FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 10
CA113/16

Lord President
Lord Menzies
Lord Brodie

OPINION OF LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion

in the cause

SCANMUDRING AS

Pursuers and Respondents

against

JAMES FISHER MFE LIMITED

Defenders and Reclaimers

Pursuers and Respondents: Borland QC, Manson; Pinsent Masons
Defenders and Reclaimers: Moynihan QC; CMS Cameron McKenna Nabarro Olswang LLP

27 February 2019

Introduction

[1] This is a reclaiming motion against an interlocutor of the commercial judge dated 15 March 2018. The judge found that the defenders were liable, in terms of the parties' contract, to pay the pursuers for the services of a scanmachine (sub-sea excavator) and its crew after the machine had become stuck on the sea-bed, because its pad-eye (lifting lug) had failed when it was being lifted. The parties went to proof, largely on whether the pad-eye had been "fit for purpose" or whether its failure had been caused by "reasons beyond

the pursuers' control". That matter having been determined in favour of the defenders, the issues became primarily ones of contractual interpretation; in particular the meanings of the terms "breakdown" and "temporary abandonment". The machine's breakdown would have meant that the rates otherwise payable to the pursuers would cease. Its temporary abandonment would have triggered payment of a standby rate, which, because of a contractual variation, was the same as the normal rate. The machine lay on the seabed for some 4 months. The pursuers' claim, which the judge sustained, was for 9,927,491 Norwegian Kroner (NoK) (approximately £900,000), being the accumulation of the day rates found payable during that period, together with an additional 885,816 NoK (£80,000); being the amount due in terms of the contractual interest rate.

The Contract

The Tender

[2] The pursuers supply equipment and personnel for the removal and relocation of soil and objects which lie on the seabed close to subsea installations. The defenders were engaged by Vattenfall Europe to carry out such works as part of the Dan Tysk offshore wind farm project in German North Sea waters.

[3] On 9 May 2015 the defenders concluded a contract with the pursuers for "scanmachine services". The contract consisted of the pursuers' "Revision 005" tender, their X-Subsea Service Agreement and associated correspondence. The tender contemplated that the pursuers would provide the defenders with a scanmachine along with some five personnel to operate it. The machine was to be controlled from a ship; an umbilical cord attaching it to a control container, with seats and screens, on board. The equipment supplied consisted of all of these components and not just the scanmachine on the seabed.

The works involved a pre-estimated amount of soil being removed from areas of the wind farm and redistributed elsewhere. The seabed in those areas was to be flattened using an excavator bucket, which was part of the scanmachine's equipment. The contract had described the material to be dredged as "fine sand".

[4] It had been estimated that the work on site would take 120 hours (5 days). Payment was calculated (Revision 005, para 3.5, note 10) on the basis of a lump sum for the 120 hours and a "reduced day rate" for any further work. Thus, the normal day rate for the use of the scanmachine was 70,000 NoK and the lump sum was 350,000 NoK. The day rate for all five operating crew was 43,500 NoK and the lump sum was rounded down to 217,500 NoK. The reduced day rate was 20,000 NoK for the machine and 39,700 NoK for the crew.

[5] Soon after the work on site began on 15 May 2015, it was discovered that the seabed was not fine sand, but a mixture of sand, rock, stones and hard clay. This led to a variation in the payment terms (Tender "Revision 006"), whereby an unreduced day rate of 115,500 NoK (70,000 NoK for the machine, 43,500 NoK for the crew with 2,000 NoK for a survey pole) was to apply to the whole job, which was re-estimated to take 240 hours, with no target lump sum (see the commercial judge's opinion of 23 June 2017, [2017] CSOH 91). Paragraph 3.3, Note 4, of Revision 006 said that the rate was to apply from delivery "at" until re-delivery "from terminal" (*sic*). Paragraph 3.6 provided that, if the contract were cancelled after mobilisation, day rates which had accumulated to that date would be payable together with 20% of the remaining contract value.

The Service Agreement

[6] The Service Agreement presupposed that the defenders would provide the pursuers with a work order, which could be accepted by the pursuers. With limited, but important,

exceptions (*infra*), it did not set out, at least in clear terms, the obligations which were to be incumbent upon the pursuers. It seems to have been rather assumed that the pursuers would supply the services; being the provision of both the equipment and the operating crew for the subsea excavation to be specified in the work order.

[7] Schedule 1 contained the terms and conditions which governed the work. Section 2 (Start and End for Each Work Orders *(sic)*) provided (clause 2.1) that the mobilisation date for the equipment would be the start of mobilisation at the pursuers' facilities. For personnel it would be that at the "point of origin". The work order would end at the later of the dates when the equipment and personnel were returned to their points of mobilisation. It was specifically provided that:

> "2.3 … At the completion of any Work Order all Equipment must be returned to [the pursuers]".

[8] The most critical of the clauses for present purposes were in Section 3 (Charges); specifically clause 3.4 (Rates for Equipment). This requires to be set out at some length as follows:

"Day rate – Offshore operation	Applies for the time interval starts with a Pre-dive check and includes Post-dive check, and includes standby on seabed due to reasons beyond Company's (*sic*) control.
Breakdown (Day rate ceases)	Applies from the moment the breakdown occurs, and last (*sic*) until the equipment is ready to resume operation. The breakdown time can be interrupted by standby if unable to resume operation due i.e. [defenders'] priority, weather etc.
Day Rate Offshore Standby	Applies for the time interval during which the system is mobilized onto a vessel, and available for [defenders] but not in operation. Standby rate applies also for temporary abandonment of the equipment (regardless of cause) until ready to resume work. ...

> Offshore Standby Rate shall be charged for any day during the Work Order… Standby Rate shall be paid for all days when the Services are suspended by [defenders] for convenience, all Force Majeure days and all days when [pursuers are] available and able to supply Services… but [are] hindered by [defenders] from gaining access to the worksite".

[9] Section 6 (Additional Client Obligations) stipulated certain obligations which fell upon the defenders. These included:

> "Lifting on/off and LARS [Launch and Recovery System] related tasks…".

[10] The exceptions to the absence of any statement of the obligations incumbent upon the pursuers were in Section 7 (Warranty) whereby:

> "7.1 [Pursuers] warrants the Equipment supplied to the [defenders] hereunder shall comply with the terms and conditions of this Agreement, and conform to the specifications provided by the [pursuers]…".

The tender had specified (para 2.3) the equipment as an X-Subsea "Scanmachien (*sic*) No 1", which was shown in a photograph. Technical details were given. Clause 7.2 provided that, where equipment was supplied without personnel, the client had to report any fault within 12 hours; which failing the pursuers would not accept responsibility. In the event of a dispute, the pursuers were entitled to appoint an independent examiner.

[11] The Agreement continued:

> "7.3 This warranty is the sole warranty of [pursuers]. Any other warranties, express, implied in law, including without limitation any warranties of merchantability, materials, workmanship, design and suitability for specific or intended purpose or use are hereby specifically excluded".

Clause 7.3 a) excluded from the pursuers' liability:

> "any loss, damage or liability incurred by [the defenders] … arising out of the use of [the] Equipment or … Services… whether due to the sole, joint, concurrent or partial negligence of [the pursuers] or otherwise."

Clause 7.3 c) provided:

> "[Pursuers'] warranty, including any liability for any defect or malfunction, shall be limited exclusively to a credit against the charges issued under each Work Order,

> which remedy shall constitute [defenders'] sole and exclusive remedy whether in contract, in tort, or any other warranty at law".

[12] Section 9 (Maintenance and Repair of Equipment) required (clause 9.1) the pursuers to provide such spares as were reasonably sufficient to meet anticipated needs. If equipment was to be supplied without personnel, the client was responsible for repairing any damage. However, in relation to equipment supplied with personnel:

> "9.2 The [pursuers] acknowledges that Equipment may require onsite maintenance and repair according to maintenance programme. …[M]aintenance and repair periods shall be accumulated up to a maximum of nine hours and shall be available to be used by the [pursuers] on one or more… occasions without penalty. [Pursuers'] Equipment and Personnel shall be deemed 'off-hire' on an hourly basis (pro rata on daily rate) for maintenance hours over the allowed maximum until [pursuers'] Equipment has been repaired."

