Neutral Citation Number: [2021] EWHC 566 (Comm)

Case No: CL-2020-000528

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/03/2021

Before :

SIR NIGEL TEARE SITTING
AS A JUDGE OF THE HIGH COURT

- -

Between :

REGAL SEAS MARITIME S.A.	**Claimant**
- and -	
OLDENDORFF CARRIERS GMBH & CO KG	**Defendant**

'New Hydra'

- -
- -

Michael Coburn QC (instructed by **HFW LLP**) for the **Claimant**
Chris Smith QC (instructed by **MFB Solicitors**) for the **Defendant**

Hearing date: 01 March 2021

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Approved Judgment

I direct that 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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Sir Nigel Teare

"Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 11 March 2021 at 10:00 AM."

Sir Nigel Teare :

1. This is an appeal from an arbitration award dated 20 July 2020 ("the Award") pursuant to section 69 of the Arbitration Act 1996. Permission to appeal was granted by Jacobs J. on 2 November 2020 on the basis that the Award was "obviously wrong"; see section 69(3)(c)(i) of the Act. The point of law in respect of which permission to appeal was granted concerns the true construction of a hire provision in a time charterparty. On the application for permission to appeal Jacobs J. formed his view, for which he gave reasons, without the benefit of oral argument. Now that permission to appeal has been given the question for me is whether the Tribunal reached the correct decision in law or not. The Tribunal considered, initially, that the answer to the question of construction was "not simple". I agree that the answer is not simple even with the benefit of the clear and forceful arguments by counsel on both sides.

2. The dispute in question arose out of a time charter dated 22 November 2013 ("the charter") on an amended NYPE form pursuant to which the Charterers agreed to charter the Owners' vessel mv NEW HYDRA ("the Vessel") for a period of 3 years with options for the Charterers to extend the Charter by two further periods of 1 year. Ultimately, both options were exercised.

3. The Vessel, a Cape size bulk carrier built in 2011 of 179,258 tonnes, was delivered into the charter service on 1st January 2014.

4. The relevant part of the hire clause provided as follows:

> *"Hire payable every 15 days in advance including overtime. The gross daily hire to be calculated basis the average of the 4 Baltic Cape Size Time Charter routes published by the Baltic Exchange over the previous 15 days plus 4% for size adjustment.*"

5. The background to the hire clause can be summarised briefly as follows (by reference to the Award):

    a) Since 1988, the Baltic Exchange has published information about market rates in the various shipping markets. Since 1999 this has included the "*Cape size*" sector. This was known as the Baltic Capesize Index ("BCI")

    b) The Cape size rates published daily by the Baltic are based on assessments by market panellists (or brokers) of rates for various specified routes, either on a voyage or on a time charter basis.

    c) The time charter rates have to reflect a standard "*benchmark*" ship with a defined size and other characteristics.

    d) At the time of the charter, the benchmark ship for the Cape size sector was a 172,000 tonnes ship, for which four time charter routes were assessed by panellists. Prior to 2004 the benchmark ship had been a 161,000 tonnes ship.

e) The Baltic published daily in US dollars both (a) the four individual time charter route rates and (b) the average of those four rates.

6. The Tribunal explained that owners and charterers of Cape size vessels started using the published time charter routes (usually the average thereof) as the basis for calculating hire for period time charters – the principle being that both parties would share the risks and benefits of large movements in the market. The published figures were also used by the "forward freight agreement" market ("the FFA").

7. The basic issue between the parties is how the hire clause is to be applied in the event, which occurred, of a change to the deadweight tonnage of the benchmark Cape size ship in respect of which the rates were published.

The Change to the Benchmark Ship

8. In December 2013, very shortly after the parties concluded the fixture, the Baltic announced that changes would be made to the BCI, which eventually resulted in the benchmark ship being increased to 180,000 tonnes, that is, almost exactly, but not quite, the size of the Vessel.

9. In May 2015 the Baltic Exchange announced, "following extensive discussion with market participants", the planned changes. It is necessary to understand the terminology used. "172 4TC" referred to the equally weighted average of the 4 routes. "180 5TC" referred to the unequally weighted average of 5 routes (effectively the original four plus a fifth route). "180 4TC" referred to the equally weighted average of, effectively, the four original routes.

