and Project which are used in clause 0. There is in my view no basis for saying that the reference to “Vessel type”, upon which Mr. Ashcroft placed much reliance, is to be read in a different or wider way from the definition of “Project” in clause 0; a definition which refers to Design, and thence to Designer.

203. I next address the question of what constitutes the “Project”. I agree with Prysmian’s submission that this was not any CLV. The definition of Project in clause 0 referred, via the reference to “Design”, to the drawings, specifications and documentation produced by Salt for this Project. The parties were therefore referring, as one might expect, to building a CLV to the Salt design. The scope of supply was set out in clauses 1.1 and 1.2, and the details of the documentation to be delivered were contained in “Addendum 1” headed “List of Deliverables”. Clause 1.3 provided for the timing of the “Delivery Date” for each phase of supply, as set out in “Appendix 1”. The parties also referred to “Annex 1”. The words “Addendum”, “Appendix” and “Annex” meant the same thing. Addendum 1 included certain timings, although these are not particularly easy to follow. Under the heading of “Tender Package” (ie Phase 2), a date of 15 September 2017 was given. Clause 2.3 contained the date of 31 January in relation to the materialisation of the project and the conclusion of the shipbuilding contract. The effect of these provisions, viewed as a whole, was that Salt was to provide, within a relatively short time-scale, “drawings, specifications and other documentation ... for this Project”. That clearly meant a CLV to the Salt design. The “Project” was therefore not a reference to building any CLV: the parties were referring to building a CLV to the Salt design.
204. Clauses 2.1 to 2.3 were included under a section headed “Price”. The clauses are very obviously related to one another, and indeed to the SFA as a whole. Clause 2.1 identified the amounts payable for each phase of the scope of supply. That clause did not itself provide for payment by Prysmian, because the effect of clauses 2.2 and 2.3 was that payment would not necessarily be made by Prysmian. Clause 2.2, which I set out again for ease of reference, provided:
- “It is understood and agreed that if the Project materializes and a shipbuilding contract is concluded with a shipyard (the “Yard”), a Design Contract shall be entered into between the Designer and the Yard and all the above compensation shall be paid by the Yard”
205. This clause concerns the materialisation of the Project, with a consequent Design Contract being entered into between the shipyard and Salt. In those circumstances, Salt’s work, including the work that has been carried out prior to the conclusion of the contract with the yard (in particular on phases 1 and 2), would be paid by the yard rather than Prysmian. This is because the “Project” – namely the planned collaborative enterprise to achieve the Salt designed CLV – will have materialised. If the Project has materialised, with a CLV being built to Salt’s design, then Salt’s work as exclusive designer would continue as contemplated by the SFA.
206. Clause 2.3 provides for the converse case where the project does not materialise. It provides a date by which that is to be assessed. The clause provides:

“In case the project does not materialize and a shipbuilding contract is not concluded within 31st of January 2018 the Designer shall be compensated by the Client for the Phase(s) of Supply completed in the amounts indicated above. In case the Client request the Designer to complete the Scope of Supply for Phase 3 and 4, a separate payment schedule shall be agreed.”

207. The clause does, as Mr. Ashcroft submitted, provide a benefit to Salt: it has an immediate entitlement to payment of the work for earlier phases, which have been completed, once the 31 January 2018 date arrives and if the Project has not materialised by that date and no shipbuilding contract has been concluded. However, I do not accept that this clause is simply about protecting Salt’s cash flow. When read in the context of the SFA as a whole – and in particular the second sentence of the clause, and the cross-reference to clause 2.3 in clause 6.3 – it is in my view clear that clause 2.3 has greater significance. The second sentence of clause 2.3 contains the parties’ agreement that Salt’s work was at that stage to stop. The remaining phases of work set out in the SFA, and which would have been necessary to bring the Project to fruition, if it had materialised, are not required to be performed. Salt has no obligation to do that work, and would not be entitled to any payment if it chose to do it. The work would only continue if Prysmian decided to make the request for which the second sentence of clause 2.3 provides. In those circumstances, the parties would have to agree a “separate payment schedule”. It is arguable, but I need not decide, that Salt would be entitled to ask for more substantial compensation than provided for in clause 2.1; for example, if the request was made some significant time after 31 January 2018, when Salt’s costs might be greater. The important point, however, is that the failure of the Project to materialise within the parties’ agreed timescale has brought to end Salt’s obligation to do any further work under the SFA; and if such work were to be performed, Salt would have no entitlement to payment.
208. Clause 6.3 reiterates the fact that the performance of further work is entirely optional at the behest of Prysmian. In the present case, subsequent to the 31 January 2018 date, Salt was not asked to carry out the Phase 3 and Phase 4 work.
209. Prysmian submits that the appointment of Salt as exclusive designer in clause 1.1 must be read in the light of these subsequent clauses, in particular clause 2.3. This meant that, after 31 January 2018, Prysmian was entitled to “go back to the drawing board”, and was entitled to use a different designer to build a different ship which was not to the Salt design. I agree. That is in my view the effect of the SFA read as a whole. If the 31 January 2018 date arrives and passes without the materialisation of the Project, and without the conclusion of a shipbuilding contract to bring the Project to fruition, with no obligation on the part of Salt to do any work on the Project and no obligation on the part of Prysmian to accept and pay for such work, it would in my view be a strange and uncommercial conclusion to say that Salt’s role as exclusive designer continued. That role and appointment made sense in the context of work for a Salt designed CLV to be carried out in a short time-scale, with a view to the conclusion by a set date of a shipbuilding contract to build that ship. It makes no commercial sense, however, to say that this appointment continued, so as to prevent Prysmian looking at alternative designers and alternative designs, once the relevant date had passed in circumstances where the Project had not materialised by the set date agreed by the parties.

210. The effect of Salt’s argument is that it remained the exclusive designer, at least until the SFA was terminated, even though the Project on which the parties had agreed had not materialised by the agreed date and even though no work was (absent the exercise of Prysmian’s option) to be carried out thereafter. The effect is also to preclude Prysmian from going to other designers and looking at alternative designs, again at least until the SFA was terminated, again despite the fact that the Project had not materialised and that no further work was to be carried out. I do not consider that this makes any commercial sense. Prysmian’s approach, that it was entitled to go back to the drawing board at that point, and look at alternative designs – so that Salt’s exclusivity no longer continued – makes far more commercial sense, particularly bearing in mind aspects of the factual matrix, and other aspects of the contract, which are to my mind important. These are as follows.
211. First, the 31 January 2018 date was not an arbitrary date. The parties dealt with each other on the basis that this was a fast-track project, as Mr. Stenersen said in his evidence. Mr. Vestbøstad described the fast-track nature of the project as a commercial imperative. The “Tender Alignment” document sent to tenderers including Salt, in March 2017 had referred to delivery of the vessel by Q4 2019. The 31 January 2018 date for the conclusion of the shipbuilding contract was, as Prysmian submitted, an important deadline for meeting that delivery goal.
212. The effect of Salt’s argument, however, is that Prysmian’s hands remained tied, after 31 January 2018: even though the Project had not materialised by then, and no shipbuilding contract had been concluded, Prysmian was not entitled to look elsewhere because Salt remained the exclusive designer, albeit with no obligation to do any further work. This seems to me to be a distinctly uncommercial result in the context of a fast-track project where the parties have identified an important date for the materialisation of the Project and the conclusion of the shipbuilding contract.
213. I was not persuaded by Mr. Ashcroft’s argument that the problem of Salt remaining exclusive designer was not insuperable. He said that Prysmian could overcome any difficulty by terminating the SFA which could be done after expiry of a reasonable time on reasonable notice. I agree that this met Mr. Byam-Cook’s argument that Salt’s construction meant that the parties were tied together forever. However, it does not meet the difficulty that Salt’s construction has the effect that, after 31 January 2018 and in the context of a fast-track project, Prysmian remained tied to Salt for a reasonable period of time and then must give a reasonable period of notice – with, as always, significant room for argument as to what periods, in both contexts, are reasonable. The far more obvious and straightforward approach is to say, as I do, that after 31 January 2018, Prysmian was entitled to look at other options without using Salt.
214. I was also unpersuaded by Mr. Ashcroft’s argument that Prysmian’s construction only made sense if the SFA was itself terminated, or that the passing of the 31 January 2018 gave rise to a right of termination. I do not see why there was any necessity for the SFA to be either terminated or terminable after 31 January 2018. The SFA could remain in force, even though (on its true construction) Salt’s period of appointment as exclusive designer had come to an end, for other purposes. In particular, the options in Prysmian’s favour, in clauses 2.3 and 6.3, remained in force thereafter. The continuation of the rights and obligations under the SFA, after 31 January 2018, was of potential commercial importance to Prysmian. For example, if Prysmian looked elsewhere after 31 January 2018, but was unable to find a good alternative design, it might wish to

exercise those options. The continuation of the SFA, which has in fact never been terminated by either party, also has the effect that there is no room for doubt that the confidentiality obligations contained in clause 6.4 remain in full force.

215. Secondly, Mr. Byam-Cook rightly drew attention to the fact that the SFA did not contain any promise on Prysmian's part that it would, come what may, engage a shipyard to build a CLV using the Salt design. It was common ground that there was no such promise. Clause 1.1 referred to Prysmian's "firm intention" to build a Vessel based on a design by Salt. This was a statement as to Prysmian's intention, and (on the facts) this clearly was Prysmian's intention at the time of the SFA. It said nothing about the future. The first phase of work was "Concept Design". As Prysmian submitted, and as was borne out by the evidence, the purpose of a concept design is to see if an idea can or cannot potentially be brought to fruition. The second phase of the SFA, referring to "Tender Package", is to see if the possible build is feasible both technically and commercially, including at an acceptable price. At the time when the SFA was concluded, neither party knew or could know the answer to those questions. The evidence at trial indicated that there were a large variety of ordinary and legitimate reasons why a project might not move beyond the concept or tender package stage: shipyards might not tender; there may prove to be technical difficulties with the design; the project may be turned down by the board or high-level executives whose approval for a major shipbuilding project would inevitably be required; the cost may be considered too high; the market or proposed use for the vessel may have changed between the time when the concept design was commissioned and when the shipbuilding decision came to be made (Mr. Taddei referred in his evidence to a particular cable laying project which was no longer going to be performed).
216. The SFA therefore provided no guarantee to Salt that anything would happen beyond the work to be carried out for Phases 1 and 2, and for which they were guaranteed payment pursuant to the combination of clauses 2.2 and 2.3. Mr. Ashcroft relied, as part of the factual matrix, on a document which indicated that Salt's pricing for Phases 1 and 2 did not reflect its full cost, and was to some extent a "loss leader" with the substantial reward coming for the work on Phase 3: the SFA provided for € 1,652,000 to be payable for that phase. I did not, however, consider that this argument assisted in the construction of the SFA. It was Salt's decision as to how to price its work, and how to split the price between Phases 1 and 2 (where it could be assured of payment) and later phases (where there was uncertainty). The important point is that the SFA clearly reflects the uncertainty as to whether or not the Project would materialise and whether Salt would ever be paid for anything beyond Phases 1 and 2. There was, therefore, always a risk that whilst the design work might start, no shipbuilding contract for the Salt-designed CLV might actually end up being concluded. That risk was, as Prysmian submitted, all the greater given that the contemplated vessel was highly specialised and as such its eventual build cost would have been largely unknown, and there had been no pre-approval from Prysmian's board for the shipbuilding contract.
217. Against this background of uncertainty as to how things might work out, it is unsurprising that the SFA provides, in clauses 2.2 and 2.3, for different schemes depending upon whether the Project did or did not materialise. The wording indicates that the parties were agreed that a different way forward would apply in the event that the Project did not materialise, with no Phase 3 and Phase 4 work being carried out unless Prysmian elected to request it. Prysmian submitted, and I agree, that given the

uncertainties at the time of the SFA surrounding the outcome of the ship construction tender exercise, it makes commercial sense that there might come a time when Prysmian no longer wanted to proceed with building a CLV at all or with Salt as the designer, and to that end would want to be able to go back to the drawing board.

218. In relation to the first issue identified, in paragraph 200 above, I conclude as follows. Construing the SFA as a whole, and in the context of a fast-track project with a defined date for consideration of whether the Project had materialised in the uncertain world in which the parties concluded the SFA, Salt's exclusivity came to an end if the Project did not materialise or a shipbuilding contract was not concluded by 31 January 2018. In relation to the second issue, I have accepted Prysmian's submission as to what is meant by "the Project", and therefore reject the various alternatives which were advanced by Salt. Given that the Project had not materialised by 31 January 2018, and that no shipbuilding contract had been concluded by that time, Prysmian was indeed entitled to look elsewhere. They were no longer committed to Salt as an exclusive designer for its CLV. I therefore turn to the third issue.

Was the failure of the Project to materialise, and the failure to conclude a shipbuilding contract, brought about by Prysmian's own act or default or breach?

219. Salt contended, relying upon *Chitty on Contracts* paragraph 24-033, that Prysmian could not rely upon the non-satisfaction of a condition precedent if it had prevented its occurrence by its own act or default or breach. Prysmian did not dispute the principle, but submitted that the court should reject the argument because Prysmian did no such thing.
220. This argument requires consideration of the events which occurred during the period between mid-December 2017 and 31 January 2018. These are covered in outline in Section B above and in more detail, in the context of the confidentiality arguments, in Section E below. I did not understand Salt to rely, in the context of its case that the actions taken by Prysmian brought about the failure of the condition precedent, on anything that was done prior to around 19 December 2017, when (on Salt's case) Prysmian authorised or encouraged Vard to produce an alternative design using Salt's design documents. For example, it was not suggested that Prysmian was required to accept any of the shipbuilding offers which had been received in response to the September 2017 RFQ, or indeed that it was required to accept any of the later shipbuilding offers, and that its failure to do so meant that the principle in *Chitty* paragraph 24-033 was applicable. Had such an argument been advanced, I would have rejected it. As previously discussed, there was no commitment by Prysmian to Salt that it would conclude a shipbuilding contract using the Salt design. The context of the contract was that the decision as to whether or not to do so would be based by Prysmian upon commercial and technical considerations, and these necessarily included questions such as the price being offered by shipyards and the risks involved in the terms which were being put forward.
221. In those circumstances, and subject to a possible argument concerning breach of the exclusivity provisions, I consider that there is nothing in Salt's argument that Prysmian brought about the failure of the condition precedent by its own act or default or breach. The factual position is that Prysmian did expressly include in its 27 September 2017 RFQ a pre-condition that tendering yards engage Salt as designer, and (as described in Section B above) it obtained written confirmation to this effect from the yards.

Prysmian could obviously not control which yards responded to the tender and on what terms. In the event, only 3 of the 8 yards responded: Vard, Damen and PaxOcean. A process ensued of Prysmian, with considerable input from V.Delta, evaluating and comparing the offers received. The process also involved Prysmian seeking, naturally enough, to reduce its potential cost. This included the best and final offer (BAFO) exercise launched on 19 January 2018.

222. The position that had been reached in January, and certainly by the end of January, was that there were legitimate commercial considerations which meant that Prysmian cannot be criticised for not accepting any of the offers which were made. Indeed, in the end I did not understand Salt's case in this regard to posit that Prysmian should have accepted any of the offers within the 31 January 2018 deadline. As might be expected, there were identified benefits and disadvantages of each offer. The Damen offer was problematic, because it did not yet own a shipyard where the CLV could be built. PaxOcean was, certainly in terms of price, the front-runner. But the documents show that price was far from the only consideration, and that Prysmian and V.Delta had concerns about quality. Those concerns did not exist in relation to Vard, which in all respects other than price – and in particular in terms of quality – was ahead of the other two participants. However, it is obvious from the documents that the price of Vard's offering was a significant concern for Prysmian, and indeed this lies at the heart of what Salt contends are the reasons why Prysmian sought or authorised an alternative design using Salt's design work. At the end of January 2018, further issues arose with PaxOcean, who were requiring Prysmian to take responsibility for certain risks arising from the use of Salt as an external designer. The upshot of all this was that the decision as to whether Prysmian should enter into a very significant shipbuilding contract, costing well over € 100 million whichever offer was accepted, was far from straightforward. Prysmian's failure to do so cannot in itself be relied upon as having brought about the situation where the Project had not materialised by 31 January 2018 and no shipbuilding contract concluded so as to render the principle in *Chitty* applicable.

Breach of the exclusivity provision in clause 1.1

223. A question remains, however, as to whether this conclusion is potentially affected by Salt's argument that, prior to 31 January 2018, Prysmian breached the exclusivity agreement in clause 1.1 by, in substance, agreeing with Vard in December 2017 that it could and should produce an alternative design. Mr. Byam-Cook rightly accepted in his closing submissions that if this had indeed happened, it would have been a breach of the exclusivity provision. He argued, however, that any such breach had no consequence. It had no material impact on the failure of the Project to materialise, and a shipbuilding contract being concluded, by 31 January 2018. It is a breach which would give rise to nominal damages only.
224. For reasons which will become apparent when I discuss in Section E the factual position in December 2017 and early 2018, in the context of the confidentiality issues, I consider that Prysmian was in breach of the exclusivity provisions in clause 1.1. However, I also agree with Mr. Byam-Cook that such breach had no material consequence either in terms of bringing about the situation where the Project failed to materialise by the end of January 2018, or in terms of damages.

225. As far as the former is concerned, and the applicability of the principle in *Chitty* paragraph 24-033, I do not consider that the breach of the exclusivity provision was an effective cause of the failure of the Project to materialise by 31 January 2018 and the failure to conclude a shipbuilding contract by that time. The reasons why those things did not happen were those described above. In January, and certainly by the end of January, there were problems with the Damen offer including the absence of a yard, and problems with the PaxOcean offer, which had increased in price in its BAFO and where there were issues relating to the responsibility for the use of the Salt design. As far as the Vard offer was concerned, the position throughout December 2017 and January 2018 was that the price that Vard was offering for building to the Salt design was considered by Prysmian to be too high. This meant that, at the end of January 2018, as Mr. Taddei said, the Salt project had not produced an offer that Prysmian found commercially acceptable. It cannot in my view be said that, but for Prysmian's breach of contract in relation to the discussions concerning an alternative Vard design, Prysmian would have concluded a shipbuilding contract by 31 January 2018 with any of the three shipyards which had tendered. It certainly cannot be said that Prysmian would have concluded a contract with Vard for construction on the basis of the Salt design, because Vard was considered too expensive. In view of the cost, PaxOcean remained, as at the end of January, the favoured candidate. Their price was lower than Vard and they were going to use the Salt design. But other problems had emerged at the end of January with PaxOcean – problems which had nothing to do with Prysmian's breach of the exclusivity provisions – and the documents show that Prysmian was trying, together with Salt, to deal with PaxOcean's concerns.
226. As far as the latter is concerned, I do not see how any breach of the exclusivity provisions in December 2017 can lead to an award of substantial damages in favour of Salt, either on the facts or the law. As far as the facts are concerned, I have already concluded that, by 31 January 2018, the breach of the exclusivity provision was not an effective cause of the failure of the Project or the non-conclusion of a shipbuilding contract. On the basis of my interpretation of the SFA, Prysmian was then entitled thereafter to deal with other designers. Accordingly, no substantial loss flowed from this particular breach. As far as the law is concerned, Mr. Byam-Cook referred to the principle that a party is presumed, in the context of assessment of damages, to have performed in the way that is most favourable to him; ie with the least onerous contractual performance or the one conferring the smallest level of damages see *Chitty para 26-083* and eg *The Mihalis Angelos* [1971] 1 QB 164. Since Prysmian was able, after 31 January 2018, to deal with another designer, it must be assumed that, had there been no breach, Prysmian would have exercised their right to deal with an alternative designer after 31 January 2018 – as indeed Prysmian did, in its dealings with Vard. No damages therefore flowed from the fact that Prysmian jumped the gun by dealing with Vard in December 2017.

Conclusion

227. I therefore conclude that the “vanilla” damages claim fails. This is because Prysmian was entitled to deal with an alternative designer after 31 January 2018, and because the failure of the Project to materialise or for a shipbuilding contract to be concluded was not the result of any relevant act, default or breach on the part of Prysmian.

228. I also conclude that there was (for reasons which will be developed in the context of Section E below) a breach of the exclusivity provisions, clause 1.1, in December 2017. However, Salt is only entitled to nominal damages for such breach.

