Claim No. CL-2018-000352
Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC2A 1NL

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
Neutral Citation Number: [2020] EWHC 619 (Comm)

Before

MR JUSTICE BUTCHER

BETWEEN:

CLASSIC MARITIME INC

Claimant

-v-

(1) LIMBUNGAN MAKMUR SDN BHD
(2) LION DIVERSIFIED HOLDINGS BHD

Defendants

Richard Southern QC and Andrew Pearson (Instructed by **Winter Scott LLP**) appeared on behalf of the Claimant

The Defendants did not appear and were not represented

Wednesday, 11 March 2020

MR JUSTICE BUTCHER:

Introduction

1. This has been the trial of a claim for damages made by the Claimant, Classic Maritime Inc, in respect of unperformed shipments under a contract of affreightment. The claim is brought against the First Defendant, Limbungan Makmur Sendirian Berhad, which I will refer to as Limbungan, as the charterer under the COA, and against the Second Defendant, Lion Diversified Holdings Berhad, to which I will refer as Lion Diversified, as guarantor of Limbungan's performance under the COA.

2. No separate defences have been put forward under the guarantee, and the only issue concerning Lion Diversified is whether Limbungan is in breach of contract.

3. Only the Claimant, to which I will refer as Classic, has appeared or been represented at this trial.

4. Both the Defendants are Malaysian companies. On 15 October 2019, the Malaysian court ordered that Lion Diversified be wound up pursuant to the provisions of the Companies Act 2016 of Malaysia. The liquidator of Lion Diversified has not accepted Classic's claim in this action.

5. Hill Dickinson LLP, who had represented both Defendants, continued to do so

after the liquidator was appointed. They served factual and expert evidence, and experts in both the disciplines of iron ore trading and chartering met and agreed joint memoranda.

6. Hill Dickinson LLP came off the record on 25 January 2020. No solicitors have been appointed to replace them.

7. On 26 February 2020, the liquidator of Lion Diversified applied for recognition of the insolvency proceedings in Malaysia as a foreign main proceeding in accordance with the UNCITRAL Model Law on Cross-Border Insolvency as set out in Schedule 1 to the Cross-Border Insolvency Regulations 2006.

8. On 27 February 2020, Insolvency and Companies Court Judge Burton, sitting on the Insolvency and Companies list of the Business and Property Courts of England and Wales, granted that application and also ordered that the commencement or continuation of individual actions or proceedings concerning Lion Diversified's assets, rights, obligations or liabilities were stayed.

9. That stay was, however, expressly and at the instigation of Classic, made subject to an exception in relation to this action. The order of ICC Judge Burton provided that Lion Diversified should have liberty to apply to the trial judge in this action for the stay to apply to it, but no such application has been made to me.

10. The action has accordingly proceeded but, as I have said, with only one side participating at the trial. It is necessary, accordingly, to say something about the shape that the hearing has taken.

11. Guidance as to what is or may be required in circumstances such as these is provided by the decision of the Court of Appeal in Clarke v Lighting & Lamps

UK Limited [2016] EWCA Civ 5, especially at paragraphs 37 to 42 per Vos LJ. Omitting material which is specific to the case which was then being considered, the following is helpful guidance:

"*37. […] It is important to understand that there will not be a "one size fits all" approach to the steps that a judge should take in this situation; different cases will demand different approaches. Here, however, the judge started by suggesting that the appropriate course was to strike out the defence and counterclaim […]*

38. […] That having happened, the judge had to determine what was necessary for her to decide the trial in the absence of any defence or counterclaim […]

39. […] [the Defendant] *does not submit that the judge should have gone through the charade of requiring the claimants to call their witnesses when there was nobody present to challenge their evidence. I see no reason why that could have been needed to be done in this case […]*

40. I can quite see that in some cases the particulars of claim or the witness statements might raise inconsistencies that the judge feels it necessary to clarify by the calling of one or more witnesses to give oral evidence, but no such suggestion has been made in this case. Here, the claim was straightforward and the judge understood what it was […]

41. As a matter of principle, the court is perfectly entitled to dispense with the calling of oral evidence under CPR Parts 32.2(2)(b) and 32.5(1)(b) where witness statements have been served. The court does not have to follow a pointless

procedure in an undefended claim. If it were otherwise, undefended cases up and down the country would be delayed and subjected to inappropriate scrutiny when there was no defence raised and no substantive argument about the claimants' entitlement.

42. In this case the claimants had to prove their case. They did so by presenting both their statement of case verified by a statement of truth, and also their witness statements. There was no need for the judge to require the witnesses to be called."

12. It is also relevant to note what was said in the case of Williams v Hinton [2011] EWCA Civ 1123 about a case in which witness statements were served by a party but not put in under CEA notices and where the witnesses were not called.

13. At paragraphs 42 to 46 Gross LJ said this:

"42. As will be recollected, Ground II involves the complaint that, having decided to hear the case in the Appellants' absence, the Judge failed to ensure that the Appellants' evidence and case was fully considered. In my judgment, this Ground lacks substance and I would dismiss it for the reasons which follow.

43. First and by way of starting point, the appellants' witness statements did not constitute "evidence". CPR r.32.5 provides as follows:

> *"Use at trial of witness statements which have been served*
>
> *32.5–*
>
> *(1) If—*
>
> *(a) a party has served a witness statement; and*

(b) he wishes to rely at trial on the evidence of the witness who made the statement,

he must call the witness to give oral evidence unless the court orders otherwise or he puts in the statement as hearsay evidence.

…

(5) If a party who has served a witness statement does not—

(a) call the witness to give evidence at trial; or

(b) put the witness statement in as hearsay evidence, any other party may put the witness statement in as hearsay evidence."

As it seems to me, this provision is clear. The appellants did not attend the trial. They neither called the witnesses who had given statements nor did they put in those statements as hearsay evidence. The respondents could have adduced the appellants' witness statements as evidence but wholly understandably did not do so. Those witness statements thus never became evidence at the trial.

44. Secondly, the Judge was obliged and only obliged to consider evidence. In fact, the Judge did consider the appellants' witness statements (at [12]). It follows that the Judge did more than he was obliged to do; the basis for this complaint by the appellants thus disappears. There is no duty in our adversarial system to adopt a "wider approach" as Mr Mason at one point suggested.

45. Thirdly and in any event, there is no reason to doubt what the Judge said at [12] of the judgment. Thus, on any view of the status of the appellants' witness statements and the scope of the Judge's duty to consider materials before him, he

had considered those witness statements. There is no requirement on a Judge to set out in any particular manner or at length his views on the evidence of a party who has not attended the hearing. Still less does the fact of a succinct reference to such evidence (a fortiori if it is not "evidence" at all) serve to found a ground of appeal.

46. Fourthly, nothing in art.6.1 ECHR or Van de Hurk (supra) at [59] begins to suggest otherwise. What is fair depends, inevitably, on all the circumstances. Here the Judge paid more than adequate regard to the "submissions, arguments and evidence adduced by the parties": Van de Hurk, loc cit . The point requires no further elaboration."

14. In the present case, Classic has served CEA notices in respect of its factual witness statement and expert reports. The Defendants have served no CEA notices and have called no witnesses. In the circumstances, the witness statement of Mr Lu of 17 October 2019 is not evidence in the case and nor are the reports from the experts which were served by the Defendants. I have, however, read all that material.

15. Given that there would be no one to cross-examine them and given that I did not consider that there were questions which I needed to put to them myself, I indicated that I did not require Classic to call their factual and expert witnesses to give oral evidence.