10. The new scheme was to have these features:

a) From 31 July 2015, the 180,000 tonnes ship was the only ship being assessed by the Baltic's panellists. The 172,000 tonnes ship was no longer assessed.

b) Accordingly, from that date the Baltic no longer published individual panellist-based rates for the 172,000 tonnes ship on the four time charter routes. Instead, from 3 August 2015 until 23 December 2016 the Baltic would publish a "daily rate for the 172 4TC ….derived from the 180 4TC at a constant dollar differential". The differential was to be established by reference to the "average differences between the panellist-reported 172 4TC and 180 4TC for the preceding 12 months."

c) The Baltic also announced what would happen from 2 January 2017 "until all relevant FFA open interest has settled". The Baltic would publish a "daily rate for the 172 4TC ….derived from the 180 5TC at a constant dollar differential". The differential was to be established by reference to the "average differences between the panellist-reported 172 4TC and 180 5TC for the preceding 12 months."

d) The "two-step" approach was necessary because there was "existing options open interest in the 172 4TC which expires before the end of 2016 and the 172 4TC and 180 5TC may have differing volatility

> profiles." The Baltic added that "in the event new open Interest in options in the 172 4TC is opened for settlement beyond 2016 it will settle based on the then prevailing calculation (i.e. the differential derived from the 180 5TC.)"

11. On 31 July 2015 the Baltic announced the dollar differentials which were to be applied to "generate the published value for the 172,000 4TC average". From 3 August 2015 it was to be -$1120 and from 2 January 2017 it was to be -$1064. "These have been established basis the data from 1 August 2014 until 31 July 2015."

12. On 22 December 2017 the Baltic stopped publishing the 172 4TC figure. However, in accordance with the announcement in May 2015 the 172 4TC rate was to continue to be calculated by applying the differential to the 180 5TC rate until all FFA interest had settled.

The payment of hire

13. The change to the Baltic's benchmark vessel in fact made no difference to the manner in which hire was calculated and paid under the charter by the parties. Rather, from 1st August 2015 onwards the Owners produced hire statements which continued to calculate the hire due by taking the 172 4TC figure and adding 4% to it.

14. By an Addendum No.5 dated 16th November 2017 the charter was extended for a further period of one year in the following terms:

> *"TODAY IT HAD BEEN AGREED THAT:*
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> *Charterers hereby declare the option for the second optional year with 3 months more or less in Charterers' option on final period at 104% BCI 4TCS less 3.75% address commission."*

15. It was not until July 2018 that the Owners alleged that the parties had been calculating the hire due for the previous three years in the wrong manner. The Charterers did not agree and the ensuing dispute was submitted to the Tribunal for determination.

The respective cases and the Award

16. The Owners' case was that the Charterers should have been paying hire since August 2015 on the basis of the 180 4TC rate plus 4%. Alternatively, the Owners contended that the Charterers should have been paying hire on the basis of the 180 4TC rate but with a reasonable size adjustment (which was said to be nil since the Vessel's tonnage was almost that of the benchmark vessel.)

17. By contrast, the Charterers' case was that the hire should have been calculated in exactly the same manner in which the parties had been calculating it at all material times, i.e. by using the 172 4TC as the base rate and adding 4%. Up until December 2017, this simply involved the parties adopting the 172 4TC rate as actually published by the Baltic. Thereafter, the parties were to use the fixed dollar differential and apply that to the published daily rate for 180 5TC (which is how the parties had in fact calculated the hire due from January 2018 until July 2018).

18. The Charterers contended in the alternative that, if they were wrong on the construction of the Hire Provision, then in the light of the parties' conduct, inter alia, there had been a variation to the Charter and/or the Owners were estopped from claiming any further sums by way of hire.

19. By the Award the Tribunal dismissed the claims by the Owners for hire, which the Owners said had been substantially underpaid over a number of years. The Tribunal accepted the Charterers' construction of the hire provision and so did not deal with the alternative cases of variation and estoppel. It is accepted by the Owners that if they succeed on this appeal the Award will have to be remitted to the Tribunal so that the alternatives defences of variation and estoppel can be dealt with.

The construction of a contract

20. In *Financial Conduct Authority v Arch Insurance and others* [2020] EWHC 2448 (Comm) Flaux LJ and Butcher J summarised the principles underlying the construction of contracts as follows:

General principles

> 62. The general principles of construction were not in dispute. The court must 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 contracting parties to have meant by the language used: *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 at [14]. This means disregarding evidence about the subjective intentions of the parties: *Rainy Sky* at [19]; *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [15].
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> 63. In *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173, Lord Hodge set out the applicable principles following *Rainy Sky* and *Arnold v Britton* as follows:
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> > "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)* [1976] 1 WLR 989, 997, Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 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 *Arnold* case, paras 20, 77. 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.