Damages

229. In view of my conclusion that the “vanilla” damages claim fails, the arguments as to quantum do not arise. I have considered whether I should nevertheless address them in view of the possibility of a successful appeal against my decision on liability for breach of contract, or because they may have an impact on issues which may arise in the context of damages for breach of the confidentiality obligations.
230. I consider that the possibility of a successful appeal against my decision is not, in the present case, a reason to address the complex points on quantum in detail. There is substantial evidence available which will enable such arguments to be addressed, should there be a successful appeal.
231. I also consider that it is undesirable to do so, in circumstances where the issue of damages on this head of claim does not arise, but where arguments will in due course arise in relation to the assessment of damages for breach of confidence. It may be that some of the evidence previously given, in the context of damages for the plain vanilla case, may be relevant to the arguments which later arise. That evidence can be referred to at that stage. But if I were to reach conclusions on quantum issues which do not arise at the present stage, in view of my decision as to breach, it is possible that they would then be relied upon in the different context of arguments as to damages for breach of the confidentiality provisions. I consider that it is preferable for those arguments to be addressed on the merits, when they have been fully developed, so that any relevant evidence given in this trial can be considered in the context of issues which actually arise, rather than issues which (as a result of my finding on breach) do not arise.

Section E: Breach of confidence

E1: The contract and the parties’ primary arguments

232. Salt’s primary case as to breach of confidence is based upon the express provisions of the SFA. The relevant provision is clause 6.4 which it is convenient to set out with the addition of numbered brackets for each paragraph of the clause:

“[1] The design, data, documents and know-how and all relevant copyrights, patents or other intellectual property rights related to the Scope of Work supplied by the Designer under this Contract shall remain the intellectual property of the Designer, even if not specifically so marked. However, any relevant copyrights, patents or other intellectual property rights supplied by the Client shall remain the property of the Client.

[2] Both parties acknowledge that secrecy related to proprietary design solutions is of utmost importance, and no documents describing design solutions based on input provided by the Client, related to topside layout details, mission critical equipment or interface of such equipment into the Vessel, can be

made accessible to third persons without Client's and Designer's prior consent – unless such design solutions are, or in the future comes into public domain. For the avoidance of doubt, the aforementioned shall not prevent the Client to use such documents for the purpose of marketing the Vessel to its client(s) or for tendering purposes. Furthermore, the parties will agree on a design presentation, including 3D rendering of the Vessel and key vessel information which can be used by both parties when presenting the vessel to third persons.

[3] The Client may disclose relevant documentation only to its suppliers and employees on a need to know basis. The Client is not entitled to send or make available the General Arrangement and/or Building Specification as a complete document to a third party, including any suppliers, but excepting the Yard, without the prior approval of the Designer”.”

233. At its simplest level, Salt contended that there had been a clear breach of [3] in December 2017, and indeed thereafter, when Prysmian had “made available” the General Arrangement and the “Building Specification”, as a complete document, to a third party, namely Vard Design AS. This was done for the purposes of enabling Vard to produce its alternative design which resulted initially in Vard GA Rev 2 produced to Prysmian on 3 January 2018, and then in subsequent iterations of the Vard design. Salt's case was that there had thereby been an impermissible disclosure by Prysmian to Vard, in breach of [3].
234. Salt contended that since this was a case where complete documents expressly referred to in [3] had been made available to Vard Design AS, it was unnecessary to consider [2] in any detail. If necessary, however, Salt contended that there had been a breach of that part of clause 6.4 as well.
235. It is to be noted that all of the confidential information relied upon in these proceedings was contained within and formed part of the GA itself, or the Specification, or attachments thereto. Salt's Single Line Diagram, or SLD, was itself also contained within the Specification. The “Makers List” was referred to within and attached to the Specification. There was therefore nothing relied upon which fell outside the scope of [3], and Prysmian did not contend to the contrary.
236. In response to this case, Mr. Byam-Cook correctly emphasised that Prysmian needed to be distinguished from Vard. They were not one and the same. Vard was not party to the present action. Although Prysmian had called two witnesses from Vard, Mr. Byam-Cook was not representing Vard in any shape or form, and was not there to defend the conduct of Vard. Prysmian invited the court to treat both of the Vard witnesses as reliable, and to that extent Prysmian relied, where relevant to the issues concerning Prysmian, on their evidence.
237. From that important starting point, Prysmian's primary case was that it was not liable for such steps as Vard and Vard Design took in December 2017 and January 2018, nor with regard to Vard GA Rev 2. Those steps, and that GA revision, were taken without Prysmian's involvement. Put another way, to the extent Vard GA rev 2 was a

springboard, it was not Prysmian's springboard. Whatever Prysmian may or may not have done thereafter cannot retrospectively change that.

238. As far as concerns the period from February 2018 onwards, Prysmian's primary case was that nothing that it did was a breach of clause 6.4. Clause 6.4 did not prevent the use of the Salt design documents, as documents, in that period. On its true construction, clause 6.4 only prohibits the disclosure by Prysmian of the documents. It does not prohibit use. On the facts, Vard had already, and independently of Prysmian, disclosed the Salt documents to Vard Design AS in December 2017. Prysmian cannot be liable for that disclosure. Nothing that Prysmian did thereafter amounted to a disclosure of Salt's documents to Vard Design AS. That disclosure had already happened in December 2017.
239. In the context of this submission, Prysmian emphasised that it was inappropriate to look to broaden the scope of clause 6.4 to protect against, for example, use of the Salt documents by Vard or Vard Design AS. That topic was a matter for the general law, and had been left as such by the SFA. Salt had deliberately chosen not to sue Vard or Vard Design AS.
240. For the purposes of both of these submissions, Prysmian emphasised the importance of looking carefully at the chronology. Salt did not disagree with the need to look carefully at the chronology, but submitted that this showed that there had been improper disclosure in December 2017 and that Prysmian's case that it was unaware of the use being made of the Salt design documents should be rejected.
241. In addition to the primary submissions set out above, each side put forward additional or alternative arguments. However, it is not necessary to set these out at this stage. The extent to which they arise, if at all, depends to a large extent upon my findings of fact as to what actually happened.

E2: Some basic facts and conclusions

242. I have set out in Section B a broad chronological account of the relevant events. I now focus in more detail on aspects of that chronology, in particular the December 2017 – February 2018 period. It is appropriate to start by identifying a number of facts which I consider to be beyond dispute or clearly established by the evidence and which are relevant when considering the parties' arguments.

E2.1: The GA Plan and Specifications - Salt notations and industry practice

243. The Salt GA, which was submitted to Prysmian and then shipyards as part of the September 2017 RFQ, contained the notation: "This drawing is the property of Salt Ship Design AS and must neither be reproduced nor handed over to any third party without our written consent". Salt's Single Line Diagram or SLD had the same notation. Separately, the Salt Specification which formed part of the September 2017 RFQ contained, on each page, the notation: "© Salt Ship Design AS".
244. There was nothing surprising about these notations. They reflect the confidentiality of these documents expressly provided for in clause 6.4 [3], and which would be recognised as obvious by parties in the industry dealing with designers and design documents of this kind. Thus, Mr. Taddei said in his evidence, when describing the

design tender phase in early 2017, that documents produced by one tenderer were not shared with other tenderers during that process. He agreed that this was because the documents and information, with which Prysmian were being provided, were confidential and would reflect preliminary design ideas and solutions being put forward by the various tenderers.

245. Subsequently, when asked about the documents provided to Vard at the shipbuilding tender phase, Mr. Taddei readily agreed (Day 3/page 13) that the Salt design documents should never have been made accessible to Vard Design AS for the purpose of considering them when they were working on a rival design for the Prysmian newbuilding CLV. As he said, the purpose of the tender package was to be the Salt design. Mr. Haugan, when showed the wording at the bottom of the Salt GA plan and asked whether he would have noted it, said:

“A: Which we complied to. Which we always comply to.

Q. I haven’t asked you about that yet. You would have noted it at the time that you received the documents, wouldn’t you.

A. Even if I didn’t, I know what confidentiality is.”

246. The importance of confidentiality of design documents in the industry is also clear from other aspects of the evidence. Mr. Urke gave evidence as to the standard practice of the Vard group. This was to ensure that Vard Design AS would have no access to any design documents which had been provided by an external designer to the shipbuilding entities within the Vard Group for the purpose of building a vessel. The evidence of Mr. Simpson, Prysmian’s naval architect expert, was that he would not generally expect a client who had received confidential design documents to pass those confidential design documents to a rival designer and ask him to benchmark his rival design against the original designer’s documents. He also said that he would not expect, as a matter of general industry practice, a client to pass an original designer’s confidential design documents to a rival designer and ask the latter to perform a GAP analysis, comparing for example its GA and building specification against the original designer’s GA and building specification. In all of Mr. Simpson’s lengthy experience, he had never encountered this being done.
247. This industry background is in my view a relevant part of the factual matrix against which the parties’ rival constructions of clause 6.4 of the SFA – to the extent to which there were any material differences between them – should be considered. But, in any event, the key documents with which I am concerned in the present case – Salt’s GA and Specification – are addressed in clear terms in paragraph [3] of clause 6.4. There is no room as a matter of ordinary language for any interpretation other than that these documents, as complete documents, could not be sent or made available to third parties, including Vard Design AS. In so far as Prysmian’s arguments suggested otherwise, or put forward a more complex construction – for example a construction aimed at permitting disclosure to third parties of particular items within the GA plan and specification which were within the public domain – I reject such arguments as a matter of the ordinary interpretation of the relevant words used in the light of the industry factual matrix which I have described.

E2.2: Vard Design AS is a third party

248. There were aspects of Prysmian’s opening submissions which suggested that disclosure of documents covered by clause 6.4 to Vard Design AS, for the purposes of assisting its alternative design, was permissible because the tender package had originally been provided to Vard Group AS or Vard Singapore Pte for the purposes of the shipbuilding tender. This was not, however, a point which Mr. Byam-Cook advanced in his written closing submissions. In his oral closing submissions, he rightly accepted that Prysmian could not make the Salt design available to Vard Design AS. The design documents had been given to “Vard the builder” for the purposes of making an offer to build the ship according to the Salt design. They had not been given for the purpose of an alternative design.

E2.3: Vard and Vard Design AS used the design documents in various ways in connection with their alternative design

249. Mr. Byam-Cook made it clear, on a number of occasions, that he was not here to defend Vard, emphasising that no claim had been made against them. I am also conscious that Vard is not party to the present proceedings, and has not been legally represented in the proceedings before me (although I was told that they did have legal representation). Nevertheless, the conduct of Vard has inevitably come under scrutiny in these proceedings, with two Vard witnesses giving evidence and Prysmian inviting me to say that the evidence of both witnesses is reliable. By contrast, Salt has submitted that one of those witnesses, Mr. Haugan, was combative and defensive and that his evidence should not be relied upon. They submitted that Mr. Urke was generally a reasonable witness, but invited me not to accept all of his evidence, in particular about the meeting on 7 February 2018.

250. Whilst the confidentiality issues in this case are properly focused on Prysmian’s conduct and alleged breach, it is obviously necessary to consider carefully what Vard did. This is relevant, for example, because Salt’s case is that Vard’s conduct was condoned or acquiesced in by Prysmian, and because Prysmian and Vard were interacting in relevant ways throughout the December 2017 – January 2018 period. It is also relevant because there are issues as to whether any breach of confidentiality had any practical consequences, in terms of Vard’s design and in particular the 52 (now reduced to 32) items on which Salt particularly rely as being material similarities between the Salt and Vard designs. The conduct of Vard’s senior individuals at this time, upon which they were cross-examined, is also in my view relevant when I come to consider their reliability as witnesses.

251. For present purposes, it is sufficient to say that it is clear, and indeed not significantly disputed, that Vard Design AS used Salt’s confidential design documents at various stages during the period December 2017 to April 2018. It is also clear, and again not significantly disputed, that some of that use in the later period was at the express request or instruction of Prysmian itself. The broad chronology is set out in Section B above, and the principal ways in which the documents were used by Vard can be summarised chronologically as follows.

(1) Initial copying and handover to Mr. Urke in December 2017

252. It is clear that Vard copied and then used the Salt documents during the course of their work over the Christmas period 21 December 2017 to 2 January 2018 (I here use the word “copied” to mean making a copy, rather than to denote that features were incorporated into the Vard design – an issue that I consider later). As described in Section B, this process began when Mr. Haugan put the Salt design documents on a thumb drive and then took this to Norway and handed over the thumb-drive to Mr. Urke. The evidence, that the documents were provided this way to Vard Design AS, was not contained in Mr. Haugan’s witness statement (or in Mr. Urke’s), but only emerged in Mr. Haugan’s oral evidence. I have considerable difficulty in seeing how Mr. Haugan could have understood this to be permissible, bearing in mind his evidence, described earlier, that he understood confidentiality and would have been aware of the notations on the Salt GA plan and the Specification. The GA plan notification was clear and unsurprising: “it must neither be reproduced nor handed over to any third party without our written consent”. Yet Mr. Haugan made a copy on a thumb drive which he gave to a senior individual, Mr. Urke, in Vard Design AS.

253. Mr. Haugan was asked why he had not sought Salt’s consent to hand over the Salt design documents to Vard Design AS;

“Q. Mr Haugan, when you decided to hand over the Salt Ship Design documents to Vard Design AS, for them to take into account to work out whether Vard Design AS could prepare an alternative design, you did not seek or obtain Salt’s consent to do that, did you?”

A. No, I did not, and I did not because Vard Singapore, Vard Design, Vard Electro is the same group. I don’t consider that as a third party, which you are trying to imply.

Q. You never sought Salt’s consent for the construction tender documents to be passed over to Vard Design AS for any purpose, did you?”

A. I never – you see when we are bidding for the construction of a vessel, in this case external designer, we have to pass various information from the designer to various suppliers in which we will keep the source, in this case the designer, discrete. Then when it comes to Vard Design AS, which I notice you make a big fuss out of, I didn’t consider that to be a third party. But because this is an external designer I didn’t pass this information to Mr Urke only until we reached to the point where I am sure you will raise and come to later.”

254. These were in my view unimpressive and unreliable answers. Vard Design AS was clearly a separate company within the Vard group. Vard’s presentations to Prysmian in November 2017 and February 2018, identified and described it as such. Furthermore, the importance of distinguishing Vard Design AS from other companies within the group, in the context of designs produced by other designers, was reflected and indeed emphasised by the existence of the standard practice of the Vard group, as explained

by Mr. Urke, namely: to ensure that Vard Design AS would have no access to any design documents provided by an external designer to the shipbuilding entities within the Vard Group for the purpose of building a vessel.

255. In the light of the above, Mr. Haugan's answer in cross-examination that they "always comply to" the confidentiality wording at the foot of Salt's GA plan rings hollow and I do not accept it.
256. At around the time that Mr. Haugan handed over the thumb-drive to Mr. Urke, they participated in discussions relating to the feasibility of Vard doing the necessary work for a Vard alternative design. The question of the extent to which the Salt design documents were used, for the purposes of those discussions, was the subject of evidence from both Mr. Haugan and Mr. Urke.
257. Mr. Haugan's witness statement as to these discussions was brief. In paragraph 18 of his first witness statement, he described the submission of Vard's third revised quote to Prysmian on 19 December 2017. In paragraph 19, he referred to his exploration of other means of reducing costs, which V.Delta had urged Vard to continue to do. Mr. Haugan's exploration resulted in him identifying that replacing an external vessel design with Vard's in-house design would significantly reduce the cost of building the vessel. In paragraphs 20 and 21, he identified in some detail the risks involved in having design and construction undertaken by separate entities and the benefits of having Vard do the whole design process. In paragraph 23, he described sending the third revision of the quotation to Prysmian on 3 January 2018. The preceding paragraph briefly gave Mr. Haugan's account of his dealings with Mr. Urke at that time:

"With Vard in-house design being considered as a potential major cost-saving measures, I reached out to Mr Urke and asked if it was a possibility to propose to Prysmian that Vard could offer an alternative package with Vard Design AS undertaking the necessary design and independently resuming the design work for the VARD 9 04 design and updating the design according to the new technical requirements. As elaborated in Mr Urke's witness statement, after a careful evaluation, we found that Vard had the capacity and capability within the required timeline to do so."

258. The circumstances of the provision of the thumb-drive to Mr. Urke, and the discussions at that time, were explored in cross-examination. Mr. Haugan was asked again (in the cross-examination beginning at page 27 of the transcript for Day 4) as to whether he had sought Salt's consent to hand over the documents. Mr. Haugan repeated his evidence that he did not consider Vard Design to be a third party supplier. His lengthy answer was to the effect that the hand-over of the documents was all about resourcing. Mr. Haugan said that he needed Mr. Urke's assurance that he had the resources available, since they were "way behind design development at the time". He said that this (by which I understood him to mean the handing over of the Salt documents) went "much broader than about GA revision 2. This was about us having the resources available for us to be able to make Prysmian confident that we actually had the resources available to develop the GA to their requirement and satisfaction without compromising their schedule". Mr. Haugan returned to the topic of resourcing when

asked specifically why Vard had not followed their normal practice of not giving Vard Design AS access to the work of external designers. Mr. Haugan's response was:

“I had to have this discussion with design manager of Vard Design, for me to be certain that we had the resource available for the next three or four months in the event that we were to propose something like that”.

259. At the time that this evidence was given, I was puzzled and indeed troubled by the idea that it was necessary, let alone appropriate, for Salt's design documents to be given by Mr. Haugan to Mr. Urke for the purposes of a discussion about resourcing, on which Mr. Haugan in his oral evidence was placing considerable emphasis. There was much evidence in the case, adduced by Prysmian, to the effect that Vard was a very substantial and large organisation, and that Vard Design AS was itself a substantial and experienced design company. I could understand the need for a discussion about resourcing in general terms, particularly if there were a need to do a fair amount of work urgently. But I had difficulty in seeing why it was necessary for Salt's design documents to be handed over for the purpose of that resourcing discussion, and all the more so if (as Mr. Haugan's answer on this topic indicated) the question was one of resourcing over a period as long as 3-4 months. I accordingly asked Mr. Haugan about this issue at the end of his evidence:

“MR JUSTICE JACOBS: Why in order to have the discussion about resourcing do you need to hand over Salt's design work?

A. Yes, I guess I didn't have to do that but I did it as we anticipated that Prysmian would compare our GA with Salt GA, which after all was the construction tender requirement. And Mr Urke hadn't been involved in this project since we – since the design tender phase. So for us at the time it made sense to share the tender documents at the time we were contemplating proposing an alternative design.

MR JUSTICE JACOBS: Now you just said that you anticipated that Prysmian would compare your GA with the Salt GA. Was that something which you had discussed with Prysmian?

A. No.”

260. In my view, it is clear (as Mr. Haugan acknowledged when I asked him about the issue) that he did not need to give Mr. Urke the Salt documents for the purposes of a discussion about resourcing. It was, however, only after emphasising resourcing on a number of occasions that Mr. Haugan accepted that he did not have to hand over the document for that purpose. In my view the reason for handing over of the Salt documents was to assist the work of Vard Design AS on their alternative design, not least because Vard was “way behind design development at the time.” These are matters which I take into account when assessing the reliability of Mr. Haugan as a witness.
261. In that context, however, it is fair to recognise (as Mr. Byam-Cook submitted in his oral closing) that Mr. Urke had accepted in his witness evidence that Vard had used the Salt design documents for purposes other than resourcing, and that Mr. Haugan had

expressly referred to Mr. Urke's evidence in his own witness statement. To my mind, these cross-references in Mr. Haugan's written evidence to Mr. Urke's evidence did not counterbalance the impact of Mr. Haugan referring on a number of occasions, in his oral evidence, to the significance of resourcing.

262. Mr. Urke's written evidence accepted that Vard had used Salt's design documents in the context of its work on Vard's alternative design. Mr. Urke's written evidence, as to his initial involvement with the events at the time, was that he was asked if it was "a possibility to propose to Prysmian, as an alternative package, that Vard (through Vard Design AS) also undertook the necessary design in addition to constructing the vessel". His evidence then continued:

"29. To ensure that it was a feasible proposal to make, Mr Haugan, myself and a technical manager from Vard Design AS and a Vard ship designer in Vard Singapore office evaluated the new functional and operational requirements put forward by Prysmian to see if Vard was in a position to independently resume the design work for the VARD 9 04 design (which had ended in May 2017) and update the Vard Design according to the new requirements.