16. I was addressed over two days by Mr Southern QC for Classic. He assured me that he and junior counsel for Classic had had in mind and been guided by the observations of HHJ Waksman QC, as he then was, in CMOC Sales & Marketing

Limited v Persons Unknown [2018] EWHC 2230 Comm as to their obligations in the presentation of the case in the absence of participation by the Defendants at the trial.

Factual background and the previous action

17. This is not the first time that a dispute relating to the COA at issue here has come before these courts. A previous action involved seven unperformed shipments that should have been performed under the COA between July 2015 and June 2016. The trial was heard by Teare J in July 2018. His judgment is dated 13 September 2018.

18. That action had arisen as a result of the bursting of the Fundão Tailing Dam in Brazil on 15 November 2015. Teare J's judgment gives a helpful summary of the parties involved in that action, of the COA and of the issues which arose there. It is convenient to set this out because it forms a useful statement of the background to the present action.

19. Thus, Teare J said this:

"1. On 5 November 2015 the Fundão dam, in the industrial complex of Germano in Brazil where iron ore is mined, burst. According to one iron ore expert who knows this area well the slurry went right down to the ocean, villages were swamped and people lost their lives. The bursting of the dam also stopped production at the iron ore mine and it is that event which has fuelled this litigation between a shipowner and a charterer.

2. The shipowner, Classic Maritime Inc, a Marshall Islands company working out of offices in Monaco, and the claimant in this action, entered into a

long-term contract of affreightment (the "COA") for the carriage of iron ore pellets from Brazil to Malaysia. A Malaysian company, Limbungan Makmur Sdn Bhd ("Limbungan"), was the charterer under the COA and is the defendant in this action. Limbungan has relied upon the dam burst as a force majeure *excusing it from liability for failing to provide cargoes of iron ore pellets for shipment from Brazil to Malaysia. The shipowner does not accept that the charterer is entitled to rely upon the* force majeure *clause in the COA and has claimed damages for breach of the COA.*

3. In this action damages are claimed in respect of seven shipments. Judgment has already been given in respect of two shipments which should have taken place between July and October 2015 (prior to the dam burst). This judgment therefore concerns the claim in respect of five shipments which should have taken place between November 2015 and June 2016 (after the dam burst). The sum claimed is about US$20 million in respect of three "scheduled shipments" which should have been performed at a freight rate of US$45.50 per mt. That freight rate is to be compared with the market freight rate in March to June 2016 which was less than US$7 per mt. The other two shipments, known as "index shipments" (because they were to be performed at the market rate) give rise to modest claims of just over US$400,000. (The agreement for "scheduled" and "index" shipments arose out of earlier litigation in this court between the shipowner and the charterer in 2009 following the fall in freight rates driven by the collapse in the demand for raw materials. I am told that there is a separate action in respect of 14 further shipments which should have been performed before December 2017.)" [I interpolate that that action is the present claim.]

"4. Limbungan, the charterer, is a wholly owned subsidiary of Lion DRI Sdn Bhd ("Lion DRI") which is, in turn, a wholly owned subsidiary of Lion Diversified Holdings Bhd ("Lion Diversified"). Lion Diversified is the guarantor of the charterer and is sued as second defendant. If the charterer is liable so is Lion Diversified. There was evidence that Limbungan was a special purpose vehicle established in order to enter into and perform the COA.

5. Lion DRI is the owner and operator of a Hot Briquetted Iron plant in Port Kelang in Malaysia. Its entire production was sold to a company called Megasteel.

6. Antara Steel Mills Sdn Bhd ("Antara") is the owner and operator of another Hot Briquetted Iron plant in Labuan in Malaysia. It sold its production on the open market.

7. Antara is part of "the Lion Group" but is not a wholly owned subsidiary of Lion Diversified. It is ultimately owned by Lion Industries Corporation Bhd ("Lion Industries") which I understand to have some connection with Lion Diversified. The precise connection was not in evidence but I understood it to be in the form of some common shareholders. There was evidence that Lion Industries was a substantial shareholder of Lion Diversified […]

8. Iron ore pellets from the Brazilian mining company, Samarco Mineracao SA, were shipped through Ponta Ubu in Brazil and iron pellets from another Brazilian mining company, Vale SA, were shipped through Tubarao, also in Brazil.

9. Lion DRI had a long-term sales and purchase contract with Samarco

dated 11 August 2006 for the sale and purchase of 1.2 million mt of DR-grade pellets per year between 2008 and 2018. Antara (by way of a novation) had a long-term sales and purchase contract with Samarco dated 23 November 2004 for the sale and purchase of 640,000 mt of DR-grade pellets in 2005 and 800,000 mt of DR-grade pellets per year thereafter until, by an addendum, 2015. That contract expired on 31 March 2015. A replacement contract had almost been agreed when the dam burst in November 2015. DR-grade pellets are Direct Reduction pellets. They are to be contrasted with BF pellets, Blast Furnace Pellets. Both forms of pellets were contractual cargoes under the COA.

10. Lion DRI also had a long-term supply contract with Vale dated 1 November 2006 which was scheduled to last, by an addendum, until 2018. That contract was "idle", in the sense of not being used, from 2011. Antara (by way of novation) had a long-term supply contract with Vale dated 1 April 2004 which was also scheduled to last, by an addendum, until 2018. That also appears to have been "idle".

11. The COA dated 29 June 2009 provided for 51 shipments. Between July 2009 and July 2015 Limbungan, the charterer, made cargoes available for 38 shipments. All but eight shipments were loaded at Ponta Ubu, the others being loaded at Tubarao, the last shipment from Tubarao being in July 2011.

12. From August 2011 Samarco was the sole supplier of iron ore pellets shipped under the COA. Some shipments involved pellets bought by both Antara and Lion DRI. Thus some 16 shipments were discharged at both Port Kelang and Labuan. Two shipments involved pellets bought by Antara and were discharged at

Labuan. Three shipments involved pellets bought by Lion DRI and were discharged at Port Kelang. From 2011 all shipments were of Samarco pellets ex Ponta Ubu.

13. Antara also had a COA with PCL (Shipping) dated 31 January 2008 with the same loading and discharging ports as under the COA with Classic but with a different, and lower, freight rate."

20. As Teare J set out, judgment had been given in respect of two shipments, leaving the claim before him as one in respect of five shipments which should have taken place after the dam burst. The Defendants relied on a clause of the COA, namely clause 32, and contended that the bursting of the dam was an event of *force majeure* and that, by reason of clause 32, they were excused from further performance of the COA.

21. Teare J held that Limbungan was in breach of contract in respect of the five unperformed shipments, but awarded only nominal damages. On appeal, [2019] EWCA Civ 1102, the Court of Appeal upheld Teare J's decision on liability but awarded substantial damages. The Supreme Court refused an application by Limbungan for permission to appeal.

<u>The contractual framework</u>

22. The COA is dated 29 June 2009. It identified Classic as the owners and Limbungan as charterers. It contained, amongst others, the following provisions of note:

"55. It is mutually agreed that the Charterer undertakes to ship cargo and the Owner undertakes to provide tonnage to carry same as follows:

56. Cargo / Cargo Quantity / Number of and Schedule for shipments:

*56.1 **Cargo:** IRON ORE PELLETS IN BULK excluding DRI/HBI/DRIP.*

*56.2. **Cargo quantity:***

Tubarau 160,000 Metric Tonnes per shipment, 10% more or less in Owner's option

Or

Ponta Ubu 150,000 Metric Tonnes per shipment, 10% more or less in Owner's option

Or mixer of both loading port basis one load port/one discharge port.