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 disputed provisions."
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> 64. The unitary exercise of interpreting the contract requires the court to consider the commercial consequences of competing constructions, but as Lord Neuberger said in *Arnold v Britton* at [19]-[20], 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. Where the parties have used unambiguous language, the court should apply it: *Rainy Sky* at [23].
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> 65. There may be certain cases, however, where the background and context drive a court to the conclusion that "something must have gone wrong with the language": *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at [14] (Lord Hoffmann); *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 913 (Lord Hoffmann). A "strong case" is required because courts do not easily accept that people have made linguistic mistakes in formal documents (*Chartbrook* at [15]). But if it is clear that something has gone wrong with the language, the court can interpret the agreement in context to "get as close as possible" to the meaning which the parties intended: *Chartbrook* at [23], citing *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363, [2007] Bus LR 1336 at 1351 (Carnwath LJ). This is part of the construction exercise, as opposed to a separate process of correcting mistakes, or a summary version of rectification: *Chartbrook* at [23]. Nonetheless, there are certain limits to the exercise. First, there must be a clear mistake in the language or syntax in the contract, as distinct from the bargain itself: *Honda Motor Europe Ltd v Powell* [2014] EWCA Civ 437 at [37] (Lewison LJ). Second, the court can only adopt this approach if it is clear what correction should be made: *Arnold v Britton* at [78] (Lord Hodge).
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> 66. Arguments which rely on what is *absent* from the drafting of the contract are to be treated with caution and in many cases provide little assistance: *Netherlands v Deutsche Bank AG* [2019] EWCA Civ 771 at [59]. In the context of an insurance policy, if one cover is subject to an exclusion whereas another is not, the absence of that exclusion in respect of the latter cover is not decisive as to its scope: *Burger v Indemnity Mutual Marine Assurance Co* [1900] 2 QB 348 at 351."

21. The Supreme Court approved that summary; see *Financial Conduct Authority v Arch Insurance and others* [2021] UKSC 1 at paragraph 47. Thus, as the Supreme Court observed;

> "the core principle is that [a contract] must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean."

The Owner's case

22. The Owners' case is that the base rate is and always has been the same, namely, the average of the four published rates for the current benchmark ship. There was no provision to alter it. Thus the base rate was 180 4TC after August 2015.

23. As regards the size adjustment, the Owners accept that there is no express provision which provides for this to be altered so that it remains at 4%. This was and remains the Owners' formal primary case. However, the Owners recognise that it is natural to doubt whether the size adjustment can sensibly remain at 4% if the benchmark ship increases in size, since that would result in a windfall. Accordingly, the Owners' alternative case is that the percentage size adjustment should be reduced, pursuant to an implied term that it should be reasonably revised in the light of a change to the benchmark ship, so as to become a reasonable percentage size adjustment. Applying that implied term approach the Owners contended that the size adjustment should be zero, on the simple basis that - as was common ground - the ship has characteristics very similar to that of the 180k benchmark ship. Thus on this approach the size adjustment was 0% (nil) after August 2015. It is fair to say that the Owners did not press their primary case but concentrated upon their alternative, implied term, case.

The Charterers' case

24. The Charterers' case is that the parties intended the base rate to be a rate for the 172,000 tonnes vessel throughout the life of the Charter. The 4% uplift was fixed and unalterable. It must follow that the parties intended the base rate of hire to be calculated by reference to a rate for the 172k vessel throughout the life of the Charter, because the 4% uplift was only applicable to a base rate for such a vessel. *Ergo*, to the extent that a rate for the 172k vessel continued to be published or made available by the Baltic, the parties must have intended to adopt that rate.

Discussion

25. I set out again the clause in question:

> *"Hire payable every 15 days in advance including overtime. The gross daily hire to be calculated basis the average of the 4 Baltic Cape Size Time Charter routes published by the Baltic Exchange over the previous 15 days plus 4% for size adjustment.*"

26. The clause refers to the average of 4 routes published by the Baltic over the previous 15 days. No mention is made of the size of the vessel assumed for those routes, the benchmark vessel. However, the parties can be taken to have known that which was known in the market, namely, that the benchmark vessel was 172,000 tonnes. Since the tonnage of the chartered vessel was greater, almost 180,000 tonnes, it was necessary for there to be a "size adjustment". The parties agreed plus 4% for that purpose. From the date of the charter until 31 July 2015 the Baltic published the average of the 4 routes for the benchmark Cape size vessel of 172,000 tonnes. There was thus no controversy as to how hire should be calculated from the date of the charter until 31 July 2015.