30. As part of our evaluation, we were interested only to extract Prysmian's functional requirements for the Vessel, rather than on any particular design details or features, and on the basis of those requirements, work out whether Vard had the necessary resources to complete a design to meet those requirements in a document which was circulated with our quotation sent to Prysmian/V.Delta in February 2018 to show the functional requirements on which Vard had based its design development work."

263. Mr. Urke's evidence went on to explain how, with the benefit of Prysmian's "updated functional requirements", which had been obtained from the Salt design documents, Vard was able to identify the Skandi Africa as an appropriate reference vessel.
264. There are a number of aspects of Vard's use of the Salt documents in the context of Prysmian's "functional requirements" which are to be noted.
265. First, I cannot see how the use of Salt's confidential design documents, in order to extract supposedly non-confidential Prysmian's "functional requirements", for the purposes of Vard working on its alternative design, was or could reasonably have been understood to be either possible or permissible. The Salt design documents had been produced over a lengthy period as a result of a considerable amount of work on the part of Salt in conjunction with its client. Mr. Urke rightly accepted in evidence that the process of designing a specialist ship is a collaborative process, involving discussion over many months on a large number of points. It involves a constant refinement of ideas and work in response to designs and suggestions made by the designer, input from the client, and further designs and suggestions from the designer. Mr. Simpson's evidence was that a good designer's input will influence, refine and change the client's design criteria, and that concept design is a collaborative process with much discussion and interchange of views about all sorts of requirements and design ideas.

266. I agree with Salt’s submission that no third party looking at the Salt design documents could possibly tell whether details within them were purely Prysmian’s requirements, or were the result of a process of discussion between the client and the designer, with the designer giving advice as to what to do. Mr. Simpson in his evidence rightly agreed that a third party could not know whether a particular design feature within the Salt design documents was suggested by or influenced by the designer, and therefore could not know whether it was taking information that the designer had played some role in creating or specifying or designing. His only caveat to this was if and to the extent that the third party’s prior involvement and awareness of client’s requirements at the start allowed such discernment.
267. Secondly, I note that there is nothing in the SFA which suggests that disclosure of the GA and Specification, for the purposes of conveying Prysmian’s “functional requirements” is permissible. Clause 6.4 [3] prohibits the disclosure of those documents as complete documents. I did not understand Mr. Byam-Cook, in his closing submissions to contend that disclosure of the GA and Specification, for the purposes of the extraction exercise which Vard say that they carried out, was permissible. Furthermore, the concept of a “functional requirement”, and what would or would not constitute such a requirement, is elusive and unclear. The confidentiality provisions of the SFA do not use that expression. For all these reasons, it is unnecessary to consider any “functional requirement” argument further.
268. Thirdly, there was no document produced by Vard which identified the “functional requirements” which Mr. Urke extracted in December 2017. I note that since Vard was not a party to the proceedings, there was no disclosure of Vard’s documents in these proceedings, albeit that Vard did produce at least one document during the course of the trial upon request (the attachment to the GAP analysis e-mail). A later document, produced by Vard to Prysmian as an attachment to its 15 February 2018 quotation, did list out the “Main Functional Design Criteria”. This, however, was much later in the story. As will become apparent when I address the allegations of specific use of the Salt documents, I do not consider that the work of Vard Design AS, and those who carried out the design work in the Christmas period and thereafter, was confined simply to using a list of functional requirements which had been extracted, and then working entirely independently to create the Vard Rev 2 and subsequent designs.
269. I therefore cannot see how this use of Salt’s documents by Mr. Haugan and Mr. Urke, for the purposes of allegedly extracting Prysmian’s functional requirements and then utilising the information in Vard’s alternative design, was permissible. I also have considerable difficulty in seeing how they could have thought that it was permissible, bearing in mind the obvious confidentiality of those documents.

(2) Further copying of the Salt design documents within Vard

270. Again I use the word “copy” here to mean the making of copies. Mr. Haugan’s evidence in cross-examination is that he also provided the Salt design documents to three naval architects in Singapore. He was asked (transcript Day 4 pages 28 – 30) a series of questions as to why this was done. He initially denied that the documents had been given for the purposes of working on Vard’s alternative design, explaining that Mr. Ashish Kumar had originally been given the documents for the purposes of working on the construction tender. However, he accepted that the other two architects (Mr. Rajagopalan and Mr. Vimal Kumar) were only given the documents in around the

Christmas 2017 period in order to report to Mr. Ashish Kumar. He then agreed (“That could be correct, yes”) that the documents were made accessible to Mr. Vimal Kumar and Mr. Rajagopalan in late December 2017 for the specific purpose of assisting their work towards developing Vard GA revision 2. He was then asked the following questions:

“Q. Did you seek my client's consent to make Salt design documents available to Mr Kumar and Mr Rajagopalan for those purposes?”

A. No, I did not, and I did not assume that was required either. Because I guess the counsel don't expect that the documents received by Prysmian would only be seen by me for Vard to provide a €160 million offer for building a very complex vessel. Of course I have to share it with my colleagues. It goes without saying, Mr Counsel.

Q. Mr Haugan, there is all the difference in the world, isn't there, between sharing the documents, the Salt design documents with your colleagues for the purpose of working on the construction tender and doing something very different from that which is sharing the documents with your colleagues so as to facilitate them in preparing an alternative design. You would accept that surely?

A. Sharing the documentation with my colleagues had nothing to do with Vard developing their own independent design that is based on Vard's own experience, skill, and knowledge about that project. We had no reason to use Salt tender documents to develop our own independent design.”

271. Again, I regard that evidence as unreliable. The sharing of the documentation with Mr. Haugan's colleagues plainly did have something to do with “Vard developing their own independent design”, as Mr. Haugan's earlier answer (“That could be correct, yes”) accepted. I also do not accept that Mr. Haugan could reasonably have thought that Salt's consent was not required for disclosure to his colleagues in the context of Vard Design AS working on an alternative ship design, this being (as Mr. Ashcroft's question rightly said) very different to sharing documents for the purposes of working on the construction tender.

(3) Work during the period 21 December 2017 to 2 January 2018

272. During the period between 21 December 2017 to 2 January 2018, the naval architects in Singapore worked hard, on any view, in producing what became Vard GA Rev 2. This was done in a short space of time. The precise extent to which they used and drew upon the Salt design documents during that period of time is in dispute. The thrust of Mr. Haugan's evidence, taken as a whole, was that the documentation had not been used at all. As he said in the answer quoted above: “We had no reason to use Salt tender documents to develop our own independent design”. Later on in his evidence, Mr. Haugan denied that the three naval architects had, when producing GA revision 2, relied upon months of iterative design work that had been performed by Salt. His answer was

that GA revision 2 was based on what Vard knew about the project from the design tender phase, on its good reference vessel (the Skandi Africa), its Vard Revision 1 and its in-house knowledge. As will become apparent, I do not accept this evidence. But I note that Mr. Haugan is not a naval architect. He worked on the commercial aspects of Vard's business, and he was not in a position to assist on the extent to which the three naval architects in Singapore had drawn on Salt's design documents.

273. Mr. Urke is a naval architect, with considerable technical knowledge. However, he was not involved in the detailed work that was carried out by the three naval architects during the Christmas and new year period. He explained in evidence that he was not the responsible designer of the vessel, but was monitoring the process. Sensibly, he accepted that he could not comment on whether the naval architects in Singapore were interested in particular design details and features that they could see in the Salt design documents. He said that he did not know what went through their heads, but could see the result of what they presented.
274. None of the three naval architects in Singapore provided witness statements for the purposes of the present proceedings. Mr. Urke's evidence was that he had shown or received some comments on his witness statements from at least one of those architects, Mr. Ashish Kumar. I was not provided with any clear explanation as to why none of these architects had been called as witnesses. There was no suggestion that any of them were unavailable to Prysmian as witnesses. I return later to the consequences of the decision not to call any of these individuals as witnesses.
275. A very large volume of expert evidence was provided by Mr. Cave and Mr. Simpson, and each was cross-examined at some length. My conclusions in relation to the specific items (originally 52, now 32) which Salt alleges were derived from its designs are contained in the appendix to this judgment.
276. For present purposes, it is sufficient to identify some broad conclusions.
277. First, there is no doubt at all that the Salt design documents were used by Vard for the purposes of their work on Vard Rev 2 during the December 2017/ January 2018 period. Mr. Urke's evidence as to the extraction of functional requirements establishes that.
278. Secondly, I have no doubt that the use of the Salt design documents during that period was extensive, and that it went beyond simply extracting data relating to Prysmian's functional requirements, whatever that might mean. This does not mean that Vard set out simply to copy Salt's designs. Clearly, they did not. They used their own reference vessel, the Skandi Africa, as an important part of their work, and there was no dispute that Vard GA Rev 2 was not simply a "facsimile" or reproduction of Salt GA Rev 14. It is also clear that even within Vard GA Rev 2, and certainly as Vard's work on the ship developed thereafter, there were a large number of design features which were very different to those which had been developed by Salt.
279. However, the Vard designers in my view unquestionably drew upon Salt's design documents in order to inform and assist their own design in Vard GA Rev 2, with the obvious purpose of hoping to satisfy Prysmian that their design would be just as good as the Salt design. Mr. Haugan said in his evidence that they anticipated that Prysmian would compare its GA with Salt's GA "which after all was the construction tender requirement", although he said that this was not something that he had discussed with

Prysmian. Vard had of course been involved in the initial design tender phase carried out in early 2017. But Salt had won that tender, and Vard had lost. It would have been obvious to Mr. Haugan – even if he had not seen the September 2017 tender documents – that things would have moved on very considerably, in terms of vessel design and what Prysmian wanted, once Salt had won the tender and carried out the usual extensive iterative work with its client. If Vard were to persuade Prysmian in early January 2018 that Vard could produce what Prysmian wanted, they knew that they could not simply repeat the design that had been presented in the design tender phase, where Salt had been selected. The Salt design documents told Vard how things had moved on, and what it was that Prysmian, with the benefit of Salt’s advice and design, were now looking for. The Salt design documents were therefore the obvious place to look in order to see what it was necessary for Vard to do in order to achieve Prysmian’s up-to-date design goals.

280. If Vard were to produce an acceptable design, particularly in a short period of time, then its options were limited. As Mr. Ashcroft submitted in his written closing, it was obvious that Vard and Vard Design would have to use the Salt design documents to prepare anything like a design that Prysmian might be happy with. They could not otherwise know what design details Prysmian was wanting and expecting as at late 2017. Obviously, what they knew from the design tender phase, which they had dropped out of in May 2017, was limited and outdated.
281. There were, as it seems to me, three other possible ways forward. First, Vard and Prysmian could have asked for Salt’s consent, in December 2017 or thereabouts, for their design documents to be given to Vard Design AS for the purposes of their alternative design. No doubt it was thought to be highly unlikely that such consent would be forthcoming, and no such request was made. Salt would also, no doubt, have immediately pointed out that they had been appointed exclusive designer, and that the commissioning of an alternative design was a breach of contract. This, indeed, was a point which Salt immediately took when Mr. Taddei broke the news to Salt on 8 March 2018 that (following work and discussions on the alternative design over the previous months which had not been revealed to Salt) Prysmian was going to use a shipyard design. Secondly, Vard could have taken steps to ensure that its designers knew nothing about the Salt designs, so as to avoid any argument that they had been used. This clearly did not happen. Thirdly, it would in theory have been possible for Vard and Prysmian to sit down together in December 2017 and thereabouts in order to have a discussion about Prysmian’s requirements as they now were. Such discussions at that stage would have of course have risked Prysmian being in breach of the exclusivity provisions of the SFA. Also, it may not have been easy to have detailed discussions, consistent with respecting the confidentiality obligations in the SFA. However, it might have been possible, consistent with those obligations and without disclosure of Salt’s GA and Specification, to have a high level discussion about the new things that Prysmian was looking for. Again, however, this did not happen.
282. Indeed it is a relevant fact, when it comes to considering the key issue of Prysmian’s knowledge in December 2017 of Vard’s use of the Salt design documents, that there is no evidence that Prysmian had any meetings or discussions with Vard in order to explain what it was now wanting and expecting. If, as I consider below, Prysmian was aware in December that Vard was starting to work on an alternative design, how did

they think that Vard could do this sensibly without being told what Prysmian was now expecting, other than through the use of Salt's design documents?

283. Thirdly, there is in my view other substantial evidence that the Vard designers drew upon Salt's design documents in order to inform and assist their own design in Vard GA Rev 2. This is covered in the confidential appendix to this judgment. However, I will identify a few points at this stage.
- i) It is in my view a striking feature of Vard GA Rev 2 that it was produced in such a short space of time, over the Christmas period. Yet it contained (albeit without supporting calculations) a similar level of detail as Salt GA Rev 14, on which Salt had worked for many months. It is in my view difficult to see how this could have been achieved without extensive use of Salt GA Rev 14. Indeed, in important respects, the use of Salt GA Rev 14 and Specification is accepted; since Vard would not have known Prysmian's "functional requirements" without it.
 - ii) Mr. Urke accepted in his evidence that the 3 naval architects in Singapore would have relied heavily on the Salt design documents, albeit "only to understand the new requirements from Prysmian". Since, for reasons explained, pure "Prysmian requirements" cannot be extracted from Salt's design documents, Mr. Urke's qualification means little or nothing. The position is that if the 3 naval architects used the Salt design documents to seek to understand what it was that Prysmian now wanted, then they were using the confidential design work of Salt.
 - iii) This is a case where Vard had previously provided a design for Prysmian's CLV. It is therefore possible to see how Vard were envisaging the CLV at that stage, and how they later designed it as part of Rev 2. It is in my view clear that, in material respects, Vard departed from their prior thinking and adopted design solutions which were to be found in Salt GA Rev 14. For example, the dimensions of the vessel's beam (ie breadth) at the waterline and work deck were exactly the same in Vard GA rev 2 and Salt GA Rev 14. That beam could not be explained by reference to either Vard's original work on Rev 1 (1), or the Skandi Africa. Mr. Simpson in his evidence accepted that the Vard designers had probably used the dimensions of the beam in the Salt design as their starting point. It was, as Salt submitted, also Vard's endpoint for GA Rev 2, which was unsupported by any detailed calculations.
 - iv) Another example is the generator sizing. The question of the sizing of generators is closely linked to an issue discussed further in the confidential appendix concerning the use of batteries as an additional power source in the context of the CLV's Dynamic Positioning system. By the end of the trial, it was (as Prysmian's closing submissions recognised) common ground that the adoption of the specific generators in Vard GA Rev 2 was driven by sight of Salt's construction tender documents. Furthermore, the specific battery solution reflected in Salt's design documents, and in particular the Single Line Diagram and Specification, was reflected in Vard GA Rev 2, and cannot be linked back to its previous design or the Skandi Africa.

284. In these circumstances, the Salt design documents were very clearly a springboard for Vard's design work which commenced in December 2017, and then resulted in Vard GA Rev 2 which was further developed thereafter. This does not mean, however (as Mr. Byam Cook submitted) that it was Prysmian's springboard as well.

E2.4: During the period February to April 2018, Prysmian actively encouraged Vard to use the Salt design documents, specifically Salt's GA and the Specification, in order to check and improve its design work on its alternative design

285. I will address in due course the issue of whether Prysmian was privy to the use of the Salt design documentation by Vard and Vard Design during the December 2017 and January 2018 period. It is in my view clear, however, that from February 2018 onwards, Prysmian was privy to the use of those documents and actively encouraged it. Salt in its submissions used the language of condoning, adopting, accepting and acquiescing. It is not necessary in my view to analyse any differences between these verbs. I consider that "active encouragement" sufficiently conveys what was happening. Salt relied strongly upon the evidence of what happened during this period to justify a conclusion that, in the prior period, Prysmian was aware of, and acquiescing in, what Vard and Vard Design were doing with the Salt design documents.

The 7 February 2018 meeting

286. I have already described this meeting, in general terms, in Section B. At this stage in the sequence of events, PaxOcean had dropped out and Prysmian and V.Delta were looking closely at Vard's alternative design proposal. Mr. Haugan had, as he said in evidence, understood that Prysmian would be comparing Salt's latest GA (Rev 14) with Vard's GA, and this is exactly what happened. At some point prior to the meeting, a document containing a list of 22 questions was drawn up by V.Delta. The document is undated on its face, but its hearing bundle reference indicates that it is a document prepared on 2 February 2018. This identified various differences between the two designs, and various questions arising for Vard in relation to those differences. The document was headed: "Questions for VARD regarding GA".

287. The same heading "Questions for VARD regarding GA" was given to a later document, again undated on its face, but apparently prepared on 7 February 2018. This is an expanded version of the 2 February 2018 document and it includes many of the 22 questions. The 7 February document contains 46 questions on its first 4 pages, and it then continues with a further 3 pages under the heading "MOM" (which I understand to be Minutes of Meeting). It is clear from the 46 questions that Vard were to be referred to the Salt GA, and to be asked to explain or consider differences between them. For example, some of the detailed questions included:

"31. Mess is positions further forward than in SALT design. Not favourable for crew comfort. Justification?"

43. The cable laying hangar has been slightly shortened from SALT design (about 0.65m) and capstan has been moved aftwards, can you please justify?"

44. Change from SALT design: TT fwd. no 2 and Azi fwd. no.3 are now in same compartment. This changes DP plan as now only 4 DP zones.”

288. The introductory questions (under the heading “General”) invited comparison at a higher level of generality. Thus:

“3. What makes Vard design better than SALT design?

Would Vard indemnify Prysmian and V.Delta in case we go for Vard design. Vard to revert

4. SALT, V.Delta and Prysmian have worked together on the fine tuning of design for about eight months, how long would Vard expect it to take achieving the design aligned?”

289. An issue developed in the parties’ closings concerned the extent to which, on the evidence, all of the 44 questions were in fact discussed and considered at the 7 February meeting. Prysmian referred to Mr. Urke’s oral evidence about the meeting. This was to the effect that Vard had not been given the list of questions, that some of the questions were asked but that they did not go through all of them. He denied that Prysmian drew attention to particular aspects of the Salt design, or that Prysmian indicated that they wanted Vard to align the Vard design more closely with the Salt design. When asked whether Vard was referred specifically to the Salt design, and asked to justify departures from the Salt design, Mr. Urke said that he could not recall “that there were certain points that they were pointing at, “In this design we have it like this and why, and you need to do it like that””. In closing, Mr. Byam-Cook submitted that the use at this stage by Prysmian of the Salt design documents (as entire documents) was purely internal: there was no suggestion that the Salt design documents were looked at during the 7 February 2018 meeting.

290. Whilst I accept that it is possible that not all of the questions were discussed at the meeting, I consider that it is likely that at least a significant majority were. On the V.Delta side, it is clear that the two most recent GA plans of Salt and Vard had been considered carefully, and pertinent questions identified and then revised. Mr. Taddei in his written evidence described the document as setting out “some questions and notes from this meeting”. That indicated that these were indeed questions which were raised at the meeting. When Mr. Taddei was asked about the meeting in cross-examination, his responses did not suggest that the meeting had not considered the questions which had been carefully prepared.

291. In relation to some questions, the document sets out Vard’s response. It does not follow, however, that other questions were not asked and dealt with. It is clear, for example, that question 44 (set out above) was discussed, albeit that no Vard response is noted on the document. This concerned the layout in the thruster part of the vessel, where there was equipment relevant to its DP systems. The point under discussion concerned a bulkhead which had appeared in the Salt GA, but which was not in the Vard GA. This meant that there was one less “zone”, which could potentially affect the operation of the system in certain conditions. The expert evidence showed that, subsequent to the meeting, the removed bulkhead was reinserted so that in that respect the Vard design replicated the Salt design. Similarly, item 36, which concerned the MOB (Man

Overboard) boat, was clearly discussed, with a consequent change being made in Vard's next revision.