*56.3. **Number of and schedule for shipments**:*

(a) The total number of shipments to be performed hereunder shall be 51 (fifty-one);

(b) 43 (forty-three) of the 51 (fifty-one) shipments to be performed hereunder shall be "Scheduled Shipments" as defined in clause 56.3(c) below. The remaining 8 (eight) shipments to performed hereunder shall be "Unscheduled Shipment" as defined in clause 56.3(d) below.

*(c) **"Scheduled Shipments":** The schedule for the Scheduled Shipments shall be as follows:*

2009: 3 shipments fairly evenly spread but at least one shipment in every two consecutive calendar months;

2010: 6 shipments fairly evenly spread but at least one shipment in every two consecutive calendar months;

2011: 6 shipments fairly evenly spread but at least one shipment in every two consecutive calendar months;

2012: 6 shipments fairly evenly spread but at least one shipment in every two consecutive calendar months;

2013: 6 shipments fairly evenly spread but at least one shipment in every two consecutive calendar months;

2014: 6 shipments fairly evenly spread but at least one shipment in every two consecutive calendar months;

2015: 6 shipments fairly evenly spread but at least one shipment in every two consecutive calendar months;

1.1.16 to 30.6.16: 4 shipments fairly evenly spread.

The words "at least one shipment in every two consecutive calendar months within a given year or shorter time" shall mean that the relevant year or shorter time is to be divided up into smaller periods of two consecutive calendar months starting from the beginning of the relevant year and shorter time, and that at least one laycan for one shipment, declared in accordance with clause 66 below, must begin and end within each smaller period of two consecutive calendar months.

Shipment schedule may be amended by mutual agreement. In case of emergency (ie. Plant accident or similar) there can be up to 90 days between 2 shipments, but in any event a minimum of 6 cargoes to be shipped during such calendar year as well.

(d) *"**Unscheduled Shipments**": Charterers shall declare laycans for the 8 (eight) Unscheduled Shipments as and when the requirements of "the Lion Group" and all corporations within the same for iron ore pellets in bulk become such that the same cannot be wholly satisfied through the performance of the Scheduled Shipments or the performance of any other contracts of affreightment or charterparties into which Charterers have entered prior to the date hereof (the "Extra Requirements"). Charterers undertake that neither Charterers nor any other corporation within "the Lion Group" shall charter in vessel(s), whether on a voyage, time or contract of affreightment basis, from any third party or amend or vary existing any* [sic] *charterparty or contract of affreightment with third parties or otherwise purchase iron ore pellets on terms that the seller is responsible for carriage of the same, to satisfy the requirements of "the Lion Group" or any corporation within the same for iron ore pellets in bulk (the "Requirements Undertaking") save that after Charterers*

have declared the laycan for the first of the said 8 (eight) shipments, the Requirements Undertaking is then temporarily suspended and not applied for the next shipment (meaning a cargo loaded on a single ship) needed for Extra Requirements (in respect of which Charterers may therefore contract with a third party) but is reinstated and applies again for the following shipment needed for Extra Requirements, but not for the one after, and so continues in this alternating pattern until all eight Unscheduled Shipments are performed. Without prejudice to the forgoing, all the laycans for the Unscheduled Shipments must be declared so that the same fall in their entirety before 31 December 2017.

[...]

58. Load port:

One safe berth/port Tubarao, Brazil or one safe berth/port Ponta Ubu [...]

59. Discharge port:

One safe berth/port Labuan or one safe anchorage Port Kelang in Charterers' option [...]

61. Freight:

U.S. $45.50 (Forty-Five Dollars and Fifty Cents) per Metric Ton.

[...]

66. Cargo declaration / Vessel nomination clause.

Charterers to give Owners 45 days tentative and 30 days definitive notice of required layday commencement with Stem in Order for 15 days spread inclusive. Owners to declare name of the performing vessel with exact position and itinerary, ETA at both load and discharge port, expected intake and stowage plan and complete vessel description so that the declaration reaches Charterers not later than 15 days prior to the commencement of laydays. Owners permitted to provide a substitute vessel up to 10 days prior to commencement of laydays. The ETA of the substitute vessel is to be within the laydays as notified by Charterers, unless otherwise mutually agreed, and the substitute vessel is to be capable of lifting a contractual cargo size i.e. 150,000/160,000 MT 10 percent more or less in Owner's option at Labuan and Port Kelang respectively.

All vessels nominated under this contract including substitute vessels will be subject to shippers' and receivers' approval declarable within 2 working days from time of receipt of official nomination and all details as requested. Should Charterers fail to revert timely within the 2 working days and provided nomination of performing vessel and/or the subsequent substitutes are within the terms of this contract, Owners are not obliged to perform the cargo in question.

The nominated vessels will not tender NOR before 0001 hours (local time)

on the first day of the laydays except with Charterers' approval. If this approval is given on half time used shall count [sic]. Should the nominated vessels not be ready to load by 2400 hours (local time) on the last day of laydays or if any wilful misrepresentation is made with respect to the size, position or state of the vessel, Charterers shall have the option of cancelling the vessel. Such option shall be declared on Notice of Readiness being tendered. Should it become clear that the nominated vessel will not be ready to load by 2400 hours (local time) on the last day of the laydays, Owners to inform Charterers immediately. Within 48 hours of receipt of such notification, Charterers to inform Owners whether vessel will be maintained with laydays revised to cover her position basis adding 2 days to the new ETA for the purposes of establishing a new cancelling date, or cancelled. If the vessel is cancelled, the voyage shall stand as unperformed and cargo lifting shall be re-nominated by Charterer."

23. The COA also contained, as clause 32, a clause which was headed "Exceptions". That clause provided as follows:

"Neither the Vessel, her Master or Owners, nor the Charterers, Shippers or Receivers shall be Responsible for loss or damage to or failure to supply, load discharge or deliver the cargo resulting From: Act of God, act of war, act of public enemies; pirates or assailing thieves; arrest or restraint of princes, rulers or people; embargoes; seizure under legal process, provided bond is promptly Furnished to release the Vessel or cargo; floods; frosts; fogs; fires; epidemics; quarantine; Intervention of sanitary, customs or other constituted authorities;

Blockades; Blockages; riots; insurrections; civil commotions; political disturbances; earthquakes; Landslips; explosions; collisions; strandings, and accidents of navigation; accidents at the mine or Production facility or to machinery or to loading equipment; accidents at the Receiver's works, Port, wharf or facility; or any other causes beyond the Owners', Charterers', Shippers' or Receivers' Control; always provided that any such events directly affect the performance of either party under This Charter Party. If any time is lost due to such events or causes such time shall not count as Laytime or demurrage (unless the Vessel is already on demurrage, in which case only half time to count)."

24. By 2014 it appears that Limbungan was experiencing difficulties in complying with the shipment schedule under the 2009 COA. Accordingly, the parties entered into Addendum Number 1, dated 30 June 2014. Under that Addendum Number 1, it was provided inter alia as follows:

"2. Clause 56.3(a) of the COA is hereby amended to read as follows:

"The total number of shipments to be performed hereunder shall be 59 (fifty-nine)"

3. Clause 56.3(b) of the COA is hereby amended to read as follows:

"35 (thirty-five) of the 59 (fifty-nine) shipments to be performed hereunder shall be "Scheduled Shipments" as defined in clause 56.3(c) below. Of the remaining 24 (twenty-four) shipments to be performed hereunder, 16 (sixteen) shall be "Unscheduled Shipments" as defined in clause 56.3(d) below, and 8 (eight) shall be "Index Shipments" as defined in clause 56.3(e) below."