[13] The obligation (clause 10.1) to insure the scanmachine fell on the pursuers. Section 11 related to indemnities. Clause 11.3 ([Pursuers'] Property and Personnel) provided:

> "Except as otherwise provided in this Agreement, the [pursuers] shall be responsible for and hereby agrees to save, indemnify, defend and hold harmless the [defenders] from and against all claims, losses, damages… in respect of:
>
> > (d) loss of or damage to property of the [pursuers] … arising from, relating to or in connection with the performance or non-performance of any Work Order;…".

Clause 11.6 precluded either party from recovering "Consequential Loss", relating to the performance or non-performance of any Work Order.

Facts

[14] After the scanmachine had been re-configured to tackle the seabed in its discovered state, it operated from 20 until 24 May 2015. On the latter date, it was, on the advice of the

pursuers, to be lifted by a crane aboard the MV Natalie, which had been chartered by Vattenfall, and repositioned in order to continue with the excavation work. The crane was operated by a member of the ship's crew. The crane was attached by a strop and hook to a pad-eye or lifting lug (ie an attachment point) which formed part of the top surface of the boom arm of the machine. As the machine was being lifted, there was a loud noise. When the lift was completed, all that came up was the lifting tackle and the pad-eye, which had broken off from the boom arm. The top plate of the boom arm, to which the pad-eye had been attached, had fractured. The commercial judge found (*infra*) that the fracture was as a result of defects in the connection between the pad-eye and the boom.

[15] The scanmachine fell back down onto the seabed and embedded itself in clay and mud. It could not be moved under its own power, or by using its own devices to dig itself out. Efforts in that regard went on all night. There was no equipment on board that could have re-attached the lifting gear to the machine. In any event, there was a concern that, even if an attempt were made to lift the machine, the suction effect of it being stuck on the seabed may have resulted in the load exceeding the crane's safe lifting capacity. Something required to be done. The Natalie had to return to port to refuel. It could not remain tethered to the machine, as it then was, by the umbilical cord. The defenders, in consultation with the pursuers and Vattenfall, decided to cut the cord. The pursuers did this, using a grinder, on 25 May 2015. The ship left the excavation location and returned to port.

[16] Vattenfall took the lead in investigating how the scanmachine might be recovered. The machine had been partially buried in clay. The initial aim was to recover the machine in order to allow the works to be completed. By 29 May 2015, however, Vattenfall had decided not to continue using a scanmachine. The priority became recovering the one on the seabed.

Detailed proposals for recovery were drafted, but attempts ceased as the parties' focus shifted to the question of responsibility.

[17] The pursuers' position at the time was that the scanmachine had been "temporarily abandoned". The defenders were responsible for its recovery and for the hire charges until it was returned to them. The defenders' reply was that responsibility fell to the pursuers, or their insurers, and that hire charges ceased to be payable from 24 May 2015. By 9 July, the pursuers' had decided not to effect a recovery, but to hold the "defenders/ shipowners/Vattenfall" responsible. On 29 July, the pursuers wrote to the defenders to say that the contract was terminated.

[18] The scanmachine had to be recovered from the seabed as a requirement of the German authorities and to allow the wind farm development to progress. Discussions regarding Vattenfall's plans to recover it took place in August 2015, but the dispute over responsibility for the cost continued. On 24 August the pursuers wrote to the defenders to say that the machine was totally lost and that recovery for the purpose of repair was no longer a valid option. On the same day, the defenders emailed the pursuers to advise that the machine had been recovered and that it would be returned to them. It was delivered to the pursuers on 24 September. The cost of transportation had been met by Vattenfall, with a contribution from the defenders of €88,000, for which they counterclaim.

Evidence

[19] The defenders prefaced their submissions at the appeal hearing with an acknowledgement that there was no need to look at the evidence, which had been led at the proof, since the commercial judge's findings in fact were duly supported by the evidence.

However, both parties did refer to certain passages in the witness statements and the testimony.

[20] First, Kenneth Vestly, who was the pursuers' chief operator, described what had happened after the lift had failed. He had had a conference call with the pursuers' lead engineers and management. "Everyone was shocked that the machine was stuck on the seabed". The pursuers were to provide a recovery procedure. He continued (second statement):

> "37 … [W]e could operate the Scanmachine from the control container. …[T]he Scanmachine could not be driven without restriction because it had become stuck on the sea bed. …[T]he machine could have been driven without any problem had it not been stuck on the seabed.
>
> 38 …If I had been able to get the machine loose, I may have been able to finish the scope of works and then drive out of the area so we could then work out how to recover it. …[W]e could have continued the dredging work if the Scanmachine had not been stuck on the seabed. The only thing that we couldn't have done was lift it up and down, but we could just have driven it around."

[21] Mr Vestly explained that the situation had been unprecedented. The boom had been damaged and its lifting cylinder was leaking oil. Mr Vestly said (third statement):

> "11 Notwithstanding that the machine could continue to operate, it did require to be recovered to the vessel so that repairs could be carried out, following the damage caused by the incident.
>
> …
>
> 13. It is true that the machine could not be recovered by its dedicated lifting point, as it had ripped off. The Scanmachine could, however, be recovered using the Revised Emergency Recovery Procedure, to take account of the loss of the lifting point, and it was, 3 months later".

[22] Secondly, the following exchange occurred in the cross examination of Keith Douglas, the defenders' chief financial officer:

> "Q. And in the end, Vattenfall, together with a contribution financially from [the defenders], recovered the Scanmachine?

A. That is correct.

Q. And returned it to [the pursuers]?

A. That is correct.

Q. So the Scanmachine was not permanently abandoned?

A. The Scanmachine was not permanently abandoned?

Q. Do you accept that?

A. Yes, I suppose I would."

[23] In the defenders' Daily Progress Reports for the day of the incident, and for the two days thereafter, the contract summary had referred to "Operational" and "Standby" time, but not to any "Breakdown" time; each type of time being specified in the pro forma report. The report for the day of the incident had it occurring at about 5.15 pm. The pursuers' operators had tried to move the dredger, but this had caused "the dredger to dig into the (heavy clay) seabed". The machine was described as "still fully functional" but "now stuck, in the clay seabed".

[24] In an email on the day of the incident, Alistair Braid, who was the defenders' "eyes on the project" aboard the Natalie, wrote to Andrew Scott, the defenders' operations manager, as follows:

> "… There is a plan in place and nobody is pointing figures (*sic*) yet.
>
> … 1st step is to try and free the dredger. If that works we will walk the dredger out with the boat to a safe area and get [remotely operated vehicle] to come and assist with hooking the crane up to different lifting points given by [the pursuers'] engineers… [I]f that fails and they can not free the vehicle try and get another vessel in to assist with lifting the tool and if that fails and there are no other options cut the umbilical, only 25m of water so won't loose (*sic*) too much.
>
> It is a difficult one with regards to blame and for now I think everybody is just working together to recover the dredge to deck".

Mr Braid described the scanmachine as "operational" after the incident and that remained his view at proof (second statement para 4). He had said that Mr Vestly had tried to move the machine using its own equipment but it was stuck (first statement para 14).

[25] Mr Scott testified that it had been Vattenfall's priority, in the light of deteriorating weather conditions and a lack of fuel, to return the Natalie to port. Hence there was the decision to cut the umbilical cord, but to leave a recovery buoy. In an email dated 25 May 2015, this was reported to Mr Scott. The recovery buoy was to be attached to the dead end of the cord for the purpose of locating and recovering the scanmachine. In an email exchange on 28 May 2015, Mr Vestly wrote to Mr Scott as follows:

> "We did a [remotely operated vehicle] survey of the machine and the seabed around it. We found out that the boom… was so damaged that it needs to be replaced with a new one. The survey also showed that we managed to dredged (*sic*) port and front side of the machine loose from the clay. [Starboard] and AFT (*sic*) side of the machine was still stuck in clay. We tried to airlifte (*sic*) this clay away with no success. After that we performed a as left survey and left the field".