27. However, the hire clause did not expressly deal with the calculation of hire in the event that the size of the benchmark vessel used by the Baltic was changed. The question raised by the Owners' case is whether the clause, on its true construction, encompassed any such change because it referred to the average of the 4 routes published by the Baltic, whatever the size of the benchmark vessel. The question raised by the

Charterers' case is whether, on its true construction, the base rate was to be fixed for the period between July 2015 and December 2017 by reference to the "172 4TC" rate published by the Baltic and for the period thereafter by the rate calculated in the manner described by the Baltic in its May and July announcements, notwithstanding that no such rate was published by the Baltic.

28. The scheme of the hire clause was one which recognised that if the size of the benchmark vessel was different from the size of the chartered vessel a size correction was required. As a matter of language the definition of the base rate, "*the average of the 4 Baltic Cape Size Time Charter routes published by the Baltic Exchange over the previous 15 days",* is not restricted to a particular size of benchmark vessel and so can apply to whatever size of benchmark vessel is from time to time used by the Baltic for the BCI. That suggests that the average rate of the four published rates could be used so long as an appropriate size adjustment is made. Such a construction would also give effect to the commercial purpose of the hire provision, namely, that both parties share the risks and benefits of large movements in the market. But against that suggestion stands the fact that the hire clause did not provide for a reasonable size adjustment but only made reference to a plus 4% size adjustment which was what the parties agreed to be appropriate for the average of four published rates for a 172,000 tonnes vessel. That is the difficulty with the Owner's construction.

29. But the Charterers' construction also has a difficulty. The hire clause provided for the base rate to be fixed by reference to the average of the 4 routes published by the Baltic over the previous 15 days. But from 31 July 2015 no such rate was published for a 172,000 tonnes vessel because the rates for such a vessel on the 4 routes were no longer assessed or published. Instead a rate was published - the 172 4TC rate - which was calculated by reference to the average of the 4 (later 5) routes published by the Baltic for a 180,000 vessel less a discount calculated by reference to the difference between the average rate of the 172,000 tonnes benchmark vessel and the average rate of the 180,000 tonnes benchmark vessel in the period before 31 July 2015. It is not, I think, possible to describe such a rate as "*the average of the 4 Baltic Cape Size Time Charter routes published by the Baltic Exchange over the previous 15 days*". The 172 4TC rate is not an average of 4 routes but a rate derived from such an average reduced by a discount calculated by reference to historic average rates. The difficulty with the Charterers' construction is even greater when one looks at the period after December 2017. From then on no 172 4TC rate was published at all.

30. I consider that the difficulties facing the Charterers' construction are formidable. They can only be overcome by reading the reference to an "average" rate published by the Baltic as encompassing what the Baltic itself described as a "daily rate for the 172 4TC ….derived from the 180 4TC [later the 180 5TC] at a constant dollar differential". I do not consider that such a rate can be regarded as within the words of the hire provision. In truth it amounts to a re-writing of the hire provision. With regard to the period after December 2017 it would be necessary to say that the formula announced by the Baltic for the calculation of the 172 4TC rate for use in the FFA market was an average published by the Baltic even though no 172 4TC rate was published at all. That would require further re-writing. Such re-writing is reflected in the phrase used by counsel for the Charterers to describe the rate capable of being calculated after July 2015 as "an official rate endorsed by the Baltic."

31. I have noted that in July 2015 the Baltic announced the differentials which were to be used "to generate the published value for the 172,000 4TC average". Although the Baltic uses the word "average" the published value was not in fact an average for the 172,000 vessel, but was, as the Baltic made clear in May 2015, "a daily rate for the 172 4TC …derived from the 180 4TC at a constant dollar differential" I therefore do not think much can be made of the use of the term "average" by the Baltic in July 2015 (and I do not think much, if anything, was made of it by counsel for the Charterers.)

32. It can of course be said that the difficulty facing the Owners' construction is that it also requires a re-writing of the hire clause by making provision for a reasonable size adjustment in the event that the size of the benchmark vessel changed. However, the Owners say they do not have to re-write the hire clause because the hire clause can be properly regarded as including an implied term to the effect that the size adjustment should be reasonably revised in the light of a change to the benchmark ship, so as to become a reasonable size adjustment.