4. *Clause 56.3(c) of the COA is hereby amended so that provisions thereof as to 2014, 2015 and 2016 are to read as follows.*

"1.1.14 to 30.6.14: 3 shipments fairly evenly spread but at least one shipment in every two consecutive calendar months;

1.3.15 to 30.6.15: 2 shipments fairly evenly spread but at least one shipment in every two consecutive calendar months.

1.3.16 to 30.6.16: 3 shipments fairly evenly spread."

5. *Clause 56.3(d) of the COA is hereby amended so as to delete the references in the first and thirteenth lines thereof to "8 (eight)" shipments, and to insert in their place references to "16 (sixteen)" such shipments.*

6. *Clause 56.3 of the COA is hereby further amended so as to insert the following sub-clause (e).*

*"(e) "**Index shipments":** The schedule for the Index Shipments shall be as follows:*

1.7.14 to 28.2.15: 4 shipments fairly evenly spread but at least one shipment in every two consecutive calendar months.

1.7.15 to 28.2.16: 4 shipments fairly evenly spread but at least one shipment in every two consecutive months.

The words "at least one shipment in every two consecutive calendar months" shall bear the meaning as defined in clause

56.3(c) above."

7. *Clause 56.3 of the COA is hereby further amended so as to insert the following sub-clause (f):*

   "(f) For the avoidance of doubt, the provisions of clause 66 shall apply to all shipments under this COA whether the same are Scheduled, Unscheduled or Index Shipments [...]"

[...]

9. *Clause 61 of the COA is hereby amended so as to read as follows.*

   "61. Freight.

   61.1. Freight rate for Scheduled Shipments and Unscheduled Shipments is US$ 45.50 (Forty-five dollars and 50 cents) per metric tonne basis 1 load port Tubarao or Ponta Ubu and 1 discharge port Port Kelang or Labuan.

   61.2. For each particular Index Shipment the freight rate is the rate for route C3 as quoted on the Baltic Cape Size index (BCI) on the date of the bill(s) of lading issued in respect of that particular Index Shipment or if the BCI is not published on that date the most recent date prior to the date of the bill(s) of lading on which the BCI was published, LESS:

   US$1.75 (one dollar and seventy-five cents) per metric tonne in case of discharge Port Kelang as sole discharge port; or

   US$0.40 (forty cents) per metric tonne in case of discharge at

Labuan as sole discharge port or at Port Kelang and Labuan as per clause 59 above [...]"

[...]

11. Save as expressly provided for herein, the terms of the COA remain unamended and unvaried and in full force and effect. This Addendum Number 1 forms part of the COA and without limitation is subject to the choice of law and to the agreement of London arbitration contained therein."

25. There was no dispute in the previous action and no dispute was raised in this action that as charterer Limbungan had, subject to clause 32, an absolute and non-delegable duty to provide cargoes. It is also common ground on the pleadings in this action that, firstly, Limbungan's obligations to declare laycans and make cargo available for shipment were promissory conditions, and secondly that each shipment under the COA was capable of discharge by breach separately and individually from the other shipments.

26. It is necessary to say something further about the *force majeure* defence which was raised in the previous action and the way in which this was dealt with by the decisions in the previous action because this is relevant to matters which arise in the present action.

27. The *force majeure* defence put forward by Limbungan in the previous action, which was repeated in this action, was that Lion DRI and Antara had contracts or arrangements to buy cargoes of iron ore pellets from Samarco for shipment out of Ponta Ubu in Brazil.

28. When the dam collapsed, Samarco suspended all its operations and ceased to be an available source of cargo. There was only one other source of iron ore pellets for shipment from Brazil consistent with terms of the COA, namely Vale, who shipped iron ore pellets out of Tubarao. But the Defendants asserted that Vale had no and said that they had no spare supplies of pellets at Tubarao that Vale was willing to sell to them. On that basis, the Defendants invoked clause 32 of the COA.

29. The proper construction and effect of that clause was central to the previous action. In the Court of Appeal, upholding Teare J on this issue, Males LJ said that a reasonable and realistic businessman:

"... would see the broad common sense of saying that if, but for the dam burst, [Limbungan] *would not have performed its obligations, its failure to perform cannot fairly be said to have 'resulted from' the dam burst and the dam burst cannot fairly be said to have 'directly affected' the performance of* [Limbungan's] *obligations."* (See paragraph 48)

30. The effect of that was that Limbungan was required to prove that, but for the collapse of the dam, it would have performed its obligations under the COA.

31. Limbungan failed to discharge that burden of proof in the previous action. Teare J held that it was more likely than not that Limbungan would not have been willing and able to supply cargoes for shipment in the months between November 2015 and June 2016 (see paragraphs 90 to 110 of his judgment).

The issues in this action

32. The issues in this action appear from the statements of case. They may be summarised as follows.

33. Classic contends that:

(1) Limbungan's primary obligation under the COA was to provide cargoes for shipment and to do so by declaring laycans for the shipment of those cargoes; that Limbungan was required by clause 56.3(d) to declare laycans for the shipment of all the COA cargoes which fell in their entirety before 31 December 2017. Classic contends that Limbungan did not do so in respect of 13 Unscheduled Shipments. Classic says that it also failed to perform one Scheduled Shipment in 2013. Classic says that unless Limbungan can excuse that failure, it is liable in damages for that failure of performance.

(2) Classic also contends that if the Lion Group had Extra Requirements as defined by clause 56.3(d), Limbungan was required to declare laycans for Unscheduled Shipments sooner. Classic's case is that the Lion Group did have Extra Requirements in 2013 to 2015 such that Limbungan should have declared six Unscheduled Shipments under the COA during that period. That would mean that seven Unscheduled Shipments were left that should have been performed before the end of 2017.

(3) Alternatively, it contends that if it is wrong about there having been Extra Requirements then all 13 Unscheduled Shipments should have been performed before the end of 2017.

(4) Classic contends that Limbungan is also liable for failure to perform what

has been called the ‘Missed 2013 Shipment’.

34. Limbungan's pleaded defences are as follows.

(1) What might be described as an overarching defence that as a matter of construction of clause 56.3(d) Limbungan was required to perform Unscheduled Shipments if, but only if, the Lion Group had Extra Requirements prior to the end of 2017.

(2) Alternatively, that if Limbungan had to perform any Unscheduled Shipments, then as a matter of construction it only had to perform alternate ones, and so only half of them or a maximum of eight rather than sixteen.

(3) A denial that Limbungan or any company in the Lion Group in fact had Extra Requirements.

(4) Insofar as Unscheduled Shipments were not required to be performed before the dam burst on 5 November 2015 but could be performed thereunder, Limbungan's failure to supply cargo resulted from the dam burst, which was an accident at the mine or a cause beyond the charterers' control, and so it is not liable for not performing the unperformed shipments by reason of clause 32 of the COA, which is effectively the same as the previously raised *force majeure* defence in the earlier action.

(5) That Addendum Number 1 treated the Missed 2013 Shipment as cancelled without compensation.

35. I will take each of the five defences which I have identified in turn.

The first issue: the defence that if, and to the extent that, there were no Extra Requirements, no Unscheduled Shipments had to be performed.