Commercial Judge's Opinion ([2018] CSOH 16)

Principal action

[26] The operative part of the commercial judge's opinion consisted initially of six questions, which he posed and answered, followed by a detailed analysis of whether the scanmachine had been "fit for purpose". The three questions and answers under challenge can be summarised as follows:

1. Did the scanmachine break down?

[27] No. The pursuers' entitlement to payment of the day rate did not cease due to a breakdown on 24 May 2015. By the ordinary and natural meaning of the words, the scanmachine had not broken down. The word "breakdown" meant "mechanical

breakdown", rather than the machine being unable to continue to excavate because of the incident. Any restriction on its capacity, apart from it being stuck on the seabed, was not the result of a breakdown, but of damage sustained as a result of the pad-eye failure.

2. Was the scanmachine temporarily abandoned?

[28] Yes. It was admitted that the scanmachine had been "abandoned". The only question then was whether that had been temporary. The words "regardless of cause" in clause 3.4 were significant. They precluded inquiry into the reasons for equipment being temporarily abandoned. The cutting of the umbilical cord was the practical expression of a decision to abandon the machine temporarily. The correspondence, which disclosed immediate efforts to find a means of recovery, showed that the decision was to abandon only temporarily. There was no evidence of a decision to abandon permanently. That would not have been permitted by Vattenfall or by the German authorities. The pursuers' insurers had not decided to abandon the machine, but had indicated a willingness to recover it, if no-one else did and recovery was economically worthwhile. An interpretation of the agreement, whereby the standby rate would be payable during periods of temporary abandonment and the defenders would be obliged to recover the machine, was not unreasonable. This was consistent with the defenders' contractual responsibility for all launch and recovery systems.

3. Was it necessary to determine whether the scanmachine was fit for purpose?

[29] No. The contract did not require the pursuers to prove the cause of the pad-eye being detached from the boom arm. Rather, the standby rates were due regardless of the cause of the temporary abandonment. There was no basis for the proposition that the pursuers had to establish that the incident had been caused by the fault of the defenders.

The warranties of, *inter alia,* materials, workmanship, design and fitness for purpose were expressly excluded by clause 7.3. Nothing in the contract disentitled the pursuers from seeking payment on the basis of the scanmachine's lack of fitness for purpose. Evidence as to the cause of the fracture was irrelevant.

Fit for Purpose

[30] On the commercial judge's analysis, there had been no need for a proof on the issue of whether the scanmachine had been defective. He nevertheless, correctly, scrutinised the evidence on this in some detail and made findings based upon it. He held that the machine had not been fit for purpose as a result of defects introduced when repairs had been carried out by the pursuers in 2013. These defects had included poor welding, miscalculations of the width of the top plate of the boom and the creation of irregular surfaces of the underside of the plate, which reduced its thickness ductility and strength. The welds had failed and the top plate had detached from the pad-eye. The judge accepted the defenders' evidence that the failure would have occurred if a load of about 17.4 tonnes (ie with a dynamic factor of about 1.8) were applied. It ought to have been capable of withstanding a much greater load. No fault could be attributed to the crane or its operator.

Counterclaim

[31] The defenders based their counterclaim for payment of €88,000 on clause 11.3. The claim was irrelevant. That provision did not permit a claim by the defenders. It protected them against a claim by the pursuers. It addressed loss of, or damage to, their property. The expense incurred was not such a loss.

Submissions

Defenders

General

[32] The defenders' central argument was that the commercial judge misapplied the terms of the contract to the facts of the incident on 24 May 2015. The judge was wrong in his interpretation of "breakdown" and "temporary abandonment". There was no dispute on the relevant principles of contractual interpretation, as summarised in *Midlothian Council* v *Bracewell Stirling Architects* [2018] PNLR 25 (at para [19]). There had been a breakdown and that was the financial responsibility of the pursuers. The scanmachine was off-hire from the time of the incident. The scanmachine had not been temporarily abandoned. It was relevant that the machine was not fit for purpose. In relation to the counterclaim, the judge misconstrued the indemnity provisions in clause 11. The effect of the judge's decision had been to turn a contract with an estimated value of about £65,000 into one worth almost £1m.

[33] It was the obligation of a lessor to deliver, for the use of the lessee, the thing hired (Wood: *Leasing and Hire of Moveables* in the Stair Memorial Encyclopaedia (reissue) at para 39). This obligation could extend to the lessor having to maintain the thing with the lessee having a general entitlement to an abatement, if the lessee was not able to use the thing due to a breakdown. Implied terms such as these were excluded by clause 7.3, but the express terms were consistent with these "natural and commercially sensible rules". A commercial entity would not expect to pay hire charges for a machine that was not operable. Clause 3.4 provided for this, in that the charge was abated during breakdown. Such a breakdown occurred when there was a stoppage, even if the machine or parts of it were capable of operation.

[34] Clauses 9.1 and 9.2, which the commercial judge had not been asked to consider, indicated that the parties would not have contemplated the same daily rate applying when the pursuers were in breach of their obligation to repair. If, due to lack of repair, the scanmachine was not available for a protracted period (eg beyond the number of hours estimated for the works), it was off-hire and the defenders had no liability for the hire charges. Those provisions showed that the contract addressed common or usual stoppages and, as in *Wilson* v *Norris*, Second Division, 10 March 1810, FC, the defenders had no liability to pay for equipment that was in disrepair for periods which were longer than would be required for ordinary maintenance. The express limit was 9 hours. Clause 3.4 provided for payment, even if the defenders were not actually using the machine, but holding it on standby or during temporary abandonment for any reason. The fact that the same daily rate was applied during both operation and standby was consistent with the need for the machine to be operational during periods of standby. This interpretation was consistent with clauses 11.3 and 11.6, in that the financial consequences of that (including loss of use) were to be borne by the pursuers.

Breakdown

[35] The Oxford English Dictionary defined breakdown as "A fracture or dislocation of machinery resulting in a stoppage". Here, there had been a fracture of the pad-eye from the boom, resulting in a stoppage. The scanmachine had fallen to the seabed and could not be moved. It was stuck in clay as a result of the fracture. The operation of the machine required it to be capable of being deployed, moved and recovered by crane using a cable attached to the pad-eye. The fact that the machine was capable of some operations did not mean that it had not broken down. Even if the damaged machine had been capable of some

excavation, there would have been a stoppage, when it required to be recovered, because there was, at the time, no alternative means of recovery without the existence of a functioning pad-eye. The proper conclusion in law on these facts was that there had been a breakdown. The machine could equally have fallen upside down or onto the deck. It would have been as inoperable as it turned out to be. The court had to look at the contract in a practical way.

Temporary abandonment

[36] "Temporary abandonment" had to be considered in light of the phrase "until ready to resume work". It assumed that the scanmachine would be ready to work and was available for use to the client. It did not apply either during a breakdown or when damage had affected recovery. The Launch and Recovery System did not place an obligation on the defenders to launch and recover the machine in every eventuality. The obligation to repair was on the pursuers. The financial impact of breakdown or damage should fall on the party responsible for maintenance. The same rationale applied between the defenders' lack of liability for repairs (clause 11.3(a)) and for rental charges during breakdown (clause 3.4), and for the machine to be deemed off-hire if maintenance became protracted (clause 9.2). It was irrelevant that the machine had eventually been recovered and returned to the pursuers. It had been recovered by Vattenfall for reasons unrelated to its repair. It had not been "ready to resume work" as contemplated by the temporary abandonment provision. Subsequent conduct did not effect interpretation of the contract. Common sense dictated that, if the machine could not be recovered within a reasonable time, as a normal incident of the contract, then the contract determined where responsibility would lie.

Indemnity

[37] The question was whether the counterclaim was excluded by the indemnity. The defenders had been required to make a contribution to the costs incurred by a third party in recovering the scanmachine. Clause 11.3(a) provided that the defenders were to be held harmless from and against "all claims…costs… expenses and liabilities in respect of…loss of or damage to property of" the pursuers. The €88,000 were costs in respect of the damage to the property. Reading clauses 11.3 and 11.6 together, it was the pursuers who had to bear the costs consequent on damage to the scanmachine, including those of its recovery.

Pursuers

General

[38] The pursuers maintained that : (a) it was not disputed that the scanmachine had been abandoned; (b) the evidence was unanimous to the effect that it had not been abandoned permanently; (c) the parties had contracted on the basis that the day rate applied to temporary abandonment, regardless of cause; (d) in temporary abandonment, the day rate applied until either: (i) the machine was recovered with the intention of it resuming work; or (ii) the machine was recovered, where there was no such intention, but the machine was returned to the pursuers; and (e) the machine had been recovered without any such intention. There were five questions.