292. Furthermore, the questions show that Prysmian and V.Delta were positively inviting comparison between Vard's design and Salt's confidential design documents, without any regard for the confidentiality of the latter. Whilst it is true that the evidence did not expressly include statements by witnesses that the Salt design documents were looked at during the meeting, it is clear that they were being referred to openly and that some of the questions could not sensibly be answered without reference to Salt's GA. It is an overwhelmingly probable inference that one or more participants would have taken Salt's design documents to the meeting (they would likely have been readily available on their laptops), and that they were looked at during its course. But whether or not that happened does not seem to me to be crucial. The important point is that Prysmian were actively and openly encouraging comparisons to be made between Vard's design and Salt's design. Indeed, Mr. Taddei frankly accepted that this was the case. He was asked about Question 3 in the list of questions:

“Q. If we look at item 3 in this document for example: "What makes Vard design better than [Salt] design?" Would you accept this, that these questions were challenging Vard Design AS to carefully consider the Salt design documents and to try to justify to Vard why their design was better than the Salt design.

A. Yes, it was a challenge to evaluate from the information that we received during the tender why they thought its design was better. Could have been better.”

293. Similarly, in response to some of the other questions in the list, Mr. Taddei agreed that Vard was being asked to take an aspect of the Salt design into account and to compare and contrast it with the Vard design.
294. Mr. Haugan's evidence confirms that this was indeed what Prysmian was doing during this meeting. In cross-examination on this meeting, he denied that Prysmian and V.Delta encouraged Vard Design to consider the Salt design documents for the purpose of improving Vard's alternative design as set out in GA revision 2. That answer seemed to me to be difficult to reconcile with the list of questions in the 7 February 2018 document. However, it was later put to him that in February 2018, the Vard designers used the Salt design documents to compare and contrast with the evolving Vard design. He agreed:

“Q. In February 2018, Mr Haugan, the Vard designers used the Salt design documents to compare and contrast with the evolving Vard design, didn't they?

A. We did, we were instructed by Prysmian. We didn't want to have any reference to Salt, because we wanted to be independent.

Q. But Prysmian instructed you nevertheless to compare and contrast the Salt design documents with your evolving design, didn't they?

A. They did so because of their belief that that would give them confidence, despite what we told them, to – that our design would also meet their requirement.

Q. And they asked you to engage in GAP analyses with a view to making sure that all of the issues that had been addressed in the Salt design were also addressed in the Vard design, correct?

A. It was for their confidence, it was not for Vard. We knew that we were able to provide a GA and design specification equal or better, so we didn't have to have any GAP or comparison or anything, but Prysmian for their reason did.”

295. Mr. Haugan was there squarely putting the responsibility for the use of the Salt documents in February 2018 on Prysmian, rather than Vard. Although I do not regard Mr. Haugan as a generally reliable witness, and his evidence in this passage was seeking to minimise (as he did throughout) the reliance placed by Vard on Salt documents, it is clear that Prysmian itself was positively encouraging and indeed requiring the use of the Salt design documents in order to ensure that the Vard alternative design gave them what they were looking for.
296. Before leaving the 7 February meeting document, it is appropriate to refer to three particular paragraphs on which reliance was placed by one or other party.
297. Prysmian drew attention to paragraph 1: “Reason behind the proposal of a Vard design”. It submitted that this showed that the Vard alternative design had been a surprise to Prysmian, who did not know why it had been produced and needed to ask. It will become apparent that I do not accept that this is so. The origins of the Vard alternative design were well understood by senior individuals within Prysmian, and Mr. Taddei received an explanation in early January as to how this had come about. It is possible that the drafter of the document, a gentleman at V.Delta called Rory McKenzie, who did not feature to any substantial degree in the evidence in the case, was unaware of this background.
298. Salt relied upon question 4, which referred to the “fine tuning of design for about eight months” and then asked “how long would Vard expect it to take achieving the design aligned”. Salt relied upon the fact that V.Delta were talking about alignment. I did not understand Salt ultimately to contend that this meant that the two designs should be precisely the same, or that one should copy the other. Rather, to use the language of the Letter of Intent between the parties, it was alignment in the sense of fully meeting Prysmian’s requirements and expectations as set out in the tender documents; so that in essence there was nothing that was achieved by Salt’s design that was not similarly achieved by Vard’s. I consider that this is indeed what was meant, as shown by some of the detailed points in the list of questions where Prysmian compared and contrasted the approach taken in the two designs and were seeking improvement to the Vard design. Contrary to the evidence of Mr. Taddei, who was generally speaking a very fair and careful witness, I did not consider that question 4 related to alignment in the sense of containing the same level of detail. Indeed, Mr. Simpson’s evidence was that Vard Rev 2 did in fact contain the same level of detail as Salt Rev 14.

299. Prysmian relied on a passage in the Minutes of Meeting, under the heading: “Concerns with Salt design”. This included the statement: “Vard has not looked into Salt design”. If this was indeed said by the Vard representatives, it seems to me to have been untrue: and thus is a further reason for my reluctance to accept the evidence of Mr. Haugan. However, I do not consider that it provides any assistance to Prysmian’s case. If the factual position were that, as at February 2018, Prysmian had no knowledge of Vard looking into the Salt design, then the statements made at that meeting – whereby Vard were asked in effect to compare and contrast the two designs – would in my view suffice to establish a breach of the obligation in Clause 6.4 [3] as further discussed below.

The GAP analysis

300. On 21 February 2018, Vard sent V.Delta and Prysmian an e-mail attaching a “high level GAP analysis between Salt and Vard GA and specification believed to highlight the main differences with remarks made in attachment as relevant”. The e-mail indicated that this GAP analysis had been requested by Prysmian: it was not produced by Vard off its own bat. The attachment set out details of the Salt design and the Vard design, and contained certain remarks, such as: “Can be improved”. A notation at the foot of the document recorded that the GAP analysis covered only the “high level items/parameters and does not cover all the detailed level items”. It also stated that: “With regards to details and description, Vard Building specification is drafted from scratch by Vard (i.e. without reference to Salt specification)”.
301. The attachment itself is not revealing in terms of explaining the derivation of Vard’s design in relation to Salt’s design. The significance of the document lies in the fact that it was created at Prysmian’s request, despite the confidentiality of the Salt GA and Specification and the express provisions in clause 6.4 of the SFA. Prysmian expressly required a “compare and contrast” exercise to be carried out between Vard’s design, and Salt’s confidential documents, with a view to identifying gaps and thereby enabling the former to be improved. As described above, Mr. Simpson’s unsurprising evidence is that he had never previously heard of such an exercise being carried out.

The Compliance Matrix

302. On 17 April 2020, Mr. Leoni sent a detailed “Compliance Matrix” to various individuals at Prysmian and V.Delta. The covering e-mail said:

“Please find attached the updated version of the Building Specification and Compliance Matrix with Prysmian specification.

The Compliance Matrix has been checked (items with compliance ‘0’ and ‘2’) and ‘cleaned’. We have verified the correct implementation of the items on the compliance matrix discussed with Vard during last week and carried out some spot checks. Several comments have been added to the building specification. Please note that due to the document size and the limited time available we couldn’t review the entire building specification.”

303. Mr. Costantino was asked about this document (which was disclosed only during the course of the trial), and specifically whether he agreed that one of its purposes was to ensure that everything that was included within the Salt design was replicated and covered in the Vard design. His answer was: “As general SFI, yes”. (SFI is a reference to the coding system created by the Ship Research Institute of Norway). Mr. Ashcroft submitted in his written closing that this answer was an acceptance of the proposition in his question, and I see no reason to disagree.
304. The document itself runs to 113 pages, and contains a number of columns. The first is headed “SFI”, and each number corresponded to the number on the Salt specification. The second column set out the relevant terms of the Salt specification. The third column was headed: “Compliance. 1 = Yes, 0 = No, 2 = Yes with comments”. There were then columns for Vard comments, Prysmian Comments, Meeting Comments, and Vard Comments. The document was then completed in detail, with entries being inserted into each line of the “Compliance” column. It is clear that a very thorough exercise had been carried out, by reference to the Salt specification – using the version provided by Salt in January 2018 – in order to ensure that the Salt design was replicated and covered. This did not mean that every item in the Vard specification was necessarily precisely the same, or directly copied from the Salt specification. But the exercise was again a “compare and contrast” exercise designed to ensure that Prysmian’s requirements and expectations, as reflected in the Salt design documents, were being met by the Vard design.

Overview

305. Salt submitted that these various documents dating from the February to April 2018 period (the 7 February meeting minutes, the GAP analysis, the Compliance Matrix) only made sense on the basis that Vard Design AS had access to, and was permitted by Prysmian to have access to, and was considering (and being encouraged to consider) the Salt design documents. Prysmian, or V.Delta on its behalf, was drawing the attention of Vard Design to specific aspects of the Salt design and asking for justification for deviations from the Salt design or asking Vard Design to move further towards the Salt design, which in some cases it is clear that it did.
306. In my view, this submission was amply borne out by the evidence discussed above.
307. It is clear that, in relation to these documents, Prysmian paid no regard to the confidentiality provisions of the SFA. The evidence indicated that Prysmian –wrongly in my view – treated Salt’s Specification as its own document, which it was free to discuss with third parties as it wished. Mr. Urke’s evidence was that Prysmian told him that they owned the Specification and could use it as they wanted to use it:

“Q: I just wanted to ask you about that. Did Prysmian tell you that they owned the specification and therefore could use it as they wanted to use it, Mr Urke?

A. Yes. The ownership of the wording, and what was inside the specification, they felt very strong ownership to because they have been writing the specification together with Salt. So they definitely felt a strong ownership to this, and felt that to start now to write a specification together with Vard again with the same

requirements that they already had put forward was, I don't know, waste of time for them since they already had their requirement in the specification. So it's -- yes.”

308. That evidence specifically concerned the Specification. But it is also clear, from the evidence described above, that Prysmian took the same view as to ownership of Salt's GA plan. Again, in that respect, Prysmian was wrong in law.

E2.5: The Letter of Intent

309. My conclusion that during the period February to April 2018, Prysmian actively encouraged Vard to use the Salt design documents, specifically Salt's GA and the Specification, in order to check and improve its design work on its alternative design, is consistent with and supported by the express language of the Letter of Intent. The third recital to the Letter of Intent states:

The BUYER has agreed to evaluate the Alternative Design with intention to sign the Contract based on the Alternative Design provided that Alternative Design fully meets the BUYER's requirements and expectations as set out in tender documents, at its absolute discretion.

310. Salt relied upon the requirement that the alternative design had to “fully meet” Prysmian's “requirements and expectations as set out in the tender documents”. They submitted that the tender documents obviously comprised the Salt design documents, including the GA plan and the Specification. They submitted, however, that Prysmian was never entitled to ask a rival designer to produce an alternative design based on those confidential design documents. The simple point, in my view, is that there is no logical way in which Prysmian could expect Vard to meet its requirements and expectations, as set out in those documents, unless Vard Design AS were provided with those documents and could give careful consideration to the requirements and expectations which they contained or evidenced. I accept that Prysmian did not expect that Vard would simply copy Salt's work and produce a facsimile of the Salt design. However, I accept Salt's submission that the Letter of Intent provides clear evidence that the expectation and understanding throughout was that Vard was to produce a design which was equal to the Salt design in every respect, in terms of fulfilling requirements and meeting expectations, and in that sense would replicate the Salt design, into which Salt had put 8 months of design work. The Letter of Intent is therefore of a piece with what I regard as the “compare and contrast and improve” exercise evidenced by the 7 February meeting note, the GAP analysis and the Specification Compliance Matrix.
311. In relation to the Letter of Intent, Mr. Byam-Cook submitted that this was to attach too much importance to a few words in the context of a much more extensive set of facts. He referred in particular to a document recording the discussions at a lengthy meeting in Norway in April 2018, where Prysmian and Vard were working through a very large number of technical issues, with Vard clearly bringing its own very considerable expertise to bear as part of the iterative process of producing Vard's design.
312. I agree with Mr. Ashcroft that the lengthy Norway meeting does not detract from the force of his point based on the Letter of Intent. That point is, simply, that Prysmian was

looking for a design that fully met its requirements and expectations as set out in the confidential Salt design documents. That could not be done without careful consideration being given to those confidential design documents, and that was in fact what was done.

E3: The disputed issue: were the steps taken by Vard and Vard Design in December 2017 and January 2018 taken without Prysmian's knowledge and involvement?

313. As previously indicated, Prysmian's primary case is that the steps taken by Vard and Vard Design in December 2017 and January 2018, including the production of GA Revision 2 itself, were taken without Prysmian's knowledge. There is a significant dispute as to that. There are two interrelated aspects of that factual dispute. Prysmian's case was that it knew nothing of the work that Vard decided to carry out shortly before Christmas 2017 and which resulted in GA Rev 2 which Vard produced and sent to Prysmian in early January. The production of Vard GA Rev 2, and Vard's offer on 3 January of a € 5 million reduction in price if Salt was not used, came as a surprise to Prysmian. During this time, therefore, Vard was doing something off its own bat, on a speculative basis, without encouragement from Prysmian. Prysmian also contended that even if it was aware that Vard was carrying out any work, it had no knowledge that Vard would be considering or using Salt's design documents for that purpose: it would have understood Vard to be producing its own design, unaided by the Salt design documents. After all, Vard was a substantial and highly professional organisation, with a specialist design company employing highly skilled people. Salt invited the court to reject that version of the facts on the basis, in summary, that it was improbable and inconsistent with the events as they unfolded from February onwards as well as with some of the evidence that Prysmian had itself adduced.
314. In approaching this issue, as with any disputed issue of fact, it is important to pay regard to the objective evidence in the form of contemporaneous documentation and facts which are beyond serious dispute, the motives of the parties and the inherent probabilities: see the well-known judgment of Robert Goff LJ in *Armagas Ltd v Mundogas S.A. (The Ocean Frost)*, [1985] 1 Lloyd's Rep. 1, 57.
315. The first aspect of the factual dispute is whether Vard's work, which started in the Christmas period, was carried out unbeknownst, at that time, to Prysmian. I regard this suggestion as extremely improbable and I reject it. I consider that it is not consistent with the written and oral evidence of Mr. Taddei. In paragraph 37 of his witness statement, Mr. Taddei said:
- I am aware that sometime in late 2017, there was an informal discussion between management of Vard and Prysmian, which touched on the construction tender. During that discussion, I understand that Vard indicated that it could provide its own vessel design, which would reduce the risk and cost to Prysmian as against using a separate designer/shipyard. I know these matters based on a later discussion with Mr Aleo, I was not present or directly involved. I did not give that any serious thought at the time because I was focussed on the Salt Project.
316. In cross-examination, Mr. Taddei explained that his conversation with Mr. Aleo had taken place on 3 January 2018, when Prysmian had received Vard's proposal which

included the alternative design offer, or at least that it had taken place after Christmas 2017. Mr. Aleo told Mr. Taddei that just before Christmas, Prysmian's CEO (Mr. Battaini) had been contacted by a senior manager at Vard: it was either Vard's CEO or its managing director, but certainly someone at an extremely high level. Mr. Taddei had not spoken to Mr. Battaini about the conversation, and he could therefore not elaborate on what had been discussed: Mr. Battaini was 3 levels above Mr. Taddei, and he did not have daily contact with him, and it was not standard process for him to go and ask Mr. Battaini questions. Mr. Aleo had not himself been involved in the discussions: as far as Mr. Taddei was aware, it was just Mr. Battaini and someone from Vard's senior management.

317. This evidence, initially adduced by Prysmian itself through Mr. Taddei's witness statement (supported by Mr. Aleo's witness statement), establishes in my view that the origins of the proposal made by Vard on 3 January 2018 were discussions at the highest level between Prysmian and Vard. It can readily be inferred that this discussion was also the origin of Vard GA Rev 2, which was supplied together with the proposal. There is nothing in the documents which suggests that the proposal made on 3 January, for a Vard alternative design, came as a surprise to Prysmian. There is no internal Prysmian e-mail expressing surprise at this development. There was also no e-mail or other communication asking Vard why they were making this proposal, or why they had taken the trouble to produce a revised GA plan in support of it. That is unsurprising, and fits with the fact that Mr. Aleo knew of the high level discussions which had taken place.
318. There is also nothing in the Powerpoint prepared by V.Delta for the 8 January 2018 meeting which suggests surprise. On the contrary, V.Delta report on the offer, and comment on its merits, expressing the view that it would be better to retain Salt. It is not difficult to see why, in view of the considerable work and progress which had been made with Salt over many months, and the fact that V.Delta had advised on the award of the contract to Salt in the first place, V.Delta may not have been particularly keen on the idea of Vard coming in to do the design. However, the fact that V.Delta wished to retain Salt does not mean that the Vard proposal came as a surprise to V.Delta. Nor is there anything in the meeting minutes of 8 January which expresses surprise. I am willing to accept that Mr. Taddei himself may have been surprised when he learned from Mr. Aleo what had happened. However, Mr. Taddei was some distance away from the relevant discussions, and his absence of knowledge – prior to sometime after Christmas and possibly 3 January – takes Prysmian no further forward.
319. It is also in my view inherently probable that Vard would only have done the work, at some speed, over the Christmas period if there had been some discussion with Prysmian which indicated that this was worth doing. The work which resulted in Vard GA Rev 2 started with Mr. Haugan going from Romania to Norway, and giving Mr. Urke the thumb drive. It is not clear whether Mr. Haugan was going to Norway in any event for the Christmas period, and I shall assume in his favour that he was. However, the production of Vard GA Rev 2 obviously involved a substantial investment of time by the three individuals in Singapore. It is in my view inherently unlikely that these events would have taken place in the absence of encouragement from Prysmian.
320. Against this background, there is in my view every reason to suppose that what happened during the Christmas/ new year period, culminating in the Vard alternative design, fully reflected the discussions which had taken place at the highest level. Indeed,

in the absence of any documentary evidence of surprise at what had happened, I consider that the obvious inference is that developments in that period of time gave effect to the discussions which, it is clear, had indeed taken place.

321. As part of his oral closing submissions, Mr. Byam-Cook submitted that Prysmian had no motive to encourage Vard to do this work, because PaxOcean was their front-running candidate willing to build the vessel at a considerable discount to the Vard price. I reject this argument. The sequence of events described in Section B above, and in particular the Powerpoint presentations prepared by V.Delta, show that Vard was very much still in the frame as at December 2017. If Prysmian had been completely happy with PaxOcean, then they could have rapidly accepted PaxOcean's offer and entered into a shipbuilding contract. That did not happen, even though PaxOcean's price was favourable.
322. The evidence also shows that there were considerable advantages to Vard as compared to PaxOcean. The only disadvantage was Vard's price, and Prysmian was therefore well-motivated to see how it could be reduced. Furthermore, there was the ordinary commercial motive, in a situation where Prysmian had yet to make up its mind as to what to do, of ensuring that it had as many potentially attractive options as possible. I consider it inherently probable that Prysmian would have acted pursuant to these motives. It may perhaps be the case that the possibility of an alternative design for a reduced price was raised by Vard in the first instance. I do not make any findings as to who first raised the possibility, because I do not think that this matters and in any event Prysmian has not called evidence from the participants in the relevant conversation. But I have no doubt that, whether the possibility was first raised by Prysmian or Vard, it was something that was encouraged by Prysmian.
323. In support of its case that Prysmian had no knowledge that Vard was going to offer, and was working on, an alternative design, Prysmian relied upon the evidence of Mr. Haugan. I have already indicated my reservations about Mr. Haugan as a witness. In addition to the matters to which I have already referred, I have paid regard to Mr. Haugan's evidence, which lacked credibility, concerning its offer, in its first quotation, to pay a substantial brokerage commission of 1.5% to V.Delta. Mr. Haugan described this in his witness statement as being an "accidental inclusion" and that it was a "misunderstanding based on miscommunication from Davide Lajolo of V.Delta which was subsequently clarified" based on a phone conversation with Mr. Taddei. When cross-examined about this passage, Mr. Haugan was unable to explain coherently why there had been an accidental inclusion, or what the misunderstanding or miscommunication was. The true position is that there was a deliberate decision by Vard to accede to a request by V.Delta to pay this commission. When Mr. Taddei learned about it, he indicated that it should not be paid and this led to its exclusion from Vard's later offers.
324. It also did not seem to me that Mr. Haugan offered any pertinent or reliable evidence which supported the conclusion that Prysmian knew nothing about the proposal for an alternative design. Mr. Haugan's witness statement said nothing about the discussions which had taken place at a very senior level between Prysmian and Vard, as explained by Mr. Taddei (supported by Mr. Aleo). There was no positive evidence from him, in his witness statement, to the effect that Prysmian knew nothing of the work that was carried out over the Christmas period. I see no reason why (as Prysmian submitted) Mr. Ashcroft was required to explore that issue in cross-examination of Mr. Haugan, when

no positive evidence had been tendered and when in any event Mr. Ashcroft had explored the issue, as far as he could, with Mr. Taddei who had at least given some positive evidence about it. Mr. Haugan did eventually say, in response to my question at the conclusion of his cross-examination, that he had not discussed with Prysmian the comparison, which he said that Vard anticipated, between Vard's GA and Salt's GA. Even if I were to accept that answer as reliable (which I am not inclined to do in view of my overall assessment of Mr. Haugan as a witness), it only goes so far as to show that Mr. Haugan did not discuss the point. It does not provide evidence in support of the proposition that Prysmian did not know that Vard were considering an alternative design.