36. As I understand this defence, it is as follows: that, as a matter of construction of clause 56.3(d) of the COA as amended, there was an obligation to make Unscheduled Shipments only to the extent that there were Extra Requirements and that, if, and to the extent that, there were no Extra Requirements before the end of 2017, then there was no obligation to perform Unscheduled Shipments and Limbungan would be discharged from any liability to make such shipments or to pay compensation therefor.

37. I do not consider that that is the correct construction of the COA as amended. I say that for the following reasons.

(1) Clause 56.3(a) as amended contains a clear provision that "*The total number of shipments to be performed hereunder shall be 59 (fifty-nine)*". Limbungan's construction would be inconsistent with this provision in that, on the basis of it, the number of shipments to be performed would be fewer than 59 if there were no Extra Requirements.

(2) The Unscheduled Shipments are intended to be a part of the 59. As clause 56.3(b) of the COA as amended states, the 16 Unscheduled Shipments were part of the "*24 (twenty-four) shipments to be performed hereunder*" other than the Scheduled Shipments. This indicates that the obligation to make the Unscheduled Shipments is no more contingent than that to make the Scheduled Shipments or the Index Shipments.

(3) The last sentence of clause 56.3(d) provides that all the laycans for the

Unscheduled Shipments must be declared so that the same fall in their entirety before 31 December 2017. Under the COA as amended, there were 16 Unscheduled Shipments; see clause 56.3(b) and the first two lines of clause 56.3(d). A natural reading of the last sentence of clause 56.3(d) is that there had to be declarations of laycans for all the Unscheduled Shipments and that those laycans should fall in their entirety before 31 December 2017.

(4) This construction gains support from the commercial background to clause 56.3(d) of the 2009 COA and indeed to Addendum Number 1. The 2009 COA was part of the settlement of disputes which had arisen under two earlier COAs made in July and August 2008, i.e. shortly before the global financial crisis. A dispute had arisen because Limbungan had failed to perform a number of shipments. The commercial logic of the 2009 COA appears clear: to increase the number of shipments from 45 to 51 and to increase the period over which they were to be performed, namely from the end of 2013 to by the end of 2017 but to reduce the freight rate. It is unlikely that this arrangement involved the Unscheduled Shipments being contingent because that would have reduced the number of definite shipments from that specified under the 2008 COAs from 45 to 43. That would have undermined the commercial rationale for the settlement.

38. Much the same can be said in relation to Addendum Number 1. It reduced the number of Scheduled Shipments from 43 to 35 but increased the number of Unscheduled Shipments from 8 to 16 as specified in clause 5 of Addendum Number 1, giving more flexibility to Limbungan as to the time of performance of

shipments at the full COA freight rate, and also introduced 8 Index Shipments which would be performed at the prevailing market rate at the date of performance. If the Unscheduled Shipments were contingent, then Classic would have been giving up the certainty of performance or compensation for 8 full COA rate shipments. That is unlikely.

The second issue: alternate shipments

39. The second issue arises from Limbungan's plea in paragraph 8(3) of its defence, which is as follows:

> *"In the event there were Extra Requirements, Limbungan was only obliged to declare laycans and make cargoes available for the 1st Unscheduled Shipment, and any odd-numbered Unscheduled Shipment necessitated by Extra Requirements thereafter. In the premises, Limbungan was only required to perform a maximum of 8 Unscheduled Shipments where required."*

40. That is a plea that Limbungan was only obliged to perform alternate Unscheduled Shipments so that it was obliged to perform a maximum of eight Unscheduled Shipments.

41. Putting on one side for a moment the reference to eight shipments in the 18th line of clause 56.3(d) as amended, I consider that this construction is clearly wrong. It would entail that shipments under contracts with other ship-owners were treated as fulfilment of an obligation to make shipments under the COA, which I regard as highly unlikely to have been intended. Such shipments with other ship-owners could not sensibly or as a matter of ordinary language be regarded as shipments "*performed hereunder*" and thus could not count towards the 59 shipments

required to be made by Limbungan under clause 56.3(a) as amended.

42. Limbungan's case on this point appears to rely for support principally on the fact that the word "eight" in the 18th line of clause 56.3(d) was not said to be amended by clause 5 of Addendum Number 1, although the reference to "*8 (eight)*" was changed to " 16 (*sixteen)*" in lines 1 and 13 of clause 56.3(d). I regard this as a drafting error, and the overlooking of the third reference in the clause to eight Unscheduled Shipments, was quite possibly the result of the fact that the third reference had not contained the numeral as well as the word "*eight*". There seems to be no sensible reason why the reference to eight shipments in the first and 13th lines should have been changed to sixteen, but the reference to eight shipments in the 18th line should have been unchanged. Accordingly, I conclude that the total number of Unscheduled Shipments that Limbungan was required to perform under the COA as varied was sixteen, not eight.

The Third Issue: did the Lion Group have Extra Requirements that should have been declared under the COA?

43. If I am right in relation to the first two issues, Classic does not need to show that the Lion Group had Extra Requirements in order to claim in respect of the Unscheduled Shipments for which it has claimed in this action. Nevertheless, if the Lion Group did have Extra Requirements, then that would have affected when the Unscheduled Shipments were to be performed. Classic has maintained that the Lion Group did have Extra Requirements and continued to maintain that position at the trial, even though, as Mr Southern QC said, it was in a sense adverse to Classic to do so, because, if there were Extra Requirements earlier

rather than later, they would have been shipped out of Ponta Ubu and so would have involved smaller shipments than out of Tubarao.

44. This issue turns out to be essentially one of construction of the COA rather than a dispute of fact. I say this because it is common ground on the pleadings that Limbungan nominated for shipment and in fact shipped under the PCL COA 11 cargoes of iron ore pellets from Ponta Ubu to Kelang and/or Labuan between March 2013 and March 2015. The table at paragraph 20 of the Re-Amended Particulars of Claim is admitted at paragraph 17 of the Re-Amended Defence.

45. The PCL COA, which is dated 31 January 2008 and was between PCL as owners and Antara as charterers, was for the carriage of 160,000 metric tonnes, 10 per cent more or less in owners' option, of iron ore pellets from Tubarao or Ponta Ubu in Brazil to Labuan or Port Kelang in Malaysia. It was thus essentially for the carriage of the same sized cargoes of the same commodity from the same load ports to the same discharge ports as under the Classic COA.

46. The PCL COA, as originally entered into, was for the carriage of eight cargoes per annum for five years from 1 March 2008 to 28 February 2013. There were two relevant variations and extensions of the PCL COA. Firstly by Addendum Number 1, dated 8 March 2012, the PCL COA was extended by somewhat over a year, namely from 1 March 2013 to 31 March 2014. The total number of shipments remained 40. Secondly, by Addendum Number 9, dated 25 June 2014, the period was extended by a further 29 months from 31 March 2014 to 31 August 2016. In addition, a further eight shipments were added, making 48 shipments in all, of which 34 had been performed.

47. The issue which arises is whether the extension of the PCL COA in this way, both increasing its duration and the number of shipments, was permitted under or was a breach of the Classic COA and in particular of what is called in clause 56.3(d) the "Requirements Undertaking". To reiterate, by that part of the clause 56.3(d) provision, Limbungan undertook that neither it nor any other corporation within the Lion Group would amend or vary any existing charterparty or contract of affreightment with third parties to satisfy the requirements of the Lion Group or any corporation within the same for iron ore pellets in bulk. Antara was a company within the Lion Group. That is common ground between the parties. Furthermore, it is clear that the PCL COA was, as at the date of the Classic COA, namely 29 June 2009, an existing charterparty or contract of affreightment with third parties for the purposes of that phrase in clause 56.3(d) of the COA.