Breakdown

[39] The first question was whether, on the available evidence, it had been open to the commercial judge, acting reasonably and properly, to find that the machine had not broken down. This was a question of mixed fact and law and required an evaluation by the

commercial judge which should be afforded respect. The parties' representatives, who had been on board the Natalie at the time, had given clear evidence that the problem with the scanmachine after the incident, and the reason why it could not continue excavating, was that it was stuck in clay. It was still operational. The judge had ample evidence upon which to reach his conclusion that the machine had not broken down. He had a clear basis in the evidence for his finding. It could not be said that he was wrong, far less plainly and obviously wrong.

[40] The second question was whether the commercial judge had been correct to say that the scanmachine could not have continued dredging because it had been stuck in the mud. This was vouched by the Progress Reports and Mr Braid's testimony. The machine could not function because it was stuck in the mud, not because it had broken down. It had been admitted (Ans 7) by the pursuers that the machine could still be operated from the Natalie, using the umbilical.

Temporary abandonment

[41] The third question was whether the commercial judge was right to hold that the abandonment had been temporary. It had been stated by the defenders in their counterclaim (Stat 3) that the incident had resulted in the scanmachine being abandoned on the seabed. This had been admitted by the pursuers. The evidence was unanimously to the effect that the abandonment had not been permanent. Mr Douglas had spoken to this. A recovery buoy had been left at the scene.

[42] The fourth question was whether the commercial judge was entitled to hold that the pursuers had been entitled to payment of the day rate when the scanmachine had been temporarily abandoned. There had to be an objective determination by looking at the

natural meaning of the language, even if that resulted in a disastrous bargain for one party (*Arnold* v *Britton* [2015] AC 1619, at para 19). This was an iterative process by which each rival meaning had to be checked against the provisions of the contract and its commercial consequences (*ibid*, at para 77).

[43] It had been the defenders' contractual responsibility both to launch and to recover the scanmachine (clause 6.2). The defenders had been obliged to return the machine to the pursuers at the demobilisation port. In terms of clauses 7.3 and 7.3(a), any warranties relative to the merchantability, fitness for purpose, design or workmanship in relation to the machine were excluded. There was no case advanced that there had been a breach of warranty. The defenders' reliance on the common law was irrelevant because any implied warranties were excluded by the contract (Wood: *Leasing and Hiring of Moveables* (*supra*) para 38).

[44] In terms of clause 3.4, the relevant day rate was applicable where there was temporary abandonment of the equipment, regardless of cause, until it was ready to resume work. The use of "also" in clause 3.4 was important, since it meant that temporary abandonment was separate from the situation where the equipment was available. The words "ready to resume work" referred to the defenders being ready. The conditions applied only to scanmachines and related equipment. Once there had been temporary abandonment, the clause provided for the payment of the relevant day rate regardless of the cause. Even if the cause had been a breakdown, the day rate would have applied. If Vattenfall had lost patience with the situation and decided to return the Natalie to port, thereby necessitating the cutting of the umbilical cord, the day rate would thereby be triggered. The obvious commercial purpose of clause 3.4 was to discourage permanent

abandonment. The repairing clause was irrelevant. The 9 hour maintenance clock would only begin to tick once the scanmachine had been recovered.

Indemnity

[45] The fifth question was whether the commercial judge had been correct to conclude that clause 11 did not provide a proper basis for the defenders to recover the money spent on recovering the scanmachine. Clause 11.3 only operated "Except as otherwise provided". In terms of clause 11.3(d), the pursuers had agreed to indemnify the defenders against all claims in respect of loss of or damage to property. However, elsewhere in the agreement it had been provided that the defenders were responsible for the recovery of the machine. The defenders had to return it to the pursuers. They were already responsible in terms of the contract for the recovery and return of the machine. The costs incurred by the defenders were not costs in respect of loss of, or damage to, the property of the pursuers.

Decision

General

[46] Although the common law on the lease of moveables may, to a mild degree, be instructive in describing what is, in the absence of an express stipulation, normally to be expected in a contract of hire, the parties' contract here was not merely one of hire of equipment but the provision of services, which included the supply of a crew as well as the scanmachine and its on-board systems and umbilical cord. A comparison between a contract for the lease of a steam engine by the owner of a spinning mill at the start of the 19th century (ie *Wilson* v *Norris*, Second Division, 10 March 1810, FC) and that of a subsea excavator and crew at the beginning of the 21st century is of limited value, especially when

there is no reported written opinion of the Georgian era Second Division. In short, this case turns upon an interpretation of a commercial contract and not upon the principles of the common law of location.

[47] In relation to the construction of the contract, as was said in *Midlothian Council* v *Bracewell Stirling Architects* [2018] PNLR 25 (LP (Carloway) at para [19]):

> "The court must ascertain the intention of the parties by determining what a reasonable person, having the background knowledge of the parties, would have understood from the language selected by them (*Arnold* v *Britton* [2015] AC 1619, Lord Neuberger at para 15…). The meaning of the words used must be assessed having regard to other relevant parts of the [contract]. In the event that there are two possible constructions, the court is entitled to prefer one which is consistent with business common sense (*Arnold* v *Britton* (*supra*), Lord Hodge at para 76).

In relation to business common sense, courts require to be careful before attributing too legalistic a meaning to the words of a commercial contract. The words used will often have been intended to apply principally to a situation in which the contract is operating satisfactorily rather than one involving the occurrence of an unanticipated and catastrophic (in contractual terms) event. It is nevertheless useful to revisit the cautionary words in *Muirhead & Turnbull* v *Dickson* (1905) 7 F 686 (Lord Dunedin at 694) that:

> "Commercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say…".

[48] This contract requires to be construed as a whole. That means that the word "breakdown" has to be looked at, not only in its immediate setting of clause 3.4, but also when set against, amongst others, the warranty in clause 7.1 and the maintenance and repair provisions in clauses 9.1 and 9.2. The words "temporary abandonment" have to be seen in a similar light. Both of these terms have to be examined in the context for which they were created. That context was a piece of work of a few days duration, during which the

pursuers would supply not only the scanmachine, including its umbilical cord and the on board control room container, but also the operating crew.

[49] Although it might have been expressed in clearer terms, one fundamental requirement for the successful operation of this contract was that the scanmachine was operational; ie that it was capable of doing what it was designed to do. This is evident from clause 7.1, which contains a warranty by the pursuers that the equipment should conform to its specifications. The exclusion in clause 7.3 of all warranties other than the "sole warranty" does not operate so as to exclude the sole warranty itself. A scanmachine without a functioning pad-eye does not conform to its specifications. Clause 7.2 states that, in an equipment only hire, the client requires to draw any fault, defect or failure to the attention of the pursuers within 12 hours, which failing the pursuers would not accept responsibility for it. The implication is that, in normal course, they would be bound to accept responsibility where there was such notification. That is understandable. In the case of a contract with equipment and crew, there would be no need for such notification, since the pursuers, who would be operating the equipment, would themselves become immediately aware of the fault, defect or failure; as they were in this case.

[50] This interpretation is consistent with clause 3.4, which states that the day rate ceases when the equipment breaks down. It is supported by the fact that the obligation to repair the equipment during the currency of the contract rested with the pursuers. The maintenance obligation in clause 9.2 stated specifically that the equipment and personnel were deemed to be "off hire" when the nine maintenance hours were exceeded. Looking at these clauses together, in the context of a contract of relatively short duration involving a piece of equipment to be operated by the pursuers, and applying commercial common sense to them, the fundamental meaning of the contract is that the counterpart of the obligation on

the defenders to pay the pursuers a day rate was that the pursuers supplied a machine, with its associated working components, which was duly maintained and repaired in an operational state conform to its specifications, and an operating crew.

[51] The idea, which is central to the pursuers' position, that the contract meant that the defenders should be required to pay, not only for the machine but also for its crew, for several months when the machine was not in an operational state and the crew had long since been demobilised, is not one which makes commercial sense, especially if the reason for it not being available for use was because the machine did not conform to its specifications because it did not have a functioning pad-eye. Such a device was an essential element of the machine's mechanisms since, without it, it could not be launched or recovered in the way which was intended. The fact that extraordinary measures might have been employed to recover the machine does not detract from this reality. Such measures were not in contemplation of the parties in relation to a machine which, conform to its specifications, had a specific launching mechanism.