325. The second aspect of the factual dispute is Prysmian's contention to the effect that even if it was aware that Vard was going to propose an alternative design, and was carrying out some work towards that end, it had no knowledge that Vard would be considering or using Salt's design documents for that purpose. I regard this as being similarly implausible. The evidence as to how matters developed in February – April 2018 shows that Prysmian encouraged Vard to use Salt's design documents for the purpose of its alternative design. Indeed, Mr. Urke's evidence was very clear, to the effect that Prysmian considered that the Specification was something that Prysmian had paid for, and which it considered it was entitled to use. There is no reason to think that Prysmian's attitude was limited to the Specification: it drew no distinction between the Specification and other documentation, in particular the GA. There is nothing in my view which suggests that Prysmian's encouragement was something that only started in the February, and which therefore would not have formed part of the discussions that had taken place in December. No event has been identified which would sensibly lead to the conclusion that Prysmian's attitude and wishes took a different turn in February from its attitude and wishes prior to that time.
326. The evidence as to what happened between February and April in my view indicates the nature of discussions that took place in December, and which then led to the use of the Salt design documents in Vard GA Rev 2 and thereafter. That conclusion is supported by other aspects of the evidence. It is clear that Prysmian was happy with the work which Salt had carried out: there were no complaints about quality. Given that an extensive effort had taken place to fine-tune the design over a period of months, it is scarcely surprising that Prysmian would have wanted Vard to consider the Salt design closely. In his closing submissions, Mr. Ashcroft submitted that Prysmian's desire – as in due course reflected in the Letter of Intent, was:
- “Take your inspiration from the Salt design. We want what you produce to meet our requirements and expectations as set out in the Salt design documents, and unless you can produce something that is as good if not better in this respect as the Salt design we are not going to use you. That is what the letter of intent says. My case is that that is the consistent message that was given from December all the way through”.
327. I consider that this summary reflects the factual position. As Mr. Ashcroft made clear, the case was not about direct or exact copying. It was that Prysmian was very happy with the work carried out over 8 months with an excellent designer. Vard needed to produce something that was equal or better. They could not do that without close

consideration of the Salt design, and in my view Vard took their inspiration from it and in some respects copied it, as discussed in the Appendix to this judgment.

328. That conclusion is also in my view consistent with other documents and matters which are inherently probable. Mr. Haugan sent the proposal for the Vard design, and the “preliminary” Vard GA, on 3 January 2018. His covering e-mail assured Prysmian that in the event that Prysmian “choose to go with Vard design, Vard GA and Specification will be finalized without compromising on the vessel specification e.g. layout, performance, capacity etc.”. In context, the reference to the “vessel specification”, upon which there would be no compromise, was the specification which Salt had produced, as part of the construction tender package, after considerable work with Prysmian. That specification was something which Prysmian apparently considered that it could treat as its own. It is also in my view inherently probable that Prysmian would have appreciated that Vard would be using and did use the Salt design documents for its 3 January design; because there had been no technical meetings or discussions between Prysmian and Vard over the Christmas period whereby Prysmian brought Vard up-to-speed on what it was now looking for. It would in practice be impossible for Vard to know what Prysmian now wanted, and to assure Prysmian that Vard could do it, without Vard using the Salt design documents – at least in the absence of some other discussions.
329. My conclusions as to Prysmian’s active encouragement of the use of the Salt design documents, both during the February – April 2018 period and earlier, are also consistent with and supported by the question and response on 1 February 2018 (see Section B paragraph 124 above). Mr. Taddei’s clear evidence was that if Vard was to be awarded the construction project, and proceeded to build the vessel on the basis of the Vard design, then it must pay Salt the € 1.72 million amount in order to take over the basic design. I do not accept that this evidence was effectively countered by evidence from Mr. Haugan (who was not a reliable witness) to the effect that Mr. Taddei was mistaken.

E4: Prysmian’s case in closing

330. In its closing submissions, Prysmian put forward essentially three arguments as to why there was no breach of confidence by Prysmian. It is convenient to identify them at this stage, before turning to the law relating to breach of confidence, and my conclusions in the light of the facts as I have found them to be.
331. Prysmian’s primary case was that Prysmian was not liable for such steps as Vard and Vard Design took in December 2017 and January 2018 nor with regard to Vard GA rev 2. Those steps were taken without Prysmian’s involvement. If there was a springboard, it was not Prysmian’s springboard. In the light of my fact-findings as set out above, I reject that primary case.
332. Prysmian’s second submission focused on the period from February 2018 onwards. Recognising that the evidence during that time shows the use by Prysmian, together with Vard, of the Salt design documents, Prysmian submitted that clause 6.4 of the SFA only prohibited disclosure. It did not prohibit use. On the facts, Vard had already, and independently of Prysmian, disclosed the Salt design documents to Vard Design in December 2017. Again, on the basis of my fact findings, I reject the case that the disclosure to Vard Design was “independent” of Prysmian. As discussed below,

however, even if I were to accept that premise, I consider that Prysmian was in breach of its contractual or equitable duties of confidence.

333. Prysmian's third submission relied upon the proviso in paragraph (2) of clause 6.4 of the SFA which provided: "*unless such design solutions are, or in the future, come into the public domain*". This argument gives rise to issues of construction (in particular, there is no public domain proviso in paragraph (3) of clause 6.4), as well as the nature of "public domain" in breach of confidence cases and in the present context. These issues are appropriately considered after I have described the applicable legal principles.

E5: Legal principles relating to confidentiality

334. I was referred to a large number of authorities and textbooks which discuss duties of confidentiality. I have found particularly helpful the review of the principles by Arnold J in *Force India Formula One Team Ltd v 1 Malaysia Racing Team SDN BHD* [2012] EWHC 616 (Ch) and Hildyard J in *CF Partners (UK) LLP v Barclays Bank Plc and others* [2014] EWHC 3049 (Ch).

Contract and equity

335. Confidentiality obligations can arise as a result of contractual agreement, or because of equitable principles. Contractual obligations and equitable duties may co-exist: the one does not necessarily trump, exclude or extinguish the other. Where the parties have specified the information to be treated as confidential and/or the extent and duration of the obligations in respect of it, the court will not ordinarily superimpose additional or more extensive equitable obligations. Where, however, the use of certain information would "plainly excite and offend a reasonable man's conscience", an equitable duty not to use the information would be recognised, even if that went further than the definition, duration or restraint prescribed by the contract: see *CF Partners*, paragraphs [130] – [134].
336. The reference to the conscience of the reasonable man reflects the principle that an action in breach of confidence is based ultimately on conscience: *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] UKSC 31, para [22]. It also reflects the classic and elegantly written judgment of Megarry J in *Coco v AN Clark (Engineers) Ltd* [1968], F.S.R. 415, [1969] R.P.C. 41 at 47. This identifies the elements necessary to found an action for breach of confidence where the equitable principle is relied upon:

"First, the information itself...must 'have the necessary quality of confidence about it'. Secondly, that information must have been communicated in circumstances importing an obligation of confidence. Thirdly, there must have been an unauthorised use of the information to the detriment of the party communicating it."

In deciding whether the information had been communicated in circumstances importing an obligation of confidence, Megarry J referred to the "overworked" reasonable man as performing a useful function in relation to the implied obligation of confidence.

337. In the present case, however, I am not (at least primarily) concerned with the extent and limits of the equitable obligation. Here, the principal basis of the claim for breach of confidence is advanced by one contracting party against another on the basis of the express agreement in clause 6.4 of the SFA. The authorities establish that contractual terms may restrict a person's use of information which would not be subject of protection in equity: see *CF Partners* paras [127] – [128] and the discussion of the authorities in *Toulson & Phipps on Confidentiality* paras 3-019 – 3-023. See too Paul Stanley: *The Law of Confidentiality: A Restatement* (Hart Publishing, 2008) § 4, pages 19 – 22.
338. Thus, in *Ministry of Defence v Griffin* [2008] EWHC 1542 (QB), an injunction was granted to enforce a contractual undertaking by a former soldier and member of the United Kingdom Special Forces (UKSF) not to disclose any information relating to the work of the UKSF without prior authority from the Ministry. Eady J said:
- “A contract may embrace categories of information within the protection of confidentiality even if, without a contract, equity would not recognise such a duty.”
339. Accordingly, contrary to Mr. Byam-Cook's submissions in one of his alternative arguments, there is no reason to approach the question of construing the relevant provisions of the SFA by considering the scope of equitable principles that would exist in the absence of an express agreement as to confidentiality, and then seeking to construe the SFA in the light of those equitable principles. Rather, the construction of clause 6.4 of the SFA should proceed on the basis of the ordinary principles as to interpretation of contracts which are set out in Section D above. Thus, Arnold J in *Force India* applied ordinary principles of construction in order to determine whether an express obligation of confidentiality continued after termination, and the scope of such obligation: see paragraphs [210] – [214]. He said that a reasonable person having the relevant background knowledge of the parties would have understood the words of the clause in issue to mean exactly what they appear to say.

Triviality

340. It is established that equity will not protect trivial information, albeit that the concept of triviality is not precisely defined and I was not referred to any cases where a claim failed because of the triviality of the information sought to be protected. In particular, I was not referred to any authority which suggested that sophisticated design drawings, produced for substantial consideration, would be regarded as trivial. For the following reasons, I did not consider that triviality had any role to play in the present case.
341. First, it follows from the discussion of the contractual principles set out above, that the parties could agree to protect information that, in the absence of agreement, would be regarded as trivial. If the parties have so agreed, then I see no basis on which the court should impose its own views as to triviality or to disregard the parties' express agreement.
342. Secondly, the present case is very obviously not concerned with trivial information. I did not understand Mr. Byam-Cook to suggest that Salt's design documents, including the GA and Specification which contained a bespoke design for Prysmian which had been fine-tuned by an experienced designer over a period of months, could possibly be

regarded as trivial. Such case as was advanced by Prysmian based on triviality was directed towards individual features within the overall design which were said to be unimportant. In approaching that case, however, it is important to bear in mind the following matters.

343. Whilst the equitable principle does not attach to trivial or useless information, as Hildyard said in *CF Partners* at [123]:

“the measure is not its commercial value: it is whether the preservation of its confidentiality is of substantial concern to the claimant and the threshold in this regard is not a high one”

Here, the preservation of confidentiality in the GA and Specification, as complete documents, was clearly of substantive concern – and consistent with what could be expected in the industry

344. Furthermore, it is not appropriate in the case of a complex design to identify and cherry-pick particular individual components, divorced from their context, and then categorise them as being individually trivial. In that regard, the approach of Arnold J in *Force India* at paragraph [265] is to be noted:

“Counsel for the corporate defendants submitted that some of the information claimed to be confidential was trivial. In my judgment this principle has little application in the circumstances of the present case. As will become apparent, I accept that some individual dimensions of some of the parts in dispute may properly be described as trivial, but it does not follow that the combinations of dimensions in issue are trivial.”

Public domain

345. When the equitable principle is relied upon, issues can arise as to whether the relevant information is in the public domain, and if so whether relief should be ordered against a defendant who has relied upon confidential information which he could have obtained, but did not in fact obtain, from publicly available information. The contract in the present case does refer, in clause 6.4 [2], to the concept of “public domain”. Insofar as that concept is concerned, I can see that the principles which have been developed in the case-law in relation thereto may be of some potential relevance.

346. In that regard, it is appropriate to quote in full Hildyard J’s summary of the principles in paragraphs [124] – [126] of *CF Partners*:

“[124] The basic attribute or quality which must be shown to attach to the information for it to be treated as confidential is inaccessibility: the information cannot be treated as confidential if it is common knowledge or generally accessible and in the public domain. Whether the information is so generally accessible is a question of degree depending on the particular case. It is not necessary for a claimant to show that no one else knew of or had access to the information.

[125] A special collation and presentation of information, the individual components of which are not of themselves or individually confidential,

may have the quality of confidence: for example, a customer list may be composed of particular names all of which are publicly available, but the list will nevertheless be confidential. In the *Saltman* case (*supra*) Lord Greene MR said:

“...it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker on materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.”

Or as it is put in Gurry on Breach of Confidence (2nd ed., 2012) para 5.16:

“Something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality: for something new and confidential may have been brought into being by the skill and ingenuity of the human brain. Novelty depends on the thing itself, and not upon the quality of its constituent parts. Indeed, often the more striking the novelty, the more commonplace its components...”

[126] Further, and of particular potential relevance in this case, pieces of information which individually might appear to have limited value and marginal secrecy, in combination in particular hands, might have special composite value and confer on the recipient a considerable advantage: as was noted by the New Zealand Court of Appeal in the *Arklow* case when at that stage (see [1998] 3 NZLR 680 at 700 in the judgment of the majority which was affirmed by the Privy Council).”

347. The above quoted passage from *Gurry* is derived from the judgment of Sir Robert Megarry VC in *Thomas Marshall Ltd v Guinle* [1979] Ch 227, 248. It is clear on the basis of these authorities that, in cases where the equitable principle is being considered, the mere fact that particular individual items of information contained within a design are in the public domain does not prevent the design as a whole from being confidential information. Nor does it prevent remedies being granted against the defendant. Accordingly, something which has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality: *Clerk & Lindsell* para 26-09.

348. In *Force India*, Arnold J said at paragraph [222]:

“In cases concerning design drawings like *Saltman v Campbell*, *Terrapin* and *Alfa Laval v Wincanton*, much will depend on the level of generality of the information asserted to be confidential. If the claimant contends that information relating to the shape and configuration of the article depicted in the drawings is confidential, but the shape and configuration of the article can readily be ascertained from inspection of examples of the article which have been sold or are otherwise publicly

accessible, then the claim will fail. If, on the other hand, the claimant contends that detailed dimensions, tolerances and manufacturing information recorded in the drawings are confidential, that information cannot readily be ascertained from inspection, but only by a process of reverse engineering and the defendant has used the drawings as a short cut rather than taking the time and effort to reverse engineer, then the claim will succeed. ”

349. This passage shows that “public domain” cases will frequently involve situations where a product has been manufactured or built, and it can then be photographed or deconstructed. Thus, when Arnold J came to consider the public domain arguments, he referred (at paras [259] – [264]) to photographs which could be taken and the possible availability of the relevant parts via a company which sold sports memorabilia. It was accepted that information available from photographs was in the public domain. The judge held, however, that information from the sale of sports memorabilia was not, because the company had not yet sold any relevant parts by the relevant time.
350. Even where information is in the public domain, for example because certain features have been published or can be ascertained by actual inspection of a product, confidential designs can retain their confidentiality. The person to whom such confidential information has been imparted cannot use it as a “springboard” for activities detrimental to the person who made the confidential communication, and “springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public”: see *Terrapin Ltd v Builders Supply Company (Hayes) Ltd* [1967] RPC 275 (Roxburgh J), quoted in *Toulson & Phipps on Confidentiality* paragraph 6-045.
351. Some caution needs to be applied in order to ensure that the *Terrapin* case is not read too broadly, as is clear from the discussion of the “Springboard doctrine” in *Gurry* paragraphs 14.17 – 14.34. The authors conclude at paragraph 14.34:
- “It is submitted, therefore, that Roxburgh J’s formulation of the springboard doctrine does not involve an indefinite prohibition on the confidant’s use of information regardless of whether the information subsequently loses its confidential character. The prohibition remains in force only for such a time as the information retains its confidentiality. But, as Roxburgh J pointed out, information will not necessarily lose its confidentiality by the marketing of a product which embodies the information and which thus publishes some features of the information. The full and complete publication of confidential information ‘must be a question of degree depending on the particular case’ and ‘if relative secrecy remains, the plaintiff can still succeed’.
352. In the present case, I do not consider that “public domain” can have a role to play. I am here concerned with a vessel which was being specially designed, over a period of many months, to meet the requirements of Prysmian. The particular vessel was never built. Its design could only be seen in Salt’s confidential design documents. There was therefore simply nothing in the public domain to which Vard could turn, or which Prysmian could identify to Vard by way of pointing them in the right direction, and which would have informed them of any aspect of the design of the CLV as at December 2017. There was nothing akin to a photograph, or brochures giving details

of the CLV, or a product which could be deconstructed. There was, as Mr. Ashcroft submitted, no sister-ship sailing the seas which Vard could inspect and consider. There was nothing to reverse-engineer. The only source of this information was the Salt design documentation, which was not in the public domain.

353. Mr. Byam-Cook in his closing submissions referred me to paragraph [222] in the judgment of Arnold J in *Force India*. He submitted that this was authority for the proposition that confidentiality depended upon the “level of generality at which the item of confidential information is particularised as being protected”. I do not consider that there is anything in that judgment, or in the authorities to which I have referred, which indicates that the existence of an obligation of confidentiality relating to design drawings depends upon the level of particularisation in a party’s pleadings. (I will return to Mr. Byam-Cook’s pleading points below). The distinction drawn by Arnold J is between (i) cases where the shape and configuration of an article can readily be ascertained from examples of the article which have been sold or which are otherwise publicly available, and (ii) cases where detailed dimensions and other matters cannot readily be ascertained from inspection, but only by a process of reverse engineering and where the defendant has not taken the time and effort to reverse engineer. In the latter case, as Arnold J says, the claim will succeed. In the present case, Prysmian and Vard could only ascertain the design of the CLV by looking at Salt’s design drawings. There was nothing in the public domain which had previously been sold, or which could be reverse engineered, or which could provide any information at all as to the design of a vessel which would provide what Prysmian wanted.
354. This is not therefore a case where issues arise because the relevant information was partly public and partly private. The Salt GA and Specification did not contain a mixture of public and private information: they were documents which contained entirely private information, recognised as confidential by the terms of the SFA. The documents were the product of careful design work by Salt, in collaboration with Prysmian, over a period of many months. The fine-tuned design was known only to those parties, by V.Delta, and the shipyards to whom the design documents had been sent specifically, and only, for the purpose of tendering for the shipbuilding contract. Mr. Byam-Cook therefore derived no assistance from cases which concerned products which were in the public domain, and where public information was available, such as the decision of Peter Smith J in *EPI Environmental Technologies Inc v Symphony Plastic Technologies plc* [2004] EWHC 2945.

Overall conclusion

355. On the basis of these authorities, I agree with Mr. Ashcroft’s submission that the information in the Salt design documents was in principle protected under an obligation of confidence, whether that be contractual under clause 6.4 or equitable.

Strict liability for breach

356. It is a general principle that where a contractual term has been breached, the breach does not have to be deliberate or dishonest or made with knowledge that the relevant conduct is a breach.
357. This is also the case where the equitable principle is being considered. The basic principle is that it is a breach of confidence to use or disclose confidential information

without the consent of the person to whom the duty is owed: see *Clerk and Lindsell* para 26-20.

358. In that context, “use” includes causing use to be made of it by others. In *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222, 236, Lord Millett said:

“Whether founded on contract or equity, the duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential, not merely to take all reasonable steps to do so. Moreover, it is not merely a duty not to communicate the information to a third party. It is a duty not to misuse it, that is to say, without the consent of the former client to make any use of it or to cause any use to be made of it by others otherwise than for his benefit.”

359. This statement was made in the context of the duties of solicitors, but Mr. Byam-Cook said that he did not dissent from the basic proposition, emphasising that it was a proposition that was forward-looking. I agree with him that it does not indicate that there can be a retrospective imposition of liability on a party on learning that a third party has done something or not done something. Mr. Ashcroft made it clear in his reply submissions that he was not suggesting retrospective liability.