33. But before one can imply a term it is first necessary to construe the hire provision; see *Marks and Spencer PLC v BNP Paribas* [2016] AC 742 at paragraphs 26 and 28 per Lord Neuberger. As a matter of language the words "plus 4% for size adjustment" do not allow for any adjustment other than plus 4%. However, that linguistic meaning gives rise to the difficulty that if the benchmark vessel is altered by the Baltic the stated differential will produce an inappropriate adjustment. That is not consistent with business common sense. What is consistent with common sense is that the "plus 4% for size adjustment" was intended to apply to the benchmark vessel at the date of the charterparty, namely, 172,000 tonnes. That, I consider, is the intended meaning of the stated size adjustment. On that basis the hire provision makes no provision for the size adjustment in the event that there is a change to the benchmark vessel. Having so construed the hire provision there is scope for an implied term that the appropriate size adjustment in the event of a change to the size of the benchmark vessel was intended to be a reasonable adjustment.

34. There are circumstances in which the law will imply what is reasonable. Thus in *Hillas v Arcos* [1932] 147 LT 503 at p.514 Lord Wright referred to the ability of the court to imply;

> "what is just and reasonable ……..as a matter of machinery where the contractual intention is clear but the contract is silent on some detail. Thus in contracts for future performance over a period, the parties may neither be able nor desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract. Save for the legal implication I have mentioned, such contracts might well be incomplete or uncertain; with that implication in reserve they are neither incomplete nor uncertain. As obvious illustrations I may refer to such matters as prices or times of delivery in contracts for the sale of goods, or times for loading or discharging in a contract of sea carriage.".

35. In *Mamidoil and Jetoil v Okta* [2001] EWCA Civ 406 Rix LJ expressed this principle shortly as follows:

> "Particularly in the case of contracts for future performance over a period, where the parties may desire or need to leave matters to be adjusted in the working out of their contract, the courts will assist the parties to do so, so as to preserve rather than

> destroy bargains, on the basis that what can be made certain is itself certain. *Certum est quod certum reddi potest* .

36. The size of the benchmark vessel had been increased in 2004 from 161,000 tonnes to 172,000 tonnes. Thus by the date of the charterparty the size of the benchmark vessel had not been changed for almost 10 years. The formula adopted by the parties for determining the rate of hire was clear. It involved using the average of the 4 routes published by the Baltic and then applying a size adjustment to that average. The parties agreed upon an appropriate size adjustment for the benchmark vessel current at the date of the charterparty but made no provision for the size adjustment in the event that the size of the benchmark vessel were increased.

37. Unless one implies the term suggested by the Owners the hire provision would not be capable of being applied in the events which happened after July 2015. This cannot have been what the parties intended. Counsel for the Charterers suggested that there was no need to imply the suggested term to "save" the charterparty because it would be saved on the Charterers' construction. But I am unable to accept the Charterers' construction. The published 172 4TC figure derived from the average for the 180,000 tonnes benchmark vessel less a discount calculated by reference to rates before July 2015 cannot be brought within the words used by the parties, "*the average of the 4 Baltic Cape Size Time Charter routes published by the Baltic Exchange over the previous 15 days".* Thus the suggested implied term is necessary to make the agreed hire provision work in the events which happened after July 2015. The term is to be implied, as it is put in the cases, to give "business efficacy" or "commercial or practical coherence" to the charterparty; see *Marks and Spencer PLC v BNP Paribas* [2016] AC 742 at paragraph 21 per Lord Neuberger.

38. Counsel for the Charterers raised several objections to the suggested implied term.

39. First, it was suggested that, in circumstances where the Owners could withdraw the vessel for non-payment of the hire said to be due, there would be no time for the tribunal to determine the reasonable size adjustment and so quantify the hire which was payable.

40. In this regard reliance was placed on *BJ Aviation v Pool Aviation* [2002] EWCA 163. That case concerned a contract for the management of an airport for 7 years with an option to renew for a further 7 years. Clause 4 of the agreement provided as follows:

> "This Agreement shall operate for a period of seven years from the date hereof and if during the six months prior to the expiration of the said term the Operator shall serve written notice upon the Owner requesting the renewal of the Agreement for a further period of seven years then subject to the re-negotiation of the rent payable in no less a sum than that which shall be payable under the terms of this Agreement at that date the Owner shall grant to the Operator a fresh agreement in the same terms hereof save and except for this clause for a further period of seven years."