Breakdown

[52] The commercial judge considered that, using its ordinary and natural meaning, the scanmachine had not broken down. He held that "breakdown" meant "mechanical breakdown". Both conclusions are in error. First, applying an ordinary and natural meaning to "breakdown" in its contractual context, the machine had broken down. A part of the machine, which was essential for its proper functioning, notably its being put into position and repositioned when required, had broken. The machine could not be lifted when it required to be. It was also stuck in the mud as a result of the fracture of the plate on the boom upon which the pad-eye was located. It could not be moved. It had broken down.

Secondly, there is no basis for restricting or qualifying "breakdown" by introducing an additional word "mechanical". Looked at, again in context, the word applies when the machine is not "ready to resume operation" (clause 3.4). This machine was not so ready because it could not be lifted into the desired position, which had been advised by the pursuers themselves. Even if "mechanical" were added to "breakdown", the reality was that the mechanism on the machine for its launch and recovery, namely the pad-eye assembly, was broken.

[53] At the risk of unnecessary repetition, "breakdown" has to be understood in the context of a contract which required a machine to be supplied, conform to its specifications (including a pad-eye). It could hardly have been argued that the defenders would have required to continue to pay a day rate if the pad-eye had fractured during or before the launch process and remained unable to be moved on the deck of the Natalie. Similarly, it has to be seen against the maintenance and repair obligation whereby, if a repair is required then, once the nine hours have expired, both the scanmachine and the personnel "shall be deemed 'off-hire' … until [the pursuers'] Equipment has been repaired". Where the machine cannot be moved, by using its intended launch and recovery system, it has "broken down" and needs to be repaired. Evidence that certain persons thought of the machine as "fully functional" after the incident cannot change the fact that it was clearly not functional, as it could not be moved. Its control mechanisms aboard the Natalie, which were part of the equipment, could not move the machine on the seabed. The pursuers' operating crew on the Natalie could make bits of the machine operate, but they could not, using the controls which formed part of the equipment supplied, make it move.

[54] The fact that the obligation to launch and recover the scanmachine rested upon the defenders does not alter the position. This obligation presupposes that the machine is in a

functioning state conform to its specifications (including the pad-eye mechanism), according to the warranty and maintenance and repair obligations. Even if it were held that the defenders were contractually obliged to recover the scanmachine in the circumstances which had occurred, the parties cannot be taken to have agreed that the defenders should be liable to pay for any extraordinary measures, as were eventually taken, to recover a machine in a situation in which it had ceased to conform to its warranted specifications.

Temporary Abandonment

[55] The commercial judge approached the issue of temporary abandonment by taking, as a starting point, the averment in the counterclaim that the machine had been abandoned, and then asking whether that abandonment had been temporary as distinct from permanent. He was bolstered in his decision by the evidence that efforts were made to recover the machine at the time and it was eventually recovered. This approach fails to understand the meaning of the words in their contractual context.

[56] Once again, the contract is written on the basis that it is proceeding satisfactorily, as the parties might have anticipated. When it is referring to "temporary abandonment", it is not to a situation which is to be contrasted with permanent abandonment. The latter situation cannot actually occur in terms of the contract, as it was designed to operate, because of the requirement that the scanmachine be returned to the pursuers by the defenders. It is referring to a situation in which the machine is in an operational state, but its operation, in the context of a short duration contract, is temporarily abandoned, for whatever reason, by the defenders. This is tolerably clear from the simple fact that the words appear in the context of payment of an offshore "standby" rate. The word "standby" presupposes a state of affairs in which the equipment and crew are in a "standby" mode, but

are not being used. In that situation, as the original standby rates anticipated, the cost of operating the scanmachine would be much less, but the crew would still require to be paid almost at normal operating levels. The parties cannot have intended the standby rate to continue to apply when either the pursuers' machine, or their crew to operate it, were not available. This meaning is also clear from the use in clause 3.4 of the words "until ready to resume work". What the parties are contemplating is a situation in which the defenders, and hence the machine, will be ready to resume work. The particular situation described in the clause illustrates the meaning neatly; where the "system" (ie the machine and the crew) is "mobilized onto a vessel, and available for [the defenders] but not in operation". The standby rate does not apply when the system is not, as occurred here, "available" for the defenders' use. The phrase is not intended to apply to a situation in which the machine has broken down, since, in that event, the "Day rate ceases". That does not mean that the "Standby" rate becomes applicable.

[57] The fact that the standby rate became, in terms of Revision 006, the same as the day rate does not affect this interpretation, other than making it even more improbable that the parties had intended the full day rate to apply when not only was the machine not in operation, but the crew would be, and were, after a very few days, demobilized and, no doubt, engaged in other work.

[58] The pursuers pray in aid an answer by a financial officer to a leading question whereby he "would accept" that the machine was not permanently abandoned because it was eventually returned to the pursuers. However, whilst it may be possible to accept this in general terms, the question, which is one for the court to determine, is whether the answer is correct when applying the terms of the contract in their context. Equally, the fact, that immediately after the incident those on board the Natalie classified the time thereafter

as standby and not breakdown, is of very limited value to the court in its exercise of contractual construction. The actions of the parties after the incident cannot alter, or be used as a significant tool in interpreting contractual meaning.

[59] In any event, if the commercial judge was correct in making a comparison between temporary and permanent abandonment, it would still be an error to conclude that, so far as this contract was concerned, the abandonment had been temporary. The contract was to last only a few days. Once it became clear that the scanmachine was stuck in the mud and could not be lifted using normal modes of doing so, there was no prospect of the machine ever being ready to resume work on the contract. So far as the contract was concerned, it had been abandoned permanently. After all, it lay on the seabed for 4 months. Neither party took steps to recover it. It was recovered by Vattenfall because of the operation of German law on objects being left on the seabed. Leaving a recovery buoy may again indicate an intention to salvage the machine, but that does not mean that it was only temporarily abandoned in terms of this short duration contract.

Indemnity

[60] Clause 11.3(d) obliges the pursuers to indemnify the defenders against all claims, in respect of loss of, or damage to, the pursuers' property. As the commercial judge has held, this relates to claims, which would otherwise be made by the pursuers against the defenders, in respect of damage to their (the pursuers') property. It is consistent with the insurance obligation in clause 10.1.

Conclusion

[61] The reclaiming motion ought accordingly to be allowed in respect of the principal action. The commercial judge's interlocutor of 15 March 2018 should be recalled in so far as

it sustains the pursuers' pleas-in-law, repels the defenders' third and fourth pleas-in-law, and grants decree for payment (paras 1 and 2). The pursuers' pleas-in-law should be repelled, the defenders' third and fourth pleas-in-law should be sustained and decree of absolvitor pronounced. The findings of expenses in favour of the pursuers (paras 5 and 6) ought also to be recalled.

[62] In relation to the counterclaim, the reclaiming motion should be refused and the court should affirm the relevant parts of the commercial judge's interlocutor (paras 3 and 4).

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 10
CA113/16

Lord President
Lord Menzies
Lord Brodie

OPINION OF LORD MENZIES

in the Reclaiming Motion

in the cause

SCANMUDRING AS

Pursuers and Respondents

against

JAMES FISHER MFE LIMITED

Defenders and Reclaimers

Pursuers and Respondents: Borland QC, Manson; Pinsent Masons
Defenders and Reclaimers: Moynihan QC; CMS Cameron McKenna Nabarro Olswang LLP

27 February 2019

[63] I am grateful to your Lordship in the chair for your clear exposition of the facts and issues in this case, and the relevant contractual provisions. I need not rehearse these here. I agree with your Lordship that this case turns on an interpretation of this particular commercial contract, and not on the principles of the common law of location. I also agree (and indeed there was no issue on this point between the parties) that the exercise of construing the contract must be carried out according to the well-known principles set out in *Arnold* v *Brittan* [2015] AC 1619, and *Midlothian Council* v *Bracewell Stirling Architects* [2018]

CSIH 21. However, I regret that I do not agree that the application of these principles to the construction of this contract has the result which your Lordship favours. For my part, I can find no error of law in the reasoning of the commercial judge, and I consider that he reached the correct conclusion. I consider that this reclaiming motion should be refused.