48. What Classic contends is that, if Limbungan had complied with the Requirements Undertaking, then Antara would either have performed shipments under the PCL COA when they fell due or paid the damages to PCL for non-performance, but would not have extended it on that basis. The PCL COA would have come to an end by 28 February 2013. That would have meant that the requirements of the Lion Group for iron ore pellets in bulk arising after that date could not have been wholly satisfied through the performance of the Scheduled Shipments under the Classic COA or the performance of any other contracts of affreightment or charterparty into which Limbungan had entered prior to the date of the Classic COA.

49. On that basis, the odd numbered shipments in the table in paragraph 20 of the Re-Amended Particulars of Claim should have been shipped under the Classic

COA as Extra Requirements. Classic accordingly claims damages for the loss it suffered by reason of those odd numbered shipments not being declared as Unscheduled Shipments under the COA at the time when they were in fact shipped under the PCL COA.

50. Limbungan disputes this claim on a number of pleaded bases. As I understood it, Limbungan makes essentially four points or groups of points in relation to this area of the case. Firstly, in paragraph 4 of the Re-Amended Defence, it contends that, upon a proper construction of clause 56.3(d) of the Classic COA, it was open to Limbungan or any other corporation within the Lion Group to vary and/or amend a contract of affreightment entered into prior to the date of the 2009 COA in order to make provision for the carriage of iron ore pellets from Tubarao or Ponta Ubu to Port Kelang or Labuan.

51. To reach this conclusion, it appears, as indeed Mr Southern QC submitted, that Limbungan must read the word "charterers" as it appears in the fifth line of clause 56.3(d) as extending to other companies within the Lion Group, including Antara. That however is not what the clause provides. Limbungan were charterers under the COA. Limbungan contends, as I understand it, that the word "charterers", as it appears in the fifth line, must be interpreted as extending to other companies in the Lion Group or should be rectified to so state because, so it contends, at the time the Classic COA was entered into, both parties knew that Limbungan was not party to any other contract of affreightment or charterparty for the carriage of iron ore pellets other than the Classic COA.

52. I consider that this point was not made out as a matter of fact. Mr Fentz's

statement indicates that, while he knew in June 2009 in general terms about the existence of the PCL COA, he did not know that the charterer was Antara rather than Limbungan, although he had not given the matter much thought.

53. Nor was I satisfied that there were other materials which showed that, for the purposes of an assessment of the factual matrix against which the COA falls to be construed, that was knowledge which Classic should be treated as having had. Equally I was not shown any material which would have supported a case for rectification.

54. A further aspect of Limbungan's case as pleaded in paragraph 4 of the Re-Amended Defence appears to be that it meets the definition of the Extra Requirements without reference to the Requirements Undertaking because it contends that the sole criterion for determining whether there would be Extra Requirements was whether the requirements of the Lion Group could be satisfied through contracts that had been entered into before 29 June 2009 irrespective of whether they were varied or amended thereafter.

55. However it does not appear to me that it is possible to read Extra Requirements in this way. Extra Requirements are defined by reference to the performance of any other contracts of affreightment or charterparties which in context must be taken to mean performance in accordance with the other contracts of affreightment or charterparties as they stood as at 29 June 2009, not as they might subsequently be varied to provide, bearing in mind that any such variation was prohibited by the Requirements Undertaking.

56. More generally, it seems to me that the case pleaded at paragraph 4 of the

Re-Amended Defence contradicts the purpose of clause 56.3(d) and in particular of the Requirements Undertaking.

57. The second pleaded point on this issue is in paragraph 8(4) of the Re-Amended Defence and is that there would only be Extra Requirements if the Lion Group or corporations within it required a shipment of 160,000 metric tonnes plus or minus 10 per cent of iron ore pellets to be carried from Tubarao or Ponta Ubu to Port Kelang or Labuan. Mr Southern QC told me that for the purposes of this action Classic does not dispute that analysis but that all the shipments under the PCL COA which are listed in the schedule to which I have referred did fall within those parameters. On this basis no separate point arises.

58. Thirdly Limbungan pleads at paragraphs 15, 16(1), 18 and 19(1) of the Re-Amended Defence that it was not a breach of the Requirements Undertaking to extend the duration of the PCL COA without increasing the number of shipments required to be performed. I consider that that is inconsistent with the terms of the Requirements Undertaking which is that neither Limbungan nor any other corporation within the Lion Group should amend or vary any existing contract of affreightment or charterparty with the third party. An extension of the duration of a contract of affreightment is an amendment or variation thereof. Furthermore, the effect of such an extension would be to prevent Extra Requirements arising when otherwise they would. This is because in the absence of the extension Limbungan would have had to perform the shipments or pay damages for non-performance and, upon expiry of the PCL COA, any requirements that could not be met by the performance of Scheduled Shipments under the Classic COA would be Extra Requirements that would have to be

declared as Unscheduled Shipments. There was therefore good commercial reason why the Requirements Undertaking should be interpreted as prohibiting an extension of the duration of other COAs or charterparties. As I have said, that interpretation also accords with the words used.

59. The fourth matter pleaded in this regard is in the Re-Amended Defence at paragraphs 16(2) and 19(2). It is that, although Addendum Number 9 to the PCL COA added additional shipments to the PCL COA, only two of those shipments have been performed and the Requirements Undertaking only precluded the performance of one such shipment. My understanding of that plea is that it depends on the third pleaded matter, which I have just considered, namely that an extension of a COA without an increase in the number of shipments was permissible. As I have held that that point is not correct, I do not consider this fourth issue takes Limbungan any further forward.

60. For those reasons, I accept Classic's case on the odd numbered shipments in the table at paragraph 20 of the Re-Amended Particulars of Claim. I find that Limbungan was in breach of the Requirements Undertaking and that those shipments should have been declared under the Classic COA.

The fourth issue: the force majeure defence

61. On the basis of the conclusions I have reached as to issue 3, this defence affects the seven Unscheduled Shipments which were not required to have been performed before the dam burst on 15 November 2015.

62. The relevant case is at paragraphs 23 to 24 of the Re-Amended Defence. That case is, to recap, in essence as follows: firstly, the Fundão Tailing Dam burst;

secondly, that this led to Samarco's suspension of operations in the Germano complex; thirdly, which led to the suspension of iron ore pellet production at Ponta Ubu; fourthly, which led to the suspension of shipment of iron ore pellets at Ponta Ubu; fifthly, which led to increased demand for iron ore pellets from Vale at Tubarao (Vale being the sole supplier of iron ore pellets from Tubarao); sixthly, that Vale preferentially committed its supplies to other customers, meaning that none were made available by Vale to Limbungan or the Lion Group; and, seventhly, that there were no other sources of iron ore pellets for shipment from Tubarao apart from Vale.

63. On this basis, it is said that Limbungan is excused from performing the COA by reason of the provisions of clause 32 of the COA. This is the same defence as was advanced in the earlier action, save that it is advanced in relation to performance due at a later period of time.