360. The case-law supports the view that it is not necessary for a defendant deliberately or dishonestly to misuse confidential information in order to establish liability – assuming of course that an equitable obligation would be imposed in the first place as a result of the application of the *Coco v Clark* principles. Thus, the duty is broken simply by the unauthorised use or disclosure of information, and the state of mind of the confidant in so misusing the information is irrelevant: see the discussion in *Gurry on Breach of Confidence*, 2nd edition at paragraph 15.32 – 15.41. This was the approach taken by Arnold J in *Force India*: see paras [240] and [243].

361. Involuntary or accidental use of confidential information may therefore still result in a breach: *Clerk & Lindsell on Torts*, 23rd edition, para 26-21. At paragraphs [981] – [984] of *CF Partners*, Hildyard J said that misuse must be demonstrated. A change of outlook is not sufficient: acting on it must be shown. However subconscious use may constitute misuse. It was not necessary for the claimant to show what influence “individual pieces of information had” on those alleged to have misused it, or to show that “specific pieces of information suggested and resulted in some particular form of approach or activity”. Misuse may be “inferred from the fact that a defendant, having obtained confidential information, is influenced by it (whist it retains the quality of confidentiality) in determining and then embarking on a course of conduct other than for the purposes for which it was provided.”

Matters to be addressed in breach of confidence actions

362. In *CMI-Centres v Phytopharm* [1999] FSR 235, 243 (paragraph [25]) Laddie J identified at least four matters which a claimant needed to address in order to succeed in a breach of confidence action:

“I turn to consider the detailed allegations made in this case. In doing so it is useful to have in mind that for a plaintiff to succeed in a breach of confidence action it must address four matters at least, namely: (i) the

plaintiff must identify clearly what is the information he is relying on (*John Zink Co. Ltd v Wilkinson* [1973] R.P.C. 717, (ii) he must show that it was handed over in circumstances of confidence, (*Coco v. A.N Clark (Engineers) Ltd* [1969] R.P.C. 41), (iii) he must show that it is information of the type which can be treated as confidential (*Coco*) and (iv) he must show that it was used without his licence or there must be a threat to so use it (*Coco*). Each of these four topics is of significance in this application.”

363. In relation to the fourth category, Laddie J gave guidance at 257 – 8 (paragraph [60]) as to the different ways in which use can be proved.

“When a plaintiff asserts that a defendant has used confidential information there are a number of ways of proving it. The first is to produce direct evidence of use, for example from an employee of the defendant who has seen the information being put into practice or by finding documents showing what the defendant has done. Secondly, it may be possible to prove use indirectly by demonstrating the existence of some significant fingerprint. For example the defendant’s product may have dimensions, a design, composition or behaviour which is only to be found in the plaintiff’s and which is consistent with the use of the information and inconsistent with use of non-contaminated sources. Similarly, it may be possible to show that the defendant has gone to all the same suppliers and customers as the plaintiff and that it would be highly unlikely that the same group would have been approached had the defendant been working from uncontaminated sources. Thirdly, it may be possible to persuade the court that the defendant could not have got to the position he has with the speed he has had he simply started from legitimate sources and worked everything out for himself. This last is particularly difficult. It depends on comparing how far the defendant has gone with an assessment of how long it would have taken him to reach that stage deploying the resources he has put into the endeavour without cutting corners. Whether the defendant’s progress suggests misuse of confidential information therefore involves assessing (a) how far has got, (b) how long it took him to get there, (c) what resources he put into the development and (d) the quality of the personnel he used for development work.”

364. Other relevant factors have been identified in the case-law and textbooks. These include the use by an alleged copyist of odd or unusual detail found in the original: see *Gurry* paragraph 15.04 footnotes 13 and 14.

Derivative products

365. A claim for damages for misuse of confidential information can succeed where the information has been used in order to make a derivative product, process or business: ie where products, process or business have been made from or with the assistance of information which is still confidential, but where they do not themselves directly disclose or incorporate the confidential information: see *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2009] EWHC 1456 (Ch) paras [94] – [95], citing Laddie J in *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289, 401 – 404. Where this

has happened, the question of whether or not to grant an injunction may not be straightforward. I am not, however, concerned with that issue at the present time. However, a financial remedy can be granted in respect of the manufacture and sale of products derived from a past misuse of confidential information.

E6: The construction of clause 6.4

366. I start with paragraph [3] of clause 6.4 of the SFA, and the second sentence thereof. The words here are clear. They are directly concerned with the GA and the Building Specification “as a complete document”. They clearly prevent Prysmian from making those documents available, as complete documents, to any third party. There is an exception for “the Yard”, previously defined in clause 2.2 as being the shipyard with whom a shipbuilding contract is concluded. By the end of the trial, it was accepted by Prysmian that “the Yard” would not include Vard Design AS, which is not a shipyard but which provides services to shipyards, principally if not exclusively within the wider Vard group. Accordingly Vard Design AS is a relevant third party within the meaning of clause 6.4.
367. It follows that if Prysmian either sent the GA or the Building Specification to Vard Design AS, or made it available to Vard Design AS, that would be a breach of paragraph [3] of clause 6.4. It would not in my view be necessary then to enquire whether, and to what extent, the GA and Specification came within the wording of the paragraph [2] of clause 6.4: ie whether they are documents “describing design solutions based on input provided by the Client, related to topside layout details, mission critical equipment or interface of such equipment into the Vessel”. The parties have specifically identified, in [3], the GA and Specification. In the context of the argument in the present case – where Salt’s case of confidential information relies upon information contained within those documents and their attachments – the question of whether those documents also fall within [2] does not need to be determined.
368. I am inclined to think, given the express reference to the GA and Specification in [3], that sub-paragraph [2] should be construed as covering a narrower category of documents. Reading that paragraph as a whole, the parties appear to be contemplating documents, such as brochures or marketing materials, which describe specific aspects of the CLV; ie where Prysmian had provided some input into the design solutions concerning topside layout details and the other matters referred to in [2]. It is because Prysmian will or at least might provide their input into those design solutions, as part of the iterative process of dialogue between designer and client, that [2] refers to the consent of both Prysmian and Salt. It also refers to the joint agreement of a design presentation in the context of dealings with third parties. In contrast, the prohibition on Prysmian disclosing the GA and Specification in [3], as complete documents, is subject to the consent of Salt alone. In my view, this fits with the first paragraph of 6.4 which deals in broad terms with Salt’s ownership of intellectual property rights concerning design, data, documents (etc) related to the Scope of Work supplied by Salt under the SFA.
369. If the SFA had not included paragraph [3] of clause 6.4, then it would be possible to give a different and wider interpretation to [2]. The GA and Specification as a whole could be regarded as documents which include a description of design solutions based on input provided by Prysmian relating to topside layout details and the other matters. Indeed, Mr. Byam-Cook at one stage submitted that the GA and Specification came

within [2] as well as [3], since he was concerned to establish that those documents could not be disclosed by Salt without Prysmian's consent. However, in view of the express terms of paragraph [3] of clause 6.4, it is not necessary to explore these matters further.

370. In relation to paragraph [3], Mr. Byam-Cook submitted that it was important to distinguish between disclosure (which is prohibited) and use (which is not). In general, I agree that this paragraph is not dealing with what I would describe as the private use of the GA and Specification, as complete documents by the individuals at Prysmian to whom those documents had been provided in the course of performance by Salt of the SFA. However, the clause prohibits those documents being "sent" or "made available" to third parties. Those words will in most factual scenarios be synonymous with disclosure (which is the different word used in the first sentence), which is itself a somewhat elastic term.
371. The reason that Mr. Byam-Cook sought to emphasise the distinction between disclosure and use was in order to address potential difficulties arising from Prysmian's own conduct in February 2018 onwards in relation to the "compare and contrast and improve" discussions at the 7 February meeting, the GAP analysis and the Compliance Matrix. Thus, Prysmian submitted:
- "Second, nothing Prysmian did in the period from February 2018 onwards was a breach of clause 6.4. Salt's case is that Prysmian wrongfully used the Salt design documents (as documents) in that period, but clause 6.4 on its true construction only prohibits the disclosure by Prysmian of the documents (it does not prohibit use). On the facts, Vard had already (and independently of Prysmian) disclosed the Salt documents to Vard Design in December 2017. On the facts, Prysmian cannot be liable for that disclosure. Nothing that Prysmian did thereafter amounted to a disclosure of Salt's documents to Vard Design (that disclosure had already happened in December 2017)."
372. The argument thus posits that once there had already been an "independent" disclosure to Vard Design AS in December 2017, without Prysmian's knowledge, there could thereafter be no further breach of clause 6.4; because the disclosure had already been made. On my view of the facts, that argument does not arise; because, as discussed above, I reject the argument that Prysmian did not know of the relevant disclosure in December 2017. However, even if that were incorrect, I would not accept Mr. Byam-Cook's analysis. I see no reason why the concept of the GA plan and Specification being "made available" to a third party should not include a factual situation where there had been prior (unknown to Prysmian) disclosure to Vard Design AS, followed by Prysmian making it clear that the relevant documents should be carefully considered by Vard Design AS. The relevant documents are then being made available to that party to carry out the instructions and requests of Prysmian. I do not see why such conduct should be regarded as falling outside the prohibition in [3], simply because the third party had previously seen the relevant documents. In other words, the documents can be "made available" to a third party beyond the time when the third party first sees those documents.
373. I should add that there was no evidence to suggest that Prysmian's involvement in the "compare and contrast and improve" exercise in February 2018 onwards came about, and was regarded as permissible, because it had taken the view that there had already

been (unbeknownst to Prysmian at the time) a disclosure to Vard Design AS by individuals in the wider Vard organisation.

E7: Application of Clause 6.4 to the facts

374. I now turn to the question of whether there was a breach of clause 6.4 in the light of the facts which I have found. My conclusions are as follows.
375. First, in view of Prysmian’s involvement in and knowledge of the work which Vard was doing in the period of December 2017 – 3 January 2018, there was a breach of clause 6.4 because Prysmian made the GA plan and Specification available to Vard Design AS, and indeed Vard as a whole, for the purposes of the Vard alternative design. Prysmian continued to make those documents available, in breach of clause 6.4, in February 2018 and thereafter.
376. Secondly, even if I had concluded that Prysmian had no involvement in or knowledge of the work carried out in December/ January, there was nevertheless a breach of clause 6.4 by reason of the events in February 2018 onwards; specifically, the events relating to the 7 February meeting, the GAP analysis, the Compliance Matrix and more generally the process envisaged by the Letter of Intent whereby Vard’s design was to meet the expectations and requirements in Salt’s confidential documents.
377. Thirdly, even if my second conclusion were wrong as a matter of construction of clause 6.4, I consider that this is a case (as envisaged by Hildyard J. in *CF Partners*) where equitable obligations of confidence would exist and preclude the use of the GA plan and the Specification in the manner in which Prysmian sought to use those documents in February 2018 onwards. The use of Salt’s confidential design documents in that way would, in Hildyard J’s memorable phrase, “plainly excite and offend a reasonable man’s conscience”.
378. In that regard, Mr. Ashcroft submitted that it was unreasonable to contend that the initial (on this hypothesis) unknown disclosure of the Salt design documents to Vard Design AS then had the consequence that Prysmian could “do whatever we wanted, and we can’t be in breach of any obligations because we haven’t handed over the confidential documents to Vard designers, they just happened to get them fortuitously; and that having occurred, we can then engage in discussions with them about benchmarking and gap analysis, and asking them to look at the documents for the purpose of considering their alternative design”. He submitted that if the contract was to be given a very limited scope, so as not to cover the situation here described, equity would step in; not least because this set of circumstances could not have been contemplated. I agree with that submission.
379. Fourth, I reject Prysmian’s argument to the extent that it involves a more complex analysis of the contractual position, based upon the language of paragraph [2] of clause 6.4, or the notion that there was anything material in the public domain, or triviality. The construction of paragraph [3] of clause 6.4 is not to be approached on the basis of analysing what equitable principles would exist in the absence of clause 6.4, and then interpreting clause 6.4 so as to give effect to those (allegedly more limited) principles.
380. In any event, it is in my view clear that there was nothing trivial about Salt’s design work as contained in the GA and Specification or, indeed, about any of the particular

aspects of design which Salt allege are to be found in the subsequent designs of Vard. Nor, as discussed above, was the GA and Specification in the public domain.

381. In paragraph 164 (i) of its opening submissions, Prysmian submitted that: “Although Prysmian did not act on this basis, properly construed the SFA gave Prysmian the right to use the designs created by Salt which it paid for”. This was also a point which featured in Prysmian’s pleadings. I did not understand Mr. Byam-Cook’s closing submissions to maintain a case that because Prysmian had paid for the Salt design documents, it was entitled to disclose them to Vard Design AS for the purposes of Vard’s alternative design. In so far as the argument was advanced by Prysmian, then I reject it as being inconsistent with the express language of clause 6.4 paragraph [3] of the SFA.

E8: Arguments arising from the pleadings

382. Salt’s case as to the breach by Prysmian of its confidentiality obligations, including related pleas concerning conspiracy and exemplary damages, were introduced by way of amendment formally made in September 2019. This followed a heavily contested application for permission to amend which was decided by Mr. David Edwards QC, sitting as deputy: [2019] EWHC 2308 (Comm). In a comprehensive and careful reserved judgment, the deputy judge granted permission to amend notwithstanding that this would result in a short delay to the trial (to April/ May 2020) which was then scheduled for January 2020. In the event, the adjourned 2020 trial date was further adjourned, ultimately to May 2021, because of the Covid-19 pandemic.
383. In its amended pleading, Salt set out the material parts of clause 6.4. Paragraph 9b referred to the second paragraph of clause 6.4, and used the expression “Restricted Know-How” to describe the obligation on Prysmian “not to disclose or otherwise use any know-how or documents setting out the design solutions devised by Salt within the Scope of Work under the contract and based on input provided by Prysmian”. Salt specifically gave, as examples of “Restricted Know-How” the confidential General Arrangement and Building Specification documents produced by Salt under Phase 1 and 2 of the SFA. Paragraph 18c of the pleading similarly said that the drawings, “and the GA and the Specification more specifically” comprise the proprietary design work carried out by Salt pursuant to Phases 1 and 2 under the SFA and were part of the Restricted Know-How.
384. Accordingly, Salt’s pleaded case clearly encompassed an argument that the GA and Specification as a whole were “Restricted Know-How” covered by the confidentiality obligations. Reliance on the GA and Specification as a whole was pleaded with the specificity which is necessary in an action for breach of obligations of confidentiality. As the argument in the case proceeded, Salt focused on the third paragraph of clause 6.4 as well as the second paragraph in support of its case. However, it was not and could not in my view be suggested that Salt had not sufficiently pleaded a case that its GA and Specification as a whole should not have been disclosed to Vard and Vard Design AS for the purposes of their alternative design, and then used by them with the encouragement of Prysmian. That argument was addressed on its merits by Prysmian in its closing submissions, albeit that its written and oral opening submissions had not really addressed the substance of that argument. Indeed, Mr. Byam-Cook in his oral opening submissions indicated that one aspect of Prysmian’s case was that the court

was not concerned with those documents “in toto”, but just the components of the design contained therein. This argument was rightly not pursued in closing.

385. In addition to identifying those documents, paragraph 36 of the amended pleading said that the interim and final designs for the CLV contained a “significant number of material similarities to the design prepared by Salt and thereby contained the Restricted Know-How”. The paragraph went on to list, in 6 subparagraphs, a number of material similarities which were provided pending disclosure and/or further information. These were pleaded in fairly general terms. This paragraph followed Salt’s plea concerning the Letter of Intent, including the provisions as to meeting Prysmian’s “requirements and expectations as set out in tender documents” upon which Salt has relied in these proceedings. Paragraphs 37 – 42 then went on to draw conclusions as to misuse of confidential information from the various facts pleaded, including the material similarities.

386. On the amendment application, Mr. Byam-Cook (who appeared on that occasion) submitted that the new claims were not properly or sufficiently pleaded. It was said that the draft amendment was overly vague with regard to the nature of the right allegedly infringed, and that it contained inadequate particulars of exactly what Prysmian was said to have misused. The deputy judge addressed those arguments in detail in paragraphs [109] – [131] of his judgment, and rejected them. In his judgment, Salt’s proposed pleading was:

“sufficient and Prysmian knows very well the case it has to meet, in essence (as it was put by Mr Austen in argument) that Salt’s designs and confidential know-how embedded in them have been used as a springboard for the proposed vessel to be built by Vard.”

387. It seems to me that this was the case which was then advanced at trial by Salt, and that all aspects of which were well within the pleadings which had by then been further particularised as a result of the following matters.

388. At the time of the amendment application, the judgment of the deputy judge indicated that Salt had not been provided with anything approaching full disclosure. In paragraph [131], the deputy judge said that:

“all of the documents that might show how Vard’s design came to be prepared, and whether and to what extent it used Salt’s design, are likely to be in Prysmian’s and Vard’s possession and that so far, save for a small number of documents, Prysmian has refused disclosure. It is not surprising in such circumstances that Salt’s case depends in part on inference.”

389. On 10 October 2019, Prysmian made a Part 18 request for Further Information. The request was concerned with the case on misuse of confidential information. For example, the first request asked for particulars of all items of “Restricted Know-How” relied upon. Salt’s response (served in November 2019) in an introductory section, relied upon paragraph [110] of the deputy judge’s judgment, where he had said that Salt’s proposed pleading was sufficient. In relation to the first request, Salt made it clear that its case was misuse of the “Restricted Know-How”, and that its case extends to all of the “Restricted Know-How in the Vessel, being the design solutions devised by Salt

within the scope of work under the Contract and based on input provided by Prysmian”. Accordingly, Salt was not narrowing its case from that pleaded in the Amended Particulars of Claim. Further details were then provided in response to the requests, but it is not necessary to describe these in detail.

390. This response did not satisfy Prysmian, who sought a further order for particularisation which was made by Robin Knowles J at a reconvened case management conference. Paragraph 12 of his order required Salt to serve particulars of:

“each item of confidential information to be relied upon at trial to demonstrate the alleged misuse of the Defendant or Vard and/or each alleged material similarity said to contain or derive from the “Restricted Know-How” to be relied upon at trial, such particulars to include but not be limited to setting out:

a) In which Salt design document(s) each item is said to be found (giving identifying reference number(s) and date(s) for each document) and where in those documents (preferably by providing suitably annotated documents);

b) In which Vard design document(s) each item is said to be found (giving identifying reference number(s) and date(s) for each document) and where in those documents (preferably by providing suitably annotated documents within the Confidentiality Club).”

391. In response, Salt provided Particulars of 52 matters. These included, side by side, comparisons between the Salt design documents and the Vard design documents. It included extracts or “clips” from the Salt drawings.

392. In the course of the parties’ oral opening submissions, I sought to understand how the 52 particularised items fitted into the case. Mr. Ashcroft summarised his position as follows:

“MR ASHCROFT: I think it is an independent point in the sense that we do say that we get home on breach by virtue of the fact that the confidential documents were shown to Vard Design and considered with Vard for the design and as we submit, used as a tool for benchmarking and GAP analysis with Vard Design, and we say that that is sufficient to establish breach. If it is necessary, my Lord, if it is necessary to go into the extent to which Vard Design in fact copied elements of the Salt design, and carried them through into their design documents, then that is when we need to look at the material similarities.”

Mr. Ashcroft went on to make clear that his primary case was that it was not (contrary to Prysmian’s arguments) necessary for Salt to demonstrate the similarities alleged in the 52 particularised items, but that Salt had nevertheless engaged with that case.

393. In my view, this way of putting Salt’s case is consistent both with the way in which it had been pleaded, and with the law relating to misuse of confidential information. There is no reason in principle why the misuse of confidential information should require the claimant to show that the defendant has produced, or caused to be produced, a product

which has material similarities to another product. The authorities on “derivative products” (see *Vestergaard* and *Ocular Sciences*) show that there can be a misuse of confidential information where products, process or business has been made from or with the assistance of information which is still confidential, but where they do not themselves directly disclose or incorporate the confidential information. Indeed, there are many cases where confidential information has been misused, but where there is no resulting product at all. Where there is a resulting product which has been produced by the wrongful disclosure or misuse of confidential information, it is no answer for the defendant to show that steps were taken to avoid direct copying of the product, or to design the product so that there were significant differences when compared to the original design.