[64] The contract must of course be construed as a whole, but the key issues arise from the terms of Article 3.4 of Schedule 1 to the Service Agreement, which, as your Lordship in the chair observes, was the most critical article. There are two terms in that article which fall to be construed, namely (a) breakdown, and (b) temporary abandonment. I consider these in turn.

(a) Breakdown

[65] This is not given any special meaning in the contract, so the ordinary and natural meaning of the word should be applied. The commercial judge reached the view (at paragraph [35] of his opinion) that "the word refers specifically to mechanical breakdown rather than generally to events rendering the machine unable to continue to dredge", and he observed that if the machine had become stuck for a reason other than an incident which caused it damage, it would be difficult to categorise such an occurrence as breakdown if the machine remained fully functional other than being incapable of being moved. I agree with this. For example, if I drive a Land Rover into an area of bog so that it completely loses traction and cannot be moved, but the engine, transmission and electrical systems all work well, I do not think that it would normally be said to have broken down. It might be said to have become stuck in the mud, or to be immovable, or bogged down, but it would not have broken down. Even if the wing mirror or the towing hook had broken off, I do not consider that this would amount to a breakdown; if, apart from the ground conditions, the vehicle

was capable of being driven around under its own power by means of its own transmission system, axles and wheels, I do not consider that, using the term in its ordinary and natural meaning, it could be said to have broken down.

[66] In the present case there is nothing to suggest that the machine (or, to use the wider term, the equipment) broke down. The passages in the evidence of Mr Kenneth Vestly, Mr Keith Douglas and Mr Alistair Braid, to which your Lordship in the chair refers (at paragraphs [20] – [24] above) all point to the opposite. "The scanmachine could not be driven without restriction because it had become stuck on the seabed ... the machine could have been driven without any problem had it not been stuck on the seabed ...". Mr Braid described the machine as "operational". In the defenders' Daily Progress Reports the machine was described as "still fully functional" but "now stuck in the clay seabed". Those observations seem to me to sum up the position accurately – the machine was functional (ie it had not broken down), but it was stuck. None of the witnesses described the machine as having broken down.

[67] Senior counsel for the defenders in his submissions referred us to the definition of breakdown in the Oxford English Dictionary as "A fracture or dislocation of machinery resulting in a stoppage", and submitted that the fracture of the pad-eye from the boom had resulted in a stoppage. However, that analysis omits two crucial elements – (a) that the machinery itself did not stop working, and (b) it was the fact that the machine became embedded in the mud which was the cause of it not being able to continue its operations. The contract explicitly refers to "the moment the breakdown occurs" – it does not refer to "the moment the machine becomes inoperable" or "incapable of operations".

[68] Is there anything in the other provisions of the contract, or in the surrounding circumstances, which would suggest that the ordinary and natural meaning of "breakdown"

should not apply, and that the word should be given a different meaning in Article 3.4? I can find nothing. The defenders sought to rely for the first time before this court on the maintenance and repair provisions of Articles 9.1 and 9.2. (If these bore the significance suggested by senior counsel for the defenders, it is perhaps surprising that no mention of them was made before the commercial judge.) These articles are concerned with maintenance and repair of equipment. By Article 9.2, the pursuers acknowledge that the equipment may require on site maintenance and repair, and a period of up to nine hours is available for this purpose without penalty, after which the equipment and personnel shall be deemed "off hire". But on this occasion the equipment did not require on site maintenance and repair to cause it to be operable – as the defenders' witnesses acknowledged, it was operational, and as they recorded in the Daily Progress Reports it was still fully functional. The problem was not that it required maintenance and repair to be operational, but that it was stuck in the mud. The provisions of Articles 9.1 and 9.2 cast no further light on the meaning of "breakdown" in Article 3.4; they are concerned with a different situation, and appear to me to be entirely consistent with the term "breakdown" in Article 3.4 being given its ordinary and natural meaning. I can find nothing in any other provision of this contract which suggests otherwise.

[69] Nor can I see anything in the surrounding circumstances which does so. It is important to bear in mind that we are concerned here with where the contract places risk/liability – issues of fault do not arise. The following points regarding the break off of the pad-eye should be remembered:

(i) The pad-eye broke off the machine during the operation to lift it from the seabed back to the MV Natalie.

(ii) By reason of section 6 of Schedule 1, (Additional Client Obligations), Lifting on/off and LARS (launch and recovery system) related tasks were the responsibility of the defenders. The pursuers had no contractual responsibility for this.

(iii) The pursuers had no part in the selection of the vessel the MV Natalie, nor what type or capacity of lifting mechanism/crane was to be used for lifting the machine on/off the vessel. These selections were made by Vattenfall Europe, by whom the defenders were engaged.

(iv) After the pad-eye had broken off during the lifting operation, and the machine had become stuck in the mud and clay on the seabed, there was no equipment on board that could have reattached the lifting gear to the machine, and in any event any attempt to lift the embedded machine might have resulted in the load exceeding the crane's safe lifting capacity.

(v) The MV Natalie had to leave because it was running short of fuel and because of concerns that the weather conditions were about to deteriorate.

(vi) A different vessel with different lifting mechanism/crane was able to lift the machine from the seabed in August 2015, and it was returned to the pursuers' premises on 24 September 2015.

[70] Having regard to these factual circumstances, I see no reason why the term "breakdown" should be given any meaning other than its ordinary and natural meaning. The commercial judge devoted a considerable part of his opinion (from paragraphs [61] to [82]) to considering the issue of fitness for purpose, and concluded that the machine was not fit for the purpose for which it was supplied by the pursuer to the defender. He also found that there was no evidence that the incident occurred as a consequence of either fault on the part of the crane operator or inadequacy of the crane itself. These findings have not been

challenged by the pursuers, and of course for my part I take no issue with them. However, the facts remain that the pad-eye broke off from the boom during an operation for which the defenders were wholly responsible, using a vessel and mechanisms for which the pursuers had no responsibility, and that in due course the machine was lifted from the seabed.

[71] Viewed against the terms of the contract as a whole, and the surrounding factual circumstances, I can find no error of law on the part of the commercial judge on the issue of breakdown.

(b) Temporary abandonment

[72] In terms of the parties' written pleadings, there was no dispute that the machine had been abandoned. In statement of facts 3 for the defender in the counterclaim the following averments appear:

> "As condescended upon in the principal action, an incident occurred while the Machine was operating on the seabed. This incident resulted in the Machine being abandoned on the seabed.
>
> ...
>
> In light of the decision from the pursuers' insurers, Vattenfall took steps to recover the Machine. The Machine was recovered and returned to the pursuer on 24 September 2015."

This was met by an admission by the pursuers that the Machine was abandoned on the seabed and that Vattenfall took steps to recover the Machine and it was recovered and returned to the pursuer on or about 25 September 2015. Senior counsel for the pursuers submitted to us that it was important to note that it was not in dispute that the machine was abandoned. The commercial judge found (at paragraph [39]) that this abandonment was temporary, not permanent. It was submitted by senior counsel for the pursuers that he was entitled, and correct, to reach that conclusion, because the witnesses were unanimous on this

point and all the evidence pointed to temporary abandonment. In support of this proposition he drew our attention to the following passages of evidence:

- The evidence of the defenders' witness Alistair Braid at paragraphs 5 and 6 of his second witness statement. Having stated that it remained his view that the scanmachine was "operational" immediately following the incident, he stated as follows:

  > "The predicted weather and fuel issue limited the options for recovery and the time available for that. Because of these issues, I believe the decision was taken for the vessel to leave for shore and in doing so, the equipment was essentially abandoned, on a temporary basis, until a recovery plan was put in place and implemented. Had the vessel had sufficient fuel to remain on site, it is my belief that a plan and procedure would have been made to recover and repair the scanmachine and the project would have continued."

- The evidence of the defenders' witness Keith Douglas in his second witness statement at paragraph 9.1, in which he stated:

  > "It was not an option to simply leave the scanmachine on the seabed. The German authorities (in common with most around the world) will not allow you to leave kit on the bottom of sea. It was therefore important for someone to recover the scanmachine given the fact that Scanmudring's insurer had decided against taking any further action in terms of recovery."