64. In this action, Classic accepts that the bursting of the dam was an accident at the mine within clause 32 of the COA. It contends, correctly, that it has been established by the decisions in the earlier case, both as a matter of authority, being a decision on the same clause in the same contract, and as a matter of issue estoppel that, in order to rely on clause 32 of the COA, Limbungan is required to prove (and the burden is on it) that, if the event relied on had not happened, it would have performed the shipments. That was the conclusion of Teare J and was upheld by the Court of Appeal; see in particular paragraphs 15 and 48 of the judgment of Males LJ.

65. In the present action, Limbungan has adduced no witness evidence at all. I have

already referred to Williams v Hinton, which is to the effect that witness statements are not evidence at the trial when not put in as hearsay evidence and when the witness is not called. Nor was I shown any documentary evidence which made out the case that, but for the collapse of the dam, Limbungan would have performed the relevant shipments. In those circumstances, Limbungan has not proved the "but for" requirement necessary for it to rely on clause 32 and this defence fails.

66. Mr Southern QC for Classic urged me to go further than this and to consider what would have been the evidence of Mr Lu had his witness statement been hearsay evidence or had he been called and given evidence in accordance with that witness statement. Mr Southern submitted that there were reasons why the court could not have been satisfied that such evidence would have been reliable.

67. I decline to embark on this exercise. Mr Lu has not been called. There is no evidence from him in this action. It appears to me to be an artificial exercise to undertake an analysis of whether Mr Lu might have had convincing answers to questions which would have been put to him had he been called, which is in effect what Mr Southern QC was asking me to do.

The fifth issue: the Missed 2013 Shipment

68. The issue here arises in this way.

    (1) The COA as amended by Addendum Number 1 states that the Limbungan was to perform 59 shipments.

    (2) It is common ground on the pleadings that Limbungan performed 38 shipments in total.

(3) That leaves, assuming Addendum Number 1 was correct in stating that Limbungan had to perform 59 shipments, 21 shipments unperformed.

(4) The claim in the previous action was for three Scheduled Shipments, namely those which should have been performed in the period 1 March 2016 to 30 June 2016, and for four Index Shipments, namely those which should have been performed between 1 July 2015 and 28 February 2016.

(5) Of the 14 shipments which are the subject of the present action, only 13 are unperformed Unscheduled Shipments. It is common grown on the pleadings that three Unscheduled Shipments were performed.

(6) It emerges however that only five of the six Scheduled Shipments for 2013 were in fact performed.

69. It is apparent that, when the parties came to agree Addendum Number 1 in June 2014, they did not make any specific provision in relation to the unperformed 2013 Scheduled Shipment. Instead, and as Classic accepts in its skeleton argument, it appears that the parties did not have it in mind.

70. Classic contends by way of its primary case that the Missed 2013 Shipment was one which Limbungan had been contractually obliged to perform. It failed to do so. Classic contends that it is entitled to damages based on the difference between the COA rate and the market rate at the time in 2013 when the missed shipment should have been performed, which Classic contends was obviously August because clause 56.3(c) required Scheduled Shipments to be fairly evenly spread but at least one shipment in every two executive calendar months and there were

Scheduled Shipments in February, April, June, October and November/December.

71. Classic argues that, once 2013 ended, Limbungan was irretrievably in breach of a condition of the COA in respect of the Missed 2013 Shipment and that Classic was not obliged to accept the breach in order to be able to sue for damages. Limbungan's obligation and right to nominate a laycan in August of 2013 expired unperformed. Addendum Number 1 had not allowed for subsequent performance of the missed shipment and accordingly Classic had and has an accrued right to damages in respect of its non-performance.

72. Classic also pleaded two alternative possibilities. They were, firstly, that the missed shipment fell to be treated as an additional Unscheduled Shipment and, secondly, that it fell to be treated as a Scheduled Shipment for which no schedule was set and therefore had to be performed within a reasonable time after 30 June 2014, which Classic contended would be within 2014.

73. Limbungan's pleaded case by contrast is that the effect of Addendum Number 1 was that the missed shipment was treated as cancelled and without any right on the part of Classic to compensation. As part of that case, Limbungan pleads that the references in clauses 2 and 3 to 59 shipments should be construed as if they read 58 or that they should be rectified to that effect and, as I understand it, contend also that the references in clause 56.3(b) as amended by Addendum Number 1 to 35 Scheduled Shipments should be construed as meaning 34 Scheduled Shipments or should be rectified to that effect.

74. That case would, as Classic submits, indicate that the Missed 2013 Shipment was not rescheduled or treated as still required to be performed after Addendum

Number 1 was agreed.

75. I confess that I found it surprising that the missing shipment in 2013 had simply not been performed without any contemporaneous discussion as to what was to happen to it. I have, however, noted the evidence in Mr Fentz's witness statement, which was to the effect that he was not aware during 2013 that only five Scheduled Shipments have been performed in that year. He says:

"I am not sure why I did not pick up on it, but there was some uncertainty on the part of myself and my colleagues at Classic as to which of the shipments that Limbungan had performed were Scheduled Shipments as opposed to Unscheduled Shipments. That in turn may have caused confusion about whether Limbungan were up to date overall for Scheduled Shipments, even though they had only performed five shipments in 2013."

76. I am unable to accept Limbungan's pleaded case. No good reason is given as to why the parties should have meant 58 when they said 59 or 34 rather than 35. The obvious interpretation of the COA as amended is that the parties did indeed intend that there should have been a contractual obligation for the performance of 35 Scheduled Shipments and 59 shipments in all. Moreover no basis for rectification was made out and Mr Fentz's evidence in his witness statement was inconsistent with such a case.

77. That still leaves the question of how the Missed 2013 Shipment must be regarded as treated by the COA as amended by Addendum Number 1 in circumstances where its non-performance was not waived but it was not expressly dealt with. In my judgment the best interpretation is that the 2013 shipment was simply

unperformed and was no longer going to be performed and that there was a right to claim damages if any could be made out in respect of this non-performance. I say that for the following reasons.

78. Firstly, under clause 11 of Addendum Number 1, save as expressly provided for in that addendum, the terms of the COA remained unamended and unvaried and in full force and effect. That meant that the provision under the COA for six Scheduled Shipments in 2013 was unvaried but had not been performed in accordance with its terms.

79. Secondly, it is difficult to read Addendum Number 1 as allowing for the unperformed 2013 shipment to be treated as falling within any category of shipments which still required to be performed. The parties applied their minds to and made express provision for the number of Scheduled Shipments to be performed in 2014, 2015 and 2016 and when they were to be performed. They equally made express provision for the number of Unscheduled Shipments and there is no good reason for interpreting the parties' agreement as involving a change in the status of the Missed 2013 Shipment from a scheduled to an Unscheduled Shipment. Accordingly, I consider that Classic's primary case on this issue is correct.

Damages

80. I accordingly turn to the issue of damages. There is no doubt as to the basic measure because it was the subject of part of the decisions in the previous action. Thus in paragraph 81 of Males LJ's judgment in the Court of Appeal in the previous action, he said this:

"81. The present case is not concerned with an anticipatory breach, but with actual breaches as a result of the charterer's failure to supply cargoes for each of the five shipments in issue. It is common ground that, subject only to clause 32, the charterer's obligation to supply cargoes was an absolute obligation (see Triton Navigation Ltd v Vitol SA (The Nikmary) [2004] 1 Lloyd's Rep 55). Thus the performance to which the shipowner was entitled, once it was determined that clause 32 did not provide the charterer with a defence, was the supply of cargoes. The value of that performance was the freights which the shipowner would have earned if the cargoes had been supplied less the cost of earning them. In principle, therefore, the comparison which application of the compensatory principle required was between: (1) the freights which the shipowner would have earned less the cost of earning them; and (2) the actual position in which the shipowner found itself as a result of the breach…"

81. Reports were served from chartering experts on behalf of both Classic and Limbungan, Mr Mike Robson on behalf of the former and Ms Jean Richards on behalf of the latter. They produced a joint memorandum and it seems to me that on any view I should and am entitled to look at that, even though Ms Richards was not in the event called because Limbungan did not appear.