41. It was held that that was an agreement to agree and thus was unenforceable; see paragraph 30. One of the reasons for not implying a term that the amount of the rent could be determined by what was fair and reasonable, in the absence of agreement, was that notice could have been given just before expiry of the original term and so there

would have been no opportunity for the rent to be assessed by reference to what was fair and reasonable; see paragraph 29.

42. I accept that the ability of the tribunal to determine the size differential in time to avoid a withdrawal is a relevant factor to take into account when considering whether the suggested term can be implied. However, it is only one factor and in my judgment it is outweighed by the circumstance that the suggested implied term is required to make the agreed hire provision work. *BJ Aviation* was a very different case. The contract required a "re-negotiation of the rent" as a condition precedent to the contract being extended.

43. Second, it was said that there was no objective benchmark against which a reasonable size adjustment could be determined by the tribunal. Reliance was placed on *Morris v Swanton Care* [2018] EWCA Civ 2763. That case concerned a claim for "earn-out consideration" pursuant to a contract for the sale of a company. The relevant clause provided as follows:

> **Consultancy Services**
> 1.1 Mr Morris shall have the option for a period of 4 years from Completion and following such period such further period as shall reasonably be agreed between Mr Morris and the Buyer to provide the following services:

44. It was held that that clause was an agreement to agree the further period and as such was unenforceable; see paragraph 26. With regard to the suggestion that the court could assess the length of the further period in the absence of agreement it was said that that was not possible because there were no objective criteria by reference to which the length of the further period could be assessed; see paragraphs 37-38.

45. The assessment of a "further period" for earning "earn-out consideration" in a contract that gives no assistance as to the assessment of the further period is a very different contract from the present charterparty which contains a formula for the calculation of hire based upon the BCI and a size adjustment. The only matter requiring assessment by the Tribunal in the absence of agreement is the size adjustment in the event that the size of the benchmark vessel is changed. The Tribunal held that the size adjustment was to reflect "the increased value" which the actual 180,000 tonnes vessel had over the benchmark vessel of 172,000 tonnes. The Tribunal had evidence of the increased earning capacity of a 180,000 vessel and if there is a difference in earning capacity between a vessel of 179,258 (the actual vessel) and a vessel of 180,000 (the benchmark vessel after July 2015) that evidence could be put before the Tribunal. In those circumstances the Tribunal would be able to assess the appropriate size adjustment, if any, which was required to reflect the difference in earning capacity between the actual and benchmark vessels. Just as the parties agreed a size adjustment at the date of the charterparty which was appropriate when the benchmark vessel was 172,00 tonnes, so the Tribunal can fix a reasonable size adjustment, if any is required, as at the end of July 2015 when the benchmark vessel was changed to 180,000 tonnes.

46. Third, it was said that, in the light of the Tribunal's finding that the agreed size adjustment of plus 4% was a "negotiated" adjustment rather than a "calculated" adjustment, the parties cannot have intended that the size adjustment in the event of a change to the benchmark vessel would be calculated on a "reasonable" basis. I disagree. The fact that the parties negotiated the size adjustment required at the date of the charterparty to reflect the difference in earning capacity does not mean that the parties

cannot have intended that in the event of a change in the benchmark vessel there was not to be a reasonable size adjustment to reflect the new difference in earning capacity, if any.

47. A fourth argument was advanced based upon the Tribunal's finding that to allow hire to be fixed by reference to the 180,000 tonnes benchmark vessel with no size adjustment (as contended by the Owner) would provide the Owner with a windfall. This was explained on the basis that a 180,000 tonnes vessel had traded at a higher level than the benchmark vessel of 172,000 tonnes plus 4%. To allow hire to be fixed by reference to a 180,000 tonnes benchmark vessel would therefore give the Owners a windfall. It was submitted that "the Tribunal was unwilling to imply a term into the Charter which would have the effect of subverting the bargain the parties had struck in this regard."

48. However, the parties' bargain was reached in the context of a 172,000 tonnes benchmark vessel. So long as that remained the benchmark vessel the agreed size adjustment of plus 4% was applied. The implied term is only necessary to make the hire provision work in circumstances where the tonnage of the benchmark vessel is changed by the Baltic during the course of the charterparty. In that event the hire will be based upon the average of the four routes published and, if necessary, a reasonable size adjustment. Far from subverting the hire provision and the parties' bargain the implied term ensures that the charterparty continues to operate for the period intended by the parties. It is difficult to see how a rate of hire based upon the new benchmark vessel as reasonably adjusted to reflect any difference in earning capacity can fairly be said to give rise to a windfall, even if, as found by the Tribunal, the Charterers did well out of the agreed size adjustment to the average rate for a 172,000 tonnes vessel.