- Mr Douglas was cross-examined on this point, and accepted that the scanmachine was not permanently abandoned (in the passage quoted by your Lordship in the chair at paragraph [22] above).

- In an email dated 25 May 2015 the defenders' Andrew Scott stated that "we are now making preparations to cut the umbilical on board the vessel. The dead end will have a recovery buoy installed for recovery of the vehicle."

- The pursuers' witness Kenneth Vestly stated at paragraph 48 of his second witness statement as follows:

> "I thought that what was going to happen after the umbilical was cut was that we would get onto another vessel with divers and a bigger crane to go back and recover the scanmachine. The scanmachine was needed to complete the project and it could not simply stay on the seabed. The rig which Vattenfall were installing was going to be installed in that location and they could not put the rig on top of the scanmachine. It had to be moved so that they could complete the works."

- Mr Vestly's evidence was supported by that of the defenders' witness Graham Murdoch, who agreed that the machine could not be left where it was "because it was some German law thing and Vattenfall did have to install a platform in that location" (in cross-examination at page 29 of the court transcript of 13 December 2017).
- The above passages of evidence were consistent with the evidence of the pursuers' witness Arild Ariansen, who discussed (at paragraphs 17-23 of his third witness statement) the decision to cut the umbilical and how the scanmachine should be recovered. He stated that on the morning of 25 May 2015 there was a telephone conference between the pursuers, the defenders, Vattenfall and the vessel operators' representatives, which focused almost entirely on how the scanmachine should be recovered. There was some discussion about using divers or a remotely operated underwater vehicle to assist in the recovery, and also discussion about how quickly the scanmachine could be recovered. This was because the vessel required to return to Esbjerg to refuel, and Mr Ariansen was told that it could not remain in the field much longer. This then led to a discussion about the option of cutting the umbilical. There was further discussion in relation to the different ways in which the umbilical could be leveraged using buoys and such like to mark the scanmachine's position. If the decision was taken to cut the umbilical, then the location of the scanmachine

> would be marked for when the vessel returned to recover it. He remembered feeling relieved during this call, as Vattenfall, who took the lead on the call, seemed experienced in carrying out this type of recovery operation. At that time, there was no concern or indication whatsoever that the defenders or Vattenfall would not recover the machine. This was apparent to Mr Ariansen because they needed the machine to complete the project, and also because they needed the machine out of the way, as it was an obstruction to the platform Vattenfall was constructing. Plus, the defenders and Vattenfall seemed to be committed to recovering the scanmachine. At that point, the only consequence Mr Ariansen could see of cutting the umbilical was that it would take a little bit longer to repair the scanmachine and get it working again. Mr Ariansen stated that the work involved in changing and reconnecting the cabling in the umbilical would take about 12 to 18 hours to complete, and the pursuers' teams sometimes have to cut the umbilical and change a piece of faulty cabling during projects, so cutting the umbilical was something they had experience of.

[73] There was nothing to contradict this evidence. There was certainly no evidence that when the umbilical was cut it was the intention that this would be a permanent abandonment. The MV Natalie required to return to port. The machine was regarded as "operational" or "functional", and it was anticipated that another means of lifting it from the seabed would be devised (as indeed might have happened if the MV Natalie was not running short of fuel). The cutting of the umbilical did not indicate that the operation was at an end – it could be reconnected after about 12 to 18 hours work. The evidence referred to above suggests that when the umbilical was cut and supported by buoys, parties were

indeed contemplating a temporary abandonment of relatively short duration. They were clearly not considering permanent abandonment, for the reasons given.

[74] In these circumstances I consider that the commercial judge was entitled to reach the conclusion that this was a situation of temporary abandonment of the equipment, and that the standby rate applied. There is nothing in the terms of Article 3.4 of Schedule 1 to the Service Agreement which suggests that this should not be treated as temporary abandonment of the equipment, nor do I consider the contract as a whole renders this interpretation unreasonable. I find myself in agreement with the reasoning of the commercial judge on this point (at paragraphs [39] and [40] of his opinion). I also share his view that significance should be attached to the words "(regardless of clause)", which are unequivocal and preclude enquiry into the reasons why the equipment was temporarily abandoned.

The warranty in Article 7 of Schedule 1

[75] Your Lordship in the chair attaches some weight (at paragraph [49] above) to the warranty contained in Article 7.1. For my part I am not persuaded that this is a factor which carries much, if any, weight in the present proceedings. I say this for three reasons.

[76] First, at no stage in this action, either before the commercial judge or before this court, have the defenders relied on a case of breach of this warranty. There is no mention of Article 7 anywhere in the defenders' answers in the pleadings. They make detailed averments about other contractual provisions, and the effect of other articles of Schedule 1, but they do not mention Article 7 at all. In their answer 7, it is averred that the pad-eye was not fit for purpose, but there is no averment of breach of warranty nor disconformity to specifications. They have no plea-in-law directed at breach of warranty. No argument was

addressed to the commercial judge based on Article 7 of Schedule 1, and indeed the commercial judge records (at paragraph [42]) that:

> "the only warranty given by the pursuer was that the equipment complied with the terms and conditions of the agreement and conformed to the pursuers' specifications. It was not contended that there had been any breach of that warranty."

This is consistent with what senior counsel for the defenders is recorded as saying at page 40 of the transcript of the proof on 12 December 2017, where she stated "For the sake of completeness can advise (*sic*) that nor do I intend to advance an argument of breach of warranty." There is no suggestion in the defenders' grounds of appeal or Note of Argument of any submission based on breach of warranty, and no oral submission was made to us based on breach of the Article 7.1 warranty by senior counsel for the defenders. In these circumstances, where very able submissions have been advanced as to the meaning and effect of numerous contractual provisions, and in the absence of any submissions on the point, I should be very hesitant to attach significance to it.

[77] Secondly, it is not immediately apparent to me that the scanmachine which was supplied by the pursuers did not conform to the specification of equipment provided in paragraph 2.3 of the tender. No evidence was placed before the court to indicate that it did not conform to this specification.

[78] Thirdly, the exclusions contained in Article 7.3 (the most relevant of which are set out by your Lordship in the chair at paragraph [11] above) seem to me to provide protection to the pursuers against a claim for breach of warranty in the present circumstances, if such a claim were to be made. I accept that the sole warranty contained in Article 7.1 is not itself excluded, but any express or implied warranties of merchantability, materials, workmanship, design and suitability for specific or intended purpose or use are specifically

excluded. Provided that the pursuers have supplied equipment of the type/model specified, manufactured by the specified manufacturer, of the specified ROV Class, and capable of having the specified available tools attached, I do not consider that they have breached the sole warranty contained in Article 7.1. The defects which appear to have caused the pad-eye to break off from the boom, of which the pursuers had been unaware until the boom was examined after the machine had been recovered and which appear to have been introduced when repairs were carried out to the boom in 2013, were set out in some detail by the commercial judge at paragraph [64] of his opinion. It seems to me that these defects, which caused the failure of the pad-eye, were probably defects of workmanship and/or materials; in the absence of any evidence and submissions on the point it is difficult to form a concluded view, but they appear to fall squarely within the bounds of the exclusions in Article 7.3.

[79] For these reasons I do not consider that the commercial judge has fallen into error in not attaching weight to the Article 7.1 warranty.

Indemnity

[80] The commercial judge held (at paragraph [88]) that the purpose of Article 11.3 of Schedule 1 was not to permit a claim by the defenders, but rather to protect them against a claim by the pursuers. It applied to loss of or damage to property of the pursuers. The expense incurred by the defenders did not consist of loss or damage to the pursuers' property, and is not covered by the indemnity. I consider that the commercial judge's reasoning on this point is sound, and that he was correct to refuse the counterclaim.

Conclusion

[81] In reaching the views which I have expressed above, I have had at the forefront of my mind the guidance given in *Arnold* v *Brittan*, and in particular the observations of Lord Neuberger of Abbotsbury PSC at paragraphs 14-23 and Lord Hodge JSC at paragraphs 76/77, and to the decision of this court in *Midlothian Council* v *Bracewell Stirling Architects* (particularly at paragraph [19]). As I indicated at the outset of this opinion, there was no dispute between the parties as to the law. My purpose in mentioning it again now is to emphasise the words of Lord Neuberger at paragraph 19 of *Arnold* v *Brittan*:

> "The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made."