82. The experts agreed the basic methodology and reached similar conclusions subject to relatively minor differences. It was agreed between them that they would provide further calculations as a result of their discussions, and calculations have been provided by Mr Robson. None have been supplied by Ms Richards because Limbungan ceased to be represented.

83. There appear to be four issues which separated the experts, and I will consider

them in turn.

The first expert quantum issue: the assumed dates at which the market freight rate is to be assessed

84. This issue did not arise in a previous action. It is this: what date ahead of the assumed laycan is to be taken for the purpose of assessing the market rate which is relevant for determining Classic's cost of earning the COA freight?

85. Ms Richards suggests a date of 35 days ahead of the laydays. Mr Robson suggests 20 days. Mr Robson justifies 20 days on the basis that vessels typically set out on the ballast leg towards the loading ports of Brazil without a firm fixture in place, and in practice the majority are fixed about 20 days before their first layday. I found this convincing and accept that 20 days would be used.

The second expert quantum issue: BCI C3 or BCI C14

86. The second issue is whether to use the most proximate voyage charter index, which is BCI C3, or the most analogous time charter index, which is BCI C14 in order to assess the market rate. Again, this is an issue which did not arise for decision in the previous action and, like the first expert quantum issue, should not consistently benefit either party.

87. Mr Robson explains that as what is involved in the present case is a voyage charterparty, it is better to use a voyage charter index, essentially because the risks of a time charterer are different from those of a voyage charter and therefore there is an economic dissimilarity. I found this convincing as a reason for using BCI C3 in the present case.

The third expert quantum issue: positional advantage

88. This issue arises out of the fact that the laden leg under the COA was from Brazil to Malaysia whereas the BCI C3 index used by Mr Robson reflects what the ship owner would have charged for a laden leg to Qingdao.

89. The experts' calculations of the costs of performing the laden leg take into account the fact that it takes fewer days and costs less fuel to reach Port Kelang rather than the Qingdao. They do not, however, take account of the fact that a shipowner would prefer to have his vessel open in the Port Kelang - Singapore range rather than in Qingdao because, simply as a matter of geography, discharge in Malaysia leaves the vessel better placed and closer to her next employment, whether that be out of Western Australia, South Africa or Brazil.

90. Ms Richards did not agree with Mr Robson's initial way of calculating this positional advantage and Mr Robson accordingly provided in his supplementary report a different way of doing so, namely by calculating the saving on the next ballast leg in terms of time and fuel for a voyage open in Singapore rather than Qingdao. That he calculated for a putative ballast leg to Western Australia rather than Brazil because Ms Richards considered that to be more appropriate. This appears to me to be a reasonable method of calculating the positional advantage and I accept it.

91. It is to be noted that a similar issue arose in the earlier action and was addressed by Teare J at paragraphs 153 to 154 of his judgment. He was there determining a question of fact in relation to different voyages and I do not consider that his decision creates an issue of estoppel, and it was neither pleaded by Limbungan

nor has it been suggested that it does.

92. Classic's method of calculation and the nature of the explanation of it appeared to be more satisfactory in this case than in that.

The fourth expert quantum issue: assumed cargo size

93. This issue affects the seven Unscheduled Shipments. The experts were agreed that the correct calculation of loss after the dam burst was to assume shipments from Tubarao. Mr Robson based his calculations on the maximum quantity under the COA, 160,000 metric tonnes plus 10 per cent, namely 176,000 metric tonnes. Ms Richards based her calculations on the average historical liftings under the COA actually performed, namely 173,718 metric tonnes.

94. This again is a point which arose in the earlier action. In relation to this, Teare J accepted Ms Richards' figure. He said at paragraph 152:

"The calculation of loss is therefore very much a broad-brush exercise rather than one fine tuned to a detailed analysis of what in fact would have happened. That being so, I think it is appropriate to take the average rate."

95. I am reluctant, especially in circumstances where Limbungan has not been represented, to use a different broad-brush approach from that employed by Teare J and have not been persuaded that I should. I accordingly consider that it is appropriate here also to take the average rate, which yields a rather smaller quantum of damages than using an assumption of shipments of 176,000 metric tonnes.

Calculation of loss: six shipments of Extra Requirements 2013 to 2015

96. These shipments should have been declared and would probably have been shipped at the times they were in fact shipped under the PCL COA. As Classic accepts, its claim in respect of these shipments is limited to one based on cargoes shipped from Ponta Ubu of 165,000 metric tonnes.

Calculation of loss: seven Unscheduled Shipments having laycans before 31 December 2017

97. As I have already set out, clause 56.3(d) of the COA as amended required all the laycans for Unscheduled Shipments to be declared so that they fell in their entirety before 31 December 2017. There were seven unperformed Unscheduled Shipments which are not to be treated as if declared at the time of the shipments made under the PCL COA.

98. The question arises as to the date or dates at which it is to be assumed that these shipments should have been made. Are they all to be regarded as having been declared on 17 November 2017, which was the last day on which Limbungan could contractually have given 30 days' notice of a 15-day laycan falling in its entirety before 31 December 2017? That answer, it could be said, would accord with the general rule that if a party must do something within a specified period, he usually has until the end of that period to do it.

99. On the other hand, it would always have been clear to the parties that seven simultaneous laycans and shipments would have been logistically impossible. Neither the shippers nor the receivers could have accommodated seven vessels simultaneously.

100. It is the case, however, that the scheme of the COA is that the timing of Unscheduled Shipments was in the first place dependent on when Extra Requirements arose, and there was no reason in principle why Extra Requirements should not have arisen in a manner which required two laycans concurrently or to overlap, one for a shipment to Antara at Labuan and one for a shipment to Lion Diversified at Port Kelang.

101. In my judgment, bearing in mind the commercial background and the realities against which the COA was entered into, the proper construction of clause 56.3(d), taken with the laycan provision in clause 66, is that the last sentence of clause 56.3(d) should be read as saying that shipments must be declared in a way which is possible to be performed given the declaration of other Unscheduled Shipments so that laycans for all have fallen in their entirety before 31 December 2017.

102. More specifically, I consider that the proper construction of the COA is that Limbungan should declare laycans which were not concurrent and did not overlap save only to the extent that there were Extra Requirements which required concurrent or overlapping laycans for shipments to Labuan and Port Kelang.

103. In fact, that exception did not apply because by 2017 Lion DRI had closed its steel-making operations.

104. If I am wrong as to the proper construction of the contract, I would nevertheless have held that there was an implied term to similar effect, for I consider it is necessary to give business efficacy to the contract.

Calculation of loss: Missed 2013 Shipment

105. This should be based on a shipment of 165,000 metric tonnes from Ponta Ubu to Port Kelang with a laycan beginning between 1 and 17 August 2013.

Conclusion

106. Classic is entitled to substantial damages in accordance with the foregoing findings. I will hear counsel as to the precise quantification, though I do not envisage receiving any further evidence at this stage.