49. For all of these reasons I consider that the Owner's construction of the charterparty is that which a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the charterparty, would have understood the language of the hire provision to mean and that the implied term suggested by the Owner is necessary to make the charterparty work for the full duration of the charterparty notwithstanding changes to the benchmark vessel by the Baltic. But before reaching a final conclusion on this matter it is necessary to mention the reliance placed by counsel for the Charterers on Addendum No.5 and, of course, the Tribunal's reasoning.

Addendum no.5

50. It is submitted that the Tribunal's finding in paragraph 29 of the Award that the "the parties agreed via Addendum No.5 that hire would continue to be paid on the basis of the 172k benchmark vessel, by reference to which the Charter had originally been agreed" is fatal to the Owners' case. I do not understand why it is fatal to the Owners' case. Given that the Tribunal did not consider the Charterers' case on variation (see paragraph 32) the Tribunal cannot have been saying that the charterparty had been varied by Addendum no.5. At most the agreement relates to the final year of the charterparty because the addendum recorded the exercise of the Charterer's option to extend the charterparty for the final year. However, I do not read the Tribunal as saying that the assessment of hire for the final year was agreed to be fixed on a different basis from years 1-4. The phrase "continue to be paid" is not consistent with any such suggestion. Rather, the Tribunal was relying upon the agreement embodied in Addendum no.5 as support for its construction of the charterparty. I shall consider

below whether the Addendum no.5 can be said to support the Tribunal's construction of the hire provision.

The Tribunal's reasons

51. The Tribunal considered and decided the question of construction at paragraphs 26-31 of the Award.

52. At paragraph 27 the Tribunal concluded that the hire clause provided for the benchmark vessel to be fixed at 172,000 tonnes for the purpose of calculating hire for the full period of the charter. The Tribunal's reason for so concluding was that when the charter was concluded the only "4TC average" which was published was that for the 172,000 tonnes vessel and that the Tribunal could see no basis in the wording of the clause for concluding that after August 2015 the parties' bargain was now that hire should be calculated by reference to "the new (180k)" benchmark vessel. The Tribunal concluded that the hire clause provided for the benchmark vessel to be "fixed at 172K" for the period of the charter.

53. I accept that the fact the only average of the 4 routes published by the Baltic at the date of the charter was for the 172,000 tonnes benchmark vessel supports the Tribunal's construction. However, that construction does not make provision for any change in the benchmark vessel. Without any such provision the hire clause cannot work in the event that the benchmark vessel is changed (as had happened in 2004 and happened again in 2015). It is unlikely that the parties contemplated that with a charter which would last for 3-5 years there would be no agreed formula for fixing the rate of hire in the event that the benchmark vessel was changed. That is a consideration which would cause the reasonable man reading the clause to doubt that it provided for the benchmark vessel to be fixed at 172,000 tonnes for the duration of the charterparty.

54. In paragraph 28 the Tribunal "saw no attraction in the Owners' proposition that the calculation should be switched to the 180k benchmark vessel since that was not the bargain between the parties when they agreed the charter." This conclusion follows inevitably from the Tribunal's conclusion in paragraph 27. Like paragraph 27 it makes no provision for any change in the benchmark vessel and it is unlikely that the parties intended to make no such provision because, if such a change occurred, there would be no agreed means of fixing the rate of hire.

55. The Tribunal went on to reject the Owners' case that there should be no size adjustment when the benchmark vessel was 180,000 tonnes because that would give a windfall profit because a 180,000 tonnes vessel could be traded at substantially more than a 172,000 tonnes vessel plus 4%. This was said to be the reason why the Tribunal rejected the Owners' implied term (though the Tribunal did not refer expressly to the implied term argument). As I have already said, the implied term is only necessary to make the hire provision work in circumstances where the tonnage of the benchmark vessel is changed by the Baltic during the course of the charterparty. In that event the hire will be based upon the average of the four routes published and any appropriate size adjustment. Far from subverting the hire provision and the parties' bargain the implied term ensures that charterparty continues to operate for the period intended by the parties. It is difficult to see how a rate of hire based upon the new benchmark vessel as reasonably adjusted to reflect any difference in earning capacity can fairly be said to

give rise to a windfall, even if, as found by the Tribunal, the Charterers did well out of the agreed size adjustment to the average rate for a 172,000 tonnes vessel.