394. Accordingly, Salt is entitled to establish (and in my view has established) that confidential information, comprising the GA and Specification as a whole, was wrongly made available by Prysmian to Vard Design AS, and then used, with Prysmian’s encouragement, in order to assist Vard’s design work, irrespective of any material similarities when comparing Salt’s design with Vard Rev 2 or indeed later versions of Vard’s design. The evidence does indicate, as Prysmian submitted, that as time progressed and Vard did more and more work on the design of the CLV during 2018, the design moved further away rather than closer to the Salt design. However, this does not meet, or provide an answer, to Salt’s case as to what happened in the earlier stages of Vard’s work, which was very much the focus of the factual and technical case advanced by Salt. During those earlier stages, specifically December 2017 to April 2018, Vard used Salt’s designs in various ways in consequence of Prysmian’s breach of clause 6.4: in developing Vard GA Rev 2 over the Christmas/ New Year period, including (as Mr. Urke said) extracting what were alleged to be “Prysmian’s requirements” from the Salt design documents; in considering the issues raised in the “compare, contrast and improve” exercise at the 7 February 2018 meeting, and responding thereto; in the “GAP” analysis, carried out in early 2018; in working through the Compliance Matrix, completed in April 2018; and generally seeking to meet Prysmian’s requirements and expectations as set out in the tender documents, as contemplated by the Letter of Intent. A breach of Prysmian’s obligations, whether contractual or equitable, is established irrespective and independently of whether Salt has proved material similarities between the designs of Vard at the initial stage (Vard GA Rev 2) or in subsequent designs. The use of the Salt design documents with the encouragement of Prysmian as a springboard, between December 2017 and April 2018, is not negated by later events whereby Vard gave more independent thought to the design and in many respects moved further away from the Salt design.
395. This does not mean that the 52 specific allegations of similarity, later reduced to 32, based on the Salt designs, need not be addressed, and I address them in the confidential appendix to this judgment. It is possible that the similarities, if they existed, are of relevance in relation to issues, as to the availability of injunctive relief and damages, which are not the subject of the present trial.
396. However, it seems to me that, for the purposes of the liability trial with which I am presently concerned, these similarities are less important than, for example, in a case where a party seeks an interim injunction at a time when there will be less evidence as to what has actually happened. As is clear from the authorities discussed above (eg *CMI-Centers*), there are different ways in which a claimant can prove that confidential

information has been used. This can include “finding documents showing what the defendant has done”. In the present case, this includes the minutes of the 7 February meeting, the GAP analysis and the Compliance Matrix. It can also be shown by the speed with which something has been done, as giving rise to an implication that the defendant has not worked everything out himself. Here, not only was Vard GA Rev 2 produced at considerable speed, but Vard could not work everything out for themselves; because there was nothing material in the public domain, and Vard had no relevant meetings in that period to assist them in understanding what Prysmian was looking to obtain by late 2018. Furthermore, there is positive evidence from Mr. Urke as to the use of the Salt documents to obtain details of what were alleged to be Prysmian’s requirements, but which in reality were design solutions which Salt had developed over many months. Accordingly, this is not a case which depends upon inferences as to what happened being drawn from similarities when comparing one design with another.

397. Another reason why focus on the 52 (now 32) similarities may be less important than in other cases is the existence of clear contractual obligations which protect the confidentiality of the GA and Specification as complete documents, together with the fact that there could be no basis for suggesting that those documents, or any materials showing how a CLV should be designed for Prysmian, were in the public domain.
398. Accordingly, I do not accept Mr. Byam-Cook’s submission in his oral opening that the 52 items are an “essential component of the exercise this court is undertaking on this trial” or that it is an “essential and integrated part of the overall analysis”, insofar as those submissions suggested that Salt’s case of breach of confidentiality was dependent upon proof of the 52 items. Nor, as I have said, do I accept the submission that the court is not concerned with the GA plan and Specification “in toto”, but just with components of the design contained therein.

E9: Adverse inferences

399. Salt contended that an adverse inference should be drawn by reason of Prysmian’s failure to call critical witnesses in relation to a number of areas of the case. Salt’s closing submissions focused on two areas of the case.
400. The first was Prysmian’s argument that Vard and Vard Design were acting on “a frolic of their own” during the period late December/ early January, with no knowledge interest or encouragement on the part of Prysmian. Salt drew attention to Prysmian’s failure to call evidence from any of the very senior management members who were involved in the relevant discussions. Salt’s argument was that the court should, on the basis of the evidence which I have already discussed in Section E3 above, draw the conclusion that Prysmian did actively encourage, and certainly permitted and acquiesced in Vard and Vard Design working on a rival design in this period, using the Salt documents and basing the rival design on those documents, replicating it as closely as possible. If necessary, Salt submitted that this conclusion was supported by the drawing of adverse inferences in circumstances where, without any possible reason or explanation, Prysmian had chosen to call no witness who could speak to the content of the key discussions that took place in late December 2017. Salt submitted that the proper inference was that those who actually knew the detail of those discussions, including Mr. Aleo (who provided a statement, but whom Prysmian did not tender for cross-examination) would not in fact support the case that Prysmian sought to run in relation to this aspect of the evidence.

401. The second concerned the Vard design work carried out during the period of the “Christmas miracle”. Salt submitted that Prysmian had long known that a significant part of Salt’s complaints relate to the preparation of Vard GA Rev 2 over the “Christmas Miracle” period. Prysmian had, however, chosen not to adduce any evidence from individuals who could actually speak to the processes and thinking involved. Salt submitted that there was no reason for this course, other than (again) to avoid scrutiny and investigation of what really happened. Adverse inferences were again appropriate. The court should therefore infer that the 3 naval architects who worked on GA Rev 2 relied heavily on, and were materially influenced by, the design solutions that they saw in the Salt design documents.
402. Both of these areas of the case, and Salt’s argument for an adverse inference, were identified in Salt’s written opening submissions. Salt had also drawn attention in opening to the absence of any evidence from V.Delta. It was not clear in Salt’s opening what, if any, inference should be drawn in relation to the absence of V.Delta. By the end of the case, V.Delta’s absence was not a focus of Salt’s adverse inference case.
403. Prysmian argued that it was inappropriate to draw adverse inferences in either of the two areas. A number of arguments were advanced. In their written opening, Prysmian submitted that complaints that witnesses from Prysmian’s higher management had not given evidence had no substance, as it was “wholly implausible they had any involvement in deciding or assessing the design of the vessel, or would order that the Salt Design should be copied as Salt seem to suggest”. In relation to the absence of Vard witnesses, Prysmian submitted that Mr. Haugan and Mr. Urke were centrally involved in all the matters under consideration. Overall, there could be no suggestion of any attempt to hide anything.
404. Prysmian also said that Salt’s case had shifted: the original conspiracy case had alleged a combination “in or around February 2018, the precise date being unknown”, but the case had then moved to an allegation of a combination in late December. In his oral closing argument, Mr. Byam-Cook emphasised this point by way of explanation as to why there had been no direct evidence as to the conversations in December 2017. He said that the passage about the conversation in Mr. Taddei’s witness statement had assumed an enormity in Salt’s presentation of the case, but it was not prefigured in the pleadings. Mr. Byam-Cook also drew attention to the fact that Mr. Haugan had been called, and he was an available and appropriate witness with whom to explore the proposition that an instruction had filtered down from above in Vard.
405. As to Vard GA rev 2, Prysmian submitted that Salt chose not to cross-examine Mr. Urke in any detail about the creation of this document, despite his making clear that he was involved in the process, discussed the designs with the Singapore naval architects and gave instructions as to the process they were to follow and checked that they had stuck to using materials from Vard’s own archives. It is not appropriate for Salt to decline to question such a witness and then argue for adverse inferences on the basis that Mr. Ashish Kumar or another naval architect in Singapore did not give evidence. Salt’s failure to put its case to the available witness undermines its position.
406. Prysmian also drew attention to the judgment of Cockerill J in *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [150]-[154] to the effect that exercising the Court’s discretion in favour of adverse inferences is likely to genuinely arise in relatively small number of cases; and even within those cases the number of times when it will be

appropriate to exercise the discretion is likely to be still smaller. Prysmian submitted that this was not such a case.

Discussion

407. An appropriate starting point, at least at the time of closing submissions in this case, is the decision of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324 where Brooke LJ summarised the applicable principles concerning adverse inferences as follows:

“(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness’s absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.”

408. I do not consider that the decision in *Magdeev* lays down any different applicable principles. Rather, that case emphasises that the drawing of an adverse inference is a discretionary matter which needs to be considered carefully. It necessarily involves considering the particular facts of each case: there is no overriding rule, or starting point, that adverse inferences are inappropriate.

409. Subsequent to closing arguments in this case, the Supreme Court has addressed the question of adverse inference in *Royal Mail Group Ltd v Efofi* [2021] UKSC 33. The Court said at para [41]:

“The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when

doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules.”

410. In the present case, I have been able to reach – without recourse to the drawing of an adverse inference – relevant fact findings favourable to Salt on the important issues on which I was asked to draw such inferences from the failure to call witnesses. The question of drawing an adverse inference is therefore academic. At most, it adds strength to the case on the evidence which has been adduced, and the conclusions which I have drawn from that evidence.
411. That said, I consider that, in both respects relied upon by Salt, it is appropriate to draw an adverse inference from Prysmian’s failure to call relevant witnesses, and to that extent Salt’s case is strengthened.
412. The first aspect concerns the discussion at a senior level which led to the work over the Christmas period and the production of Vard GA Rev 2 with Vard’s offer of a reduced price if they were the designer. It seems to me that there are here at least two “missing” witnesses who would have material evidence to give on the issues: Mr. Battaini, who had the relevant discussion, and Mr. Aleo who knew about it and subsequently explained to Mr. Taddei that this was the origin of the Vard offer of 3 January 2018. There is clearly evidence as to those discussions, albeit not adduced by Salt but by Prysmian itself. Accordingly, given that Salt had identified in its opening the point on which the inference is sought, all of the matters referred to by Cockerill J in paragraph [154] of her judgment in *Magdeev* are applicable.
413. I do not consider that I have been given a satisfactory explanation as to why evidence from either or both of those witnesses has not been forthcoming. Prysmian itself, as part of its factual evidence for trial, decided that it was appropriate to adduce evidence as to the discussions which had taken place in December. It decided to do so, however, through the route of second-hand hearsay evidence from Mr. Taddei as to what he was told by Mr. Aleo about the relevant conversation, supplemented by evidence from Mr. Aleo which supported what Mr. Taddei was saying.
414. Having chosen to adduce that evidence about the conversations from two witnesses, Prysmian cannot sensibly suggest that the evidence is immaterial or peripheral: it is evidence upon which Prysmian was intending to rely at trial. Indeed, even if the evidence had not been contained in Mr. Taddei’s witness statement, it is in my view obvious that some evidence would be required in order to explain what led to the potential change of direction in January 2018 as evidenced by Vard’s 3 January offer and GA Rev 2. I consider that this is obvious even (i) without applying the wisdom of hindsight (ii) taking into account Cockerill J’s point in paragraph [154] of her judgment

that the evidential world shifts in the run-up to trial and at the trial itself, with particular points sometimes assuming an importance which was not previously appreciated. In the present case, the potential importance of the events leading to Vard's 3 January offer and GA Rev 2 would have been obvious, and it therefore cannot have come as a surprise that this was a focus of Salt's case at trial. Indeed, Prysmian itself sought to address that area of the case with evidence from Mr. Taddei and Mr. Aleo, and also with evidence from Mr. Haugan and Mr. Urke as to their discussions.

415. Furthermore, Salt's pleaded case, when the confidential information amendment was made, referred specifically in paragraph 38 to Vard's development of a "new design for the Vessel in around two weeks", in the context of an allegation that Salt's restricted know-how was "incorporated by Vard and Prysmian in their interim and final designs for the Vessel". It is true that the 2-week period was not specified in Salt's pleading. It is not clear to me that, at this stage, Salt had in mind the Christmas/ new year period leading to Vard GA Rev 2; because it does not seem that Vard GA Rev 2 had been disclosed by Prysmian at the time that the amended case was first pleaded. No request for further particularisation of that aspect of the case was, however, made: Prysmian could have asked for details of the 2-week period if it had any difficulty understanding the case. As the pleadings developed, with the provision of the Further Information by Salt in January 2018, it would have been clear that Vard GA Rev 2 was an important document that was being relied upon. Furthermore, Prysmian's pleaded case (for example, paragraphs 28C and 28F) referred to an agreement between Prysmian and Vard, and an instruction to Vard, as to what Vard was to do. That plea necessitated evidence as to how matters had begun.
416. It is therefore not surprising that Prysmian's evidence addressed, in various ways, the circumstances in which that revision, and the accompanying offer, came to be produced. It must also be borne in mind that Prysmian was at all times fully aware that work had indeed been carried out over a two-week period prior to 3 January 2018. This fact, coupled with the reliance placed in the Further Information on Vard GA Rev 2, reinforces the conclusion that it would have been obvious that the Christmas/ new year period would come into sharp focus at the trial, as indeed it did.
417. Against this background, there has in my view been no satisfactory explanation as to why Prysmian has not called Mr. Battaini, the individual on its side who was party to the relevant discussion with the CEO or managing director of Vard. There was no suggestion that he was unavailable, or that there were some difficulties in obtaining evidence from him. Nor has there been any satisfactory explanation as to why Mr. Aleo, whose evidence as to the discussions was adduced through his witness statement, was not tendered for cross-examination.
418. I do not accept that it is any answer to this point for Prysmian to submit that Mr. Haugan was called, and that Salt could therefore have explored with him the extent to which his actions were the result of information that had filtered down to him. He was not a party to the relevant conversations, and could not give any first-hand evidence about them. His witness statement did not refer to the conversations at all, even though it is clear (on the evidence of Mr. Taddei and Mr. Aleo) that they did take place. He gave no evidence in his statements to the effect that the top management of Vard and Prysmian did not know about the work that was being carried out. In these circumstances, I see no reason why Mr. Ashcroft should have explored the topic with Mr. Haugan, who was

not a reliable witness anyway; or why his failure to do so disentitles Salt from relying upon the relevant adverse inference.

419. I reach a similar conclusion in relation to the failure to call any of the naval architects who were involved in the work which resulted in Vard GA Rev 2. Prysmian's pleaded case was (see eg paragraph 28F of the Amended Defence) that Vard "did not use any confidential information or trade secrets deriving from Salt (irrespective of whether Prysmian was contractually entitled to use such information or trade secrets, as to which Prysmian contends that it was)". The importance of Vard GA Rev 2, and the work that led to it, was apparent from no later than the time when Salt's Further Information was served in January 2020. Indeed, it would have been apparent earlier, in the light of Salt's reliance on the "two weeks" point discussed above. The actual work carried out on Vard GA Rev 2 was performed by the three naval architects in Singapore. It was not carried out by Mr. Urke, who was not in a position to give first hand evidence as to how those three individuals had approached their work, and in particular the extent to which they had used Salt's design documents. Mr. Urke and a much larger team were involved in the detail later on. But the important witnesses in relation to the Christmas period are the three naval architects who did the design work, and in particular the senior naval architect Mr. Ashish Kumar. Mr. Urke accepted, in his evidence, that he could not say what went through the heads of the naval architects as they did their work.
420. Although no longer of significance in the light of the Supreme Court's decision in *Royal Mail*, I note that the three matters referred to by Cockerill J in paragraph [154 (ii)] of *Magdeev* are again present. The point on which the inference was sought was identified in Salt's opening. The naval architects clearly had material evidence to give on the question of the work which they had carried out. There is relevant evidence on that issue, which Salt has adduced. That evidence includes the events between February and April, as described in detail above, as well as the technical expert evidence of Mr. Cave.
421. I could well understand a decision not to call all three architects. However, I do not consider that there has been a satisfactory explanation as to why none of them has been called. I recognise that these are Vard witnesses. However, Prysmian has been able to call witnesses from Vard. This is perhaps unsurprising, in view of Vard's interest in the present litigation as a party that has agreed to indemnify Prysmian. There was nothing to indicate any difficulty in calling any of these witnesses. Indeed, Mr. Urke's evidence was that Mr. Ashish Kumar had read Mr. Urke's first statement in connection with the present litigation, and had given comments on it. Mr. Ashish Kumar had read the second statement as well, although he had not provided any comments.
422. Accordingly, I draw an adverse inference from the absence of any of the witnesses who carried out the detailed work on Vard GA Rev 2, and in particular the absence of Mr. Ashish Kumar as a witness.
423. Before leaving this topic I should say that I would regard it as regrettable if the judgment of Cockerill J in *Magdeev* was to be viewed as an encouragement to parties not to call relevant witnesses on the basis that adverse inferences were unlikely to be drawn in the Commercial Court. It may be that, in the majority of cases, sufficient evidence from relevant witnesses is called, so that adverse inferences will not come into play. But each case, where a party argues for an adverse inference, must depend on its own facts.

Section F: Conspiracy

424. Salt relies upon an unlawful means conspiracy. There was no dispute as to the requirements of a claim for unlawful means conspiracy, and I was referred to a number of authorities including the recent decision of the Court of Appeal in *Racing Partnership Ltd v Sports Information Services Ltd* [2020] EWCA Civ 1300. Subsequent to closing arguments in the case, the relevant legal principles have been summarised and considered by Bryan J in *Lakatamia Shipping Co Ltd v Nobu Su and others* [2021] EWHC 1907 (Comm).
425. The requirements are as follows:
- a) A combination or understanding between two or more people;
 - b) An intention to injure the claimant. The intention to injure does not have to be the sole or predominant intention. It is sufficient if the defendant intends to advance its economic interests at the expense of the claimant;
 - c) Unlawful acts carried out pursuant to the combination or understanding; and
 - d) Loss to the claimant suffered as a consequence of those unlawful acts.
426. On the authority of the majority of the Court of Appeal in *The Racing Partnership*, it is not necessary for a defendant to know the unlawfulness of the means used to be liable in conspiracy.
427. In view of my conclusions in Section E – in particular that Salt had established that confidential information, comprising the GA and Specification as a whole, was wrongly made available by Prysmian to Vard Design A/S, and then used, with Prysmian’s encouragement, in order to assist Vard’s design work – it might seem that the conspiracy case would add little or nothing to Salt’s claim. However, it is relied upon by Salt for the purposes of its claim for exemplary damages, and in particular in order to meet Prysmian’s argument that breach of confidence alone is not sufficient to give rise to a potential entitlement to exemplary damages.
428. In the light of my conclusions in Section E, I consider that each of the ingredients of a claim in unlawful means conspiracy is made out.
429. First, there was a relevant combination or understanding. Initially, this was between the senior individuals of Prysmian and Vard who participated in the discussions which took place in December 2017, leading to the work carried out on what became Vard Rev 2. Subsequently, there was a widening of the individuals who became involved in the “compare, contrast and improve” exercise which started in early February 2018. This included, as Salt submitted, Prysmian and Vard (including Vard Design) as well as V.Delta.
430. Secondly, there was an intention to injure Salt. This arose, on the basis of my earlier findings, because Prysmian and the other parties sought to deny Salt its rights in its confidential information. In addition, although this really adds nothing to the case, there

was an intention to injure, in the initial period prior to 31 January 2018, by depriving Salt of its right to be the exclusive designer.