56. The submission made by counsel for the Charterers was that the Owner's approach involved switching the rate of hire to "a market rate for a 180,000 tonne vessel." However, the parties had fixed the size adjustment at the date of the charterparty when the benchmark vessel was 172,000 tonnes in order to reflect the difference in earning capacity between that vessel and the chartered vessel of almost 180,000 tonnes. As it happened that proved to be beneficial to the Charterers because they were able to trade the vessel at a rate greater than the rate calculated in accordance with the hire provision. But once the benchmark vessel was changed by the Baltic to 180,000 tonnes that size adjustment was no longer appropriate and a reasonable size adjustment must have been intended in order to allow the charterparty to continue for the agreed duration of the charterparty.

57. In paragraph 29 the Tribunal relied upon the Addendum No.5 pursuant to which the Charterers exercised their option to extend the charterparty for a further year. The Tribunal noted that the hire was stated to be "104% BCI 4TCS" and said that the only rationale was that "the parties agreed that hire was to continue to be paid on the basis of the 172k benchmark vessel, by reference to which the charter had originally been agreed." However, the addendum post-dated the charterparty by some four years and so cannot be used as a means of construing the charterparty. It may well be relevant to the Charterers' case on variation and/or estoppel but the Tribunal (expressly) did not deal with those arguments.

58. In paragraph 30 the Tribunal noted that "the Baltic published data by reference to which it was possible to calculate the 172k 4TC rate". However, the Tribunal did not, it appears, take into account that the published data was not, as required by the hire provision, the "average of the 4 Baltic Cape Size Time Charter routes published by the Baltic Exchange over the previous 15 days" for a 172,000 tonnes vessel.

59. In paragraph 31 the Tribunal said that "the hire could still be calculated in accordance with the parties' intentions given the data that was then available to them from the Baltic". The Tribunal concluded that both parties had the necessary data to enable them to calculate "the 172k 4TC average" at all material times. However, the Tribunal does not appear to have taken into account that the calculated rate was not "the average of the 4 Baltic Cape Size Time Charter routes published by the Baltic Exchange over the previous 15 days" for a 172,000 tonnes vessel but a figure derived from the average of the routes published by the Baltic over the previous 15 days for a 180,000 tonnes vessel less a discount calculated by reference to the difference between the average rates for a 172,000 tonnes vessel and a 180,000 tonnes vessel published before July 2015.

60. With great respect to the Tribunal, who carefully considered this question of construction, against the backdrop of the BCI as it evolved over time, I have reached the conclusion that I am unable to agree with the Tribunal's construction of the hire provision.

61. I consider that it is important to bear in mind that the parties contemplated that the charterparty would last 3-5 years with hire being fixed as provided by clause 37. That clause referred to "the average of the 4 Baltic Cape Size Time Charter routes published by the Baltic Exchange over the previous 15 days plus 4% for size adjustment" without

making express provision for what would happen in the event that the size of the benchmark was altered from what it was at the date of the charterparty. In the event that the benchmark vessel was changed from a 172,000 tonnes vessel, the hire provision, on the Tribunal's construction, could not work so as to identify the agreed rate of hire. The Tribunal considered that it could be made to work by use of the data published by the Baltic after July 2015. But that data was not "the average of the 4 Baltic Cape Size Time Charter routes published by the Baltic Exchange over the previous 15 days" for a 172,000 tonnes vessel. The use made of the data to fashion a 172 4TC rate was an alternative to that average ("an official rate endorsed by the Baltic" as it was put by counsel) but it was not the average which the parties had agreed.

62. In my judgment the Owners' (alternative) construction is that which a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the charterparty, would have understood the language of the hire provision to bear and the implied term suggested by the Owner is necessary to make the charterparty work for the full duration of the charterparty notwithstanding changes made to the benchmark vessel by the Baltic.

63. For these reasons the appeal must be allowed and the Award set aside. However, there remains to be decided the Charterers' case on variation and estoppel. The Award must therefore be remitted to the Tribunal. If neither defence succeeds it will be necessary, unless the Charterers agree that no size adjustment is required given that the chartered vessel was almost a 180,000 tonnes vessel, for the Tribunal to determine what reasonable size adjustment, if any, was required to reflect the difference in earning capacity in July 2015 when the benchmark vessel was changed.