431. Thirdly, unlawful acts were carried out pursuant to the combination or agreement as a means of injuring Salt. The significant acts comprised the misuse of Salt's confidential information by Prysmian, Vard and V.Delta acting, on the basis of my findings in Section E, in combination with each other.
432. Fourthly, loss has been caused to Salt in consequence of those acts. Although I am not presently concerned with the precise quantification of Salt's loss, I accept Salt's submission that the initial act of transferring the design work to Vard (in breach of the exclusivity provision which was in force at that time), and then more importantly the misuse of Salt's confidential information in the period between December 2017 and April 2018, led to a situation whereby Prysmian was in a position to continue the CLV project with Vard. This in turn had the consequence that Salt lost the work which it would otherwise have performed under the SFA.
433. In the context of this requirement, I do not accept Prysmian's argument – which was advanced in other contexts as well – that the conspiracy made no difference because the CLV would not otherwise have been built at all, in view of the price that Vard was asking in order to build to a Salt design. The contemporaneous documents do not in my view suggest that the Vard price for a Salt designed vessel was prohibitive, as far as Prysmian was concerned. Rather, Prysmian and V.Delta were engaged in a comparison exercise with a view to deciding which of the various offers to accept. If the only practical option was for the ship to be built at the Vard price for the Salt design, then I consider that this is something which, on the balance of probabilities, it is likely that Prysmian would have accepted. There was nothing to suggest that the additional cost (in the region of €5 million) would have caused any difficulties to a company of Prysmian's size. Nor do I accept that the risk of using a 3rd party designer would have deterred Prysmian from using Vard to build with the Salt design. Vard was willing to do this, albeit at a higher price, and V.Delta's technical advice and recommendation in January 2018 was indeed to engage Vard and use the Salt design. It is also clear that Prysmian was, during the period leading to the award of the shipbuilding contract to Vard in 2018, keen to have a state-of-the-art CLV built. It had invested very significant time and resources into the exercise over a lengthy period of time. In the end, the Leonardo da Vinci has indeed been built.
434. Prysmian put forward a number of arguments in response to the conspiracy case. These arguments encompassed, to a very large extent, factual arguments which I have rejected in the context of my findings in Section E. Prysmian's submissions recognised that Salt's allegations overlapped heavily with its allegations in relation to its claims for breach of clause 2.2 of the SFA and breach of confidence. It was also Salt's submission, in Mr. Ashcroft's oral closing, that the claim in conspiracy overlaps almost entirely with the way that Salt put the breach of confidence case.
435. Thus, by way of example, Prysmian submitted that it intended that Vard would supply a vessel which was to be built to a design created independently from the Salt design, and that its plan was to receive a vessel which, as a matter of fact, did not use the Salt design. In my view, this is not what happened, either in the initial December discussions or in the later period.

436. In so far as Prysmian's arguments on conspiracy raised issues other than those addressed in Section E in the context of the breach of confidence case, they were essentially as follows.
437. First, Prysmian referred in various contexts to Salt's pleading of a conspiracy which was made "in about February 2018", rather than a conspiracy with its origins in the December discussions. I did not consider that this was an answer to the case. The plea "in about February 2018" reflected the difficulty which frequently confronts a party who alleges a conspiracy, namely the difficulty of pinpointing when or where it was formed. It is unnecessary as a matter of pleading to pinpoint this date precisely: see *Lakatamia* paragraph [86]. The pleading of "in about February 2018" is broad enough to enable Salt to allege that a conspiracy started approximately 6 weeks before the start of February. It is also the case, in accordance with my findings in Section E, that the acts in furtherance of the conspiracy took place in February 2018 and in the following weeks: for example, the "compare, contrast and improve" discussions began in earnest at the meeting on 7 February 2018.
438. Secondly, Prysmian relied upon express assurances that Vard would not use the Salt design. It is true that some documents contain statements to this effect. For example, the 7 February 2018 Minutes of Meeting, which I have previously discussed (see Section E 2.4 above) contains the statement: "Vard has not looked into the Salt design". This statement was, as I have previously commented, untrue. Even on Vard's evidence, Vard had looked at the Salt design at least for the purpose of extracting the alleged "functional requirements" of Prysmian.
439. However, I do not accept that, even at the stage, Prysmian would have taken that statement or similar statements (for example in the yellow-highlighted footnote in the GAP analysis) at face value or attached any importance to them. It is clear from the questions raised for discussion at the meeting that Prysmian very much wanted Vard to look at the Salt design, in order to carry out what I have described as the "compare, contrast and improve" exercise. This was then continued, after the 7 February meeting, in the GAP analysis, the compliance matrix and the Letter of Intent.
440. It also seems clear that there were, at the time, concerns on the part of Prysmian as to whether there had been an illegitimate use of Salt's design work. As early as 8 January 2018, V.Delta in its slide presentation had referred to the possibility of "legal issues with Salt". Mr. Haugan's e-mail of 15 February 2018 referred to a discussion that had taken place as to "legal matters raised during our last meeting". In that e-mail, Mr. Haugan said that Vard would provide an indemnity. In his oral evidence, Mr. Haugan indicated that it was Prysmian that had asked for an indemnity. It was put to him that an indemnity agreement was an "absolute red line for Prysmian", who would not agree the shipbuilding contract with Vard unless an indemnity was provided. His response was that it was "fair to say that they were afraid for that to be an issue in which was the reason to why they requested this indemnity agreement to be made".
441. Mr. Ashcroft also drew attention to the Indemnification Agreement, executed on 24 April 2018 between Vard Group AS and Prysmian. This expressly provided for Prysmian both to terminate the SFA and also to "undertake vis-à-vis Salt not to use the Salt Design for the Vessel, for other vessels and/or for any other purpose". However, there is no evidence that any such undertaking was in fact thereafter given by Prysmian to Salt. It was suggested that this was because Prysmian recognised that it could not

properly give this undertaking, in view of the way in which matters had developed. I think that this is a marginal point, since it may be that the failure to give the undertaking was the result of a loose end not being tied up. In that context, I note that prior to the indemnification agreement, Mr. Taddei had told Mr. Stenersen in his email of 16 March 2018 that Salt's design would not be used.

442. It does seem to me, however, that there was a considerable degree of tension between Prysmian's argument that it relied on assurances that Vard would not use the Salt design, and the evidence, described in Section E, that Prysmian took the view that it had paid for the Specification and that it could therefore use it as it wished. Indeed, Prysmian's amended defence pleads (in paragraph 4A (e)) that the "designs or drawings, produced by Salt during the Phase 1 and Phase 2 work and for which Prysmian paid Salt, belonged to Prysmian". In Prysmian's opening submissions, it was submitted that the SFA "gave Prysmian the right to use the designs created by Salt which it paid for". It was also said that Prysmian "did not act on this basis". In the event, the argument that the SFA gave Prysmian this alleged right was not maintained (and I have rejected it in Section E 7 above). I consider, however, for reasons already given, that Prysmian did indeed act on the basis that it could use not only the Specification, but also the GA plan, as it wished.

Section G: Remedies and other consequences

G1: Breach of confidence and conspiracy

443. My finding in Section E above is that Prysmian acted in breach of clause 6.4 of the SFA and its equitable obligations of confidence. My finding in Section F above is that Prysmian committed the tort of unlawful means conspiracy.
444. It was agreed between the parties that the quantification of any damages due for any torts committed by Prysmian, including Salt's case based on breach of confidence, should be dealt with in a subsequent stage in the proceedings.

G2: The remaining issues for determination

445. The issues that remain for determination at the present stage are as follows.
446. First, I have been requested to make findings in relation to the 52 (now reduced to 32) particulars provided pursuant to the order of Robin Knowles J. Salt contends that establishing one, some or more of the particulars is of relevance to the remedies to which Salt is entitled on account of Prysmian's breaches of confidence, including questions of injunctive relief, albeit that those questions will be for another day. My findings in that regard are contained in the confidential appendix to this judgment.
447. Secondly, the present trial requires resolution of whether, in principle and on the basis of my fact-findings, Salt is entitled to exemplary damages from Prysmian. The quantification of such damages, if available, is reserved for later determination.
448. Thirdly, Salt seeks determination of the applicability, on the basis of my findings, of the Trade Secrets (Enforcement etc.) Regulations 2018. Salt relies upon these regulations for remedial purposes. In particular, Salt relies upon the additional remedies which they provide relating to the appropriate dissemination and publication of the

judgment at Prysmian’s expense. It is said that this is commercially very important to Salt, given the allegedly damaging effects of Prysmian’s conduct on Salt’s reputation in the market.

G3: Exemplary damages

Legal Principles

449. Both parties referred to my discussion of the relevant principles concerning exemplary damages in *Global Display Solutions v NCR Financial Solutions* [2021] EWHC 1119 (Comm) at [535] – [540], and there was no dispute as to those principles. The issue has subsequently been considered by Bryan J in *Lakatamia v Nobu Su* paras [956] – [965].

450. In *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29, Lord Nicholls said (at paragraphs [63] – [65]) that:

“[63] From time to time cases do arise where awards of compensatory damages are perceived as inadequate to achieve a just result between the parties. The nature of the defendant’s conduct calls for a further response from the courts. On occasion conscious wrongdoing by a defendant is so outrageous, his disregard of the plaintiff’s rights so contumelious, that something more is needed to show that the law will not tolerate such behaviour. Without an award of exemplary damages, justice will not have been done. Exemplary damages, as a remedy of last resort, fill what otherwise would be a regrettable lacuna.

...

[65] ... the availability of exemplary damages should be co-extensive with its rationale. As already indicated, the underlying rationale lies in the sense of outrage which a defendant’s conduct sometimes evokes, a sense not always assuaged fully by a compensatory award of damages, even when the damages are increased to reflect emotional distress.”

451. The remedy of exemplary damages is in my view potentially available in a case involving unlawful means conspiracy: see *McGregor on Damages* 21st edition, paragraph 13-011 (“... all torts which may contain a wilful element, are now up for consideration in the exemplary stakes”). In *Axa Insurance UK PLC v Financial Claims Solutions Ltd.* [2018] EWCA Civ 1330 (“*Axa*”), exemplary damages were awarded in a case of unlawful means conspiracy and deceit, without any relevant distinction being drawn between them.

452. There is first instance authority which indicates that exemplary damages are not available in a claim for invasion of privacy or breach of confidence: see *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777. As shown by the discussion in *Snell’s Equity* 34th Edition paragraph 9-024, and *McGregor* para 13-011 footnote 48, this is a controversial issue on which a higher court might take a different view. I do not need to resolve that issue in this case, since Salt is in a position to rely upon its tortious claim

for unlawful means conspiracy as the foundation of its argument for exemplary damages.

453. The availability of the remedy was discussed by the Court of Appeal in *Axa*. The claimant insurer successfully recovered exemplary damages in respect of “cash for crash” fraud, which (as the court said) had become far too prevalent and which adversely affected all those in society who are policyholders who face increased insurance premiums. The conduct in that case involved a series of frauds and production of false documentation, and the Court of Appeal referred to the need to deter the respondents and others from engaging in that form of fraud. Exemplary damages in that case came within the “second category” of case which had been identified by Lord Devlin in *Rookes v Barnard No 1* [1964] AC 1129 at 1226-8: ie where the defendant’s conduct had been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.
454. In his judgment, Lord Devlin had said:
- “In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it”.
455. The Court of Appeal in *Axa* indicated, in agreement with the trial judge, that Lord Devlin’s remarks are not to be read as though they were an Act of Parliament, and also that the word “calculated” does not mean that there has to be a careful mathematical calculation. Indeed, in an earlier case Sedley LJ said (in a judgment with which the other judges concurred) that “calculated” meant “likely”: *Borders (UK) Ltd. v Commissioner of Police of the Metropolis and another* [2005] EWCA Civ 197 para [23].
456. In his analysis and conclusions in *Axa*, Flaux LJ (delivering the judgment of the Court of Appeal) said (at paragraph [25]) that it was important to keep in mind that exemplary damages remain anomalous and the exception to the general rule. It was therefore inappropriate to extend the circumstances in which they could be awarded beyond the categories of case identified by Lord Devlin. But if the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the claimant, then exemplary damages may be awarded to deter and punish such cynical and outrageous conduct.
457. Mr. Ashcroft also drew attention to the judgment of Lord Morris in *Broome v Cassell* [1972] AC 1027, quoted in paragraph 13-023 of *McGregor on Damages*:
- “There may be exemplary damages if a defendant has formed and been guided by the view that, though he may have to pay some damages or compensation because of what he intends to do, yet he will in some way gain (for the category is not confined to money-making in the strict sense) or may make money out of it, to an extent which he hopes and expects will be worth his

while. I do not think that the word ‘calculated’ was used to denote some precise balancing process. The situation contemplated is where someone faces up to the possibility of having to pay damages for doing something which may be held to have been wrong but where nevertheless he deliberately carries out his plan because he thinks that it will work out satisfactorily for him.”

Application to the facts

458. In my view, the facts of the present case do indeed fall into the second category described by Lord Devlin, bearing in mind the way in which that category is to be interpreted in accordance with the above authorities. Prysmian identified at a very early stage, in January 2018, the possibility of legal issues with Salt if they proceeded down the road of the Vard design on which they had embarked. It was important to Prysmian to obtain an indemnity from Vard if that road was to be followed. Vard’s willingness to provide an indemnity was made clear in Mr. Haugan’s covering e-mail of 15 February 2018, following the discussion at the 7 February 2018 meeting. The terms of the indemnity were subsequently documented in April 2018, as part of the arrangements by which the shipbuilding contract was awarded to Vard.
459. I agree with Mr. Ashcroft’s submission that this is a case where Prysmian faced up to the possibility of having to pay damages for doing something which may be held to have been wrong, but nevertheless deliberately carried out its plan because it thought that it would work out satisfactorily for it. Prysmian thought that it could have the best of both worlds: a vessel that would be built by a first-class yard (favoured on all metrics apart from price), with the benefit of the work that Salt had carried out, but with a cost saving which Prysmian regarded as attractive. Prysmian would also be insulated, by the indemnity given by Vard, against any adverse consequence, in terms of possible claims by Salt.
460. The question remains, however, whether this is a sufficiently anomalous and exceptional case where it would be appropriate, in principle, to make an award of exemplary damages.
461. It seems to me that there is a very real difficulty in reaching a decision, even as a matter of principle, at the present stage. In *Rookes v Barnard* at 1228, Lord Devlin said that juries should be directed that if, but only if, the sum which they have in mind to award as compensation is inadequate to punish the wrongdoer for his outrageous conduct, then a larger sum can be awarded to mark their disapproval of such conduct. In the present case, I do not know what sum will be awarded, if any, as compensation for wrongdoing, and I therefore cannot carry out that particular balancing exercise.
462. Furthermore, the potential remedies available for breach of confidence go beyond simply the award of compensatory damages. One possible remedy is for Prysmian to be required to disgorge profits made: see *Snell’s Equity* para 9-022. It is not difficult to envisage that Salt will advance a claim which exceeds the sums that it would have been paid if the SFA had not been breached, but which is based upon or takes into account the approximately €5 million saving that Prysmian gained as a result of its decision to proceed with the Vard design. If such a sum were to be awarded, it would in my view have a very material bearing on the court’s willingness to make an award of exemplary

damages. There are also questions which may arise as to the availability of injunctive relief, and the extent to which this is relevant when considering exemplary damages.

463. In these circumstances, I think that it is preferable to defer any concluded decision on the availability of exemplary damages until the stage when the court finally determines issues as to remedies. I do not think that there is any good reason not to take this course, in circumstances where it is common ground that I could not determine at the present stage, even as a matter of principle, how much to award by way of exemplary damages.
464. I would take a different view if I had been persuaded that the facts do not take the present case into exemplary damages territory. As is clear from the decision of Bryan J in *Lakatamia*, it is not sufficient simply to show that the case is within one of Lord Devlin's categories. If the case is to be susceptible to an award of exemplary damages, then the relevant conduct must be (to use the words of Bryan J) "sufficiently high-handed or egregious as to justify a punitive response". This must itself be considered in the light of the fact that exemplary damages are not, and should not, become the norm even in cases of deceit or, as in the present case, unlawful means conspiracy.
465. Having considered the parties' arguments on exemplary damages, which were primarily addressed in their written opening and closing submissions, I have ultimately formed the view that Prysmian's conduct was sufficiently high-handed or egregious so as to, potentially at least, justify a punitive response. The reasons which have led me to this conclusion are as follows.
466. First, the confidential nature of the GA and Specification was specifically and clearly identified in the SFA. It was reinforced by the notations on those documents described in Section E2.1 above. This was unsurprising in view of the industry background, which would have been well understood by Prysmian, which is described in that section.
467. Secondly, I do not accept that Prysmian could, bearing in mind the above matters, reasonably have considered that it was entitled to use the GA and Specification as though they were their own. Indeed, Mr. Taddei readily acknowledged in his evidence that the Salt design documents should never have been made accessible to Vard Design AS for the purpose of considering them when they were working on a rival design for the Prysmian newbuilding CLV.
468. Indeed, I was unpersuaded on the evidence adduced before me that this is what Prysmian actually believed at the time. It is clear that in January 2018, at a comparatively early stage, Prysmian identified potential legal issues with Salt arising from the route that was under consideration at that time. No case was advanced to the effect that Prysmian relied upon legal advice in their decision to follow the route which they did. What happened, in my view, is that the end of obtaining a reduced price was regarded as the important goal to be achieved, irrespective of Salt's rights which were catered for by the indemnity which Prysmian required from Vard.
469. Thirdly, I think that it is appropriate to pay some regard, as Mr. Ashcroft submitted, to Prysmian's "Ethical Code" which was an annex to the SFA. This set out a "Code of Ethics" which was applicable to all "Covered Parties". This included anyone conducting business on behalf of Prysmian, including but not limited to managers, officers, employees, contractors and suppliers. It was therefore applicable not only to Prysmian personnel, but also the personnel of a contractor such as Salt. Prysmian's

Ethical Code stated that the Prysmian Group was committed to conducting its business in accordance with the highest standards of ethical behaviour, avoiding even the appearance of unethical conduct. Mr. Ashcroft submitted, and I agree, that Prysmian's conduct fell significantly below its required standards.

470. Fourth, in the light of the above matters, including the industry background, I regard this as a bad case of breach of confidence. As Mr. Ashcroft submitted, Prysmian did engage in a blatant misuse of confidential information to facilitate an outcome where it could obtain a ship built by Vard with the benefit of the Salt design, but at a significantly lower cost.
471. Accordingly, I see no reason to decide now that exemplary damages are unavailable, in the light of the facts as I have found them to be. I reserve for later determination the decision as to whether such damages should be awarded.

G4: The Trade Secrets (Enforcement etc.) Regulations 2018

472. These Regulations are relied upon by Salt for remedial purposes only. The parties' written and oral arguments addressed them only very briefly.
473. Regulation 2 of the Regulations defines a trade secret as information which:
- i) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among, or readily accessible to, persons within the circles that normally deal with the kind of information in question,
 - ii) has commercial value because it is secret, and
 - iii) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret;
474. In the light of my findings in Section E above, I consider that each of these requirements is satisfied.
475. Regulation 3 of the Regulations provides that the "acquisition, use or disclosure of a trade secret is unlawful where the acquisition, use or disclosure constitutes a breach of confidence in confidential information". Again, in the light of my findings, this requirement is satisfied.
476. Regulation 14 of the Regulations concerns injunctive or similar relief. Regulation 16 provides for compensation instead of an order under Regulation 14, as follows:
- “(1) A person liable to the imposition of an order under regulation 14 may apply for, and a court may make, an order for compensation to be paid to the injured party instead of an order under regulation 14 –
- a) if at the time of use or disclosure the person neither knew nor ought, under the circumstances, to have known that the trade secret was obtained from another person who was using or disclosing the trade secret unlawfully,

b) if the execution of the measures in question would cause disproportionate harm to the person liable to the measures, and

c) if it appears reasonably satisfactory to pay compensation to the injured party.”

477. Prysmian submitted that compensation would not be available under Regulation 16, because any infringement was not made with knowledge that unlawful acquisition, use or disclosure of a trade secret was being engaged in. Nor ought it to have known that it was, given the assurances it had received from Vard, a well-respected and reputable shipbuilder.
478. In view of my findings in Sections E, F and G3 above, I reject that argument on the facts.
479. Prysmian advanced two further arguments in relation to the Regulations.
480. First, it contended that they do not apply outside the UK, but all the alleged infringements took place in Norway, Italy and/or Singapore. Salt submitted, and I agree, that that the Regulations apply in the present case because Prysmian is subject to the *in personam* jurisdiction of this court and English law is the applicable law for the claims made.
481. Secondly, Prysmian contended that the regulations only came into force on 9 June 2019, after Vard’s design work up to Vard GA rev 8 and after the conclusion of the shipbuilding contract. I agree with Salt that this is irrelevant. Regulation 19 provides that they apply to proceedings brought before a court after the coming into force of the Regulations, in respect of a claim for unlawful acquisition use or disclosure of a trade secret. In the present case, the claim form was issued on 12 July 2018 and the relevant temporal requirement is met.
482. Accordingly, I consider that the Regulations are applicable. The nature and extent of any remedy thereunder is for later determination.