Lord Hodge made a similar point at paragraph 77:

> "But there must be a basis in the words used and the factual matrix for identifying a rival meaning. The role of the construct, the reasonable person, is to ascertain objectively, and with the benefit of the relevant background knowledge, the meaning of the words which the parties used. The construct is not there to re-write the parties' agreement because it was unwise to gamble on future economic circumstances in a long term contract or because subsequent events have shown that the natural meaning of the words has produced a bad bargain for one side."

[82] In the present case, it may be that, with hindsight, subsequent events have shown that the natural meaning of the words of the parties' contract have produced a bad bargain for the defenders, but that does not justify this court in re-writing the parties' contract. I consider, for the reasons given above, that the commercial judge was entitled to reach the conclusions which he did, and that he fell into no error of law in doing so. I would refuse the reclaiming motion.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 10
CA113/16

Lord President
Lord Menzies
Lord Brodie

OPINION OF LORD BRODIE

in the Reclaiming Motion

in the cause

SCANMUDRING AS

Pursuers and Respondents

against

JAMES FISHER MFE LIMITED

Defenders and Reclaimers

Pursuers and Respondents: Borland QC, Manson; Pinsent Masons
Defenders and Reclaimers: Moynihan QC; CMS Cameron McKenna Nabarro Olswang LLP

27 February 2019

[83] I have had the very considerable advantage of seeing, in draft, the opinion of your Lordship in the chair. I gratefully adopt your Lordship's exposition of the facts and issues.

[84] In this reclaiming motion the issues between the parties are narrow. As the defenders confirm in their note of argument, there is no issue concerning the findings of fact, nor is there any dispute regarding the principles of statutory construction summarised in *Midlothian Council* v *Bracewell Stirling Architects* [2018] PNLR 25 at para [19]. Where the parties are in dispute is as to how their contract applies to the facts found by the commercial

judge. As can be the case, that comes to be a question of what the parties are to be taken as having intended in relation to circumstances to which they never applied their minds because they did not anticipate that they might arise.

[85] The terms of the contract between the pursuers and the defenders are contained in the pursuer's tender Revision 005, emailed by the pursuers to the defender on 6 May 2015 and accepted by the defenders' purchase order emailed to the pursuer on 9 May 2015, except in so far as varied by tender Revision 006, emailed by the pursuers to the defenders on 19 May 2015 (see the commercial judge's opinion of 23 June 2017 para [33]). In accordance with section 4 of Revision 005 (Terms & Conditions), the contract incorporates the X-Subsea Form of Service Agreement ("the Agreement") and the terms and conditions set out in schedule I to the Agreement, a copy of which was sent by the pursuers to the defenders on 1 May 2015 with the original tender. Although nothing appears to turn on this and it did not feature in parties' submissions, some abbreviations used in the contractual documentation have been taken from the International Chamber of Commerce Incoterms Rules 2010.

[86] It is no longer contended that the contract came to an end, whether by cancellation, termination or otherwise, prior to the return of the scanmachine to the pursuers on 24 September 2015. It follows that the parties' rights and obligations in respect of the period between 24 May and 24 September fall to be determined by the contract.

[87] Section 2 (Execution) of Revisions 005 and 006 identifies the area to be dredged and briefly describes the work to be carried out by the scanmachine but the agreement is framed in terms of an obligation to supply equipment and associated personnel for the purpose of dredging and excavation rather than an obligation to carry out a specified item of work. The Agreement is to be governed and construed in accordance with the Laws of England

(article 14.3 of schedule I, taking priority in terms of clause 4 of the Agreement over references to Norwegian law which appear in the tender revisions) but as in the absence of proof to the contrary, the laws of any country are to be presumed exactly to conform to the law of Scotland. The contract can accordingly be regarded as an example of the nominate contract of hire or location of moveables together with services (a long-established combination: cf Bell *Commentaries* I 481). By way of introduction to his submissions Mr Moynihan on behalf of the defenders and reclaimers made reference to the usual incidents of such a contract and the terms which will be implied where the parties have not stipulated to the contrary. I agree with your Lordship in the chair that this was an interesting exercise, but only up to a point. Where parties enter into a nominate contract but have not addressed themselves to some of the necessary terms, the common law will fill the gaps by providing the relevant rights and obligations which are ordinarily to be implied in such a contract. It is the aggregate of these usual rights and obligations which give a nominate contract its particular character and because of their familiarity, as well as their purpose, they will appear, to lawyers at least, as reasonable, fair and commercially sensible. They will accordingly inform what is to be expected in a contract of a similar sort. Thus, as the defenders have it in their note of argument: "While the scanmachine is broken down it is not available for use and commercially one would not expect the lessee to have to pay a hire charge for a scanmachine that is not available for his use." I would agree with that sentence, taken in isolation and as a general statement. Lease is a mutual contract in which payment of the hire charge is the counterpart of having use of the thing which is leased - "in Location, the use of that which is set for hire and the hire, are mutual causes": Stair *Institutions* I .10.16. That is what one expects with a contract of lease; unless, of course, as Mr Borland had occasion to emphasise on more than one occasion, parties have stipulated to the contrary.

[88] It was Mr Moynihan's submission that here parties have not stipulated to the contrary. True, parties entered into a detailed written contract in terms of which implied warranties had been specifically excluded. Mr Moynihan could not and did not suggest that the parties' relationship was to be understood by reference to common law principles. Nevertheless, he contended that when one read the contract as a whole, the combined effect of articles 11.3(a), 11.6(b), 9.1, 9.2, and 3.4 of schedule I, was as one would expect with any contract of lease: entitlement to payment of hire depends on availability for use. Thus, if the scanmachine is available for use, the lessor is to be paid even if the lessee is not actually using it but is holding it on standby or has temporarily abandoned it for any reason. On the other hand, there is no basis for payment while the scanmachine is broken down or damaged; parties would hardly have contemplated the same daily rate being payable by the defenders while the pursuers were in breach of their obligation to repair it. In Mr Moynihan's submission the commercial judge had erred.

[89] Mr Borland, on the other hand, submitted that the commercial judge had not erred. The commercial judge had construed the relevant provisions of the contract according to the ordinary meaning of the words that the parties had used and he had applied that construction to the facts of the case: there had not been a "breakdown", rather there had been "temporary abandonment", the indemnity provisions did not apply to what was a claim for payment of hire charges.

[90] Your Lordship in the chair's analysis of the contract is that its fundamental meaning is that the counterpart of the obligation on the defenders to pay the pursuers a daily rate was that the pursuers had supplied a machine, with its associated working components, which was duly maintained and repaired in a functioning state conform to its specifications, and an operating crew. If I may respectfully say so, that is an attractive, and accordingly

compelling, conclusion because it would seem fair and reasonable, it is what one would expect, and it might be said to accord with commercial common sense. However, in *Arnold* v *Britton* [2015] AC 1619 at para 17 Lord Neuberger warns against a reliance on commercial common sense which has the result of undervaluing the importance of the language of the provision which is to be construed. I appreciate that para 17 of *Arnold* does not have the endorsement of this court which was given to para 15 of Lord Neuberger's judgment in *Midlothian Council* (and see the specific reservations in *HOE International* v *Anderson* 2017 SC 313 at [20]). Nevertheless, when parties set out to express their respective rights and obligations in a written contract, determining the extent of these rights and obligations and their application to a particular set of facts is an exercise in giving meaning to the words which, for better or worse, the parties have used. It is not an exercise in "re-writing the parties' bargain in the name of commercial good sense" where the bargain has turned out to be a bad one for one side (*Arnold* v *Britton*, Lord Hodge at para 77). Having said that, I appreciate that in this context giving meaning and re-writing are points on what is one spectrum rather than completely antithetical activities.

[91] What then do the words used by the parties say about the pursuer's obligations under the contract?

[92] The Agreement envisages the provision by the pursuers, as the Supplier, of "Subsea Dredging and Excavation Services" to the defenders, as the Client. "Services" is defined at article 1.8 as the provision of "Supplier Personnel and Equipment". Clause 1 of the Agreement provides for instructions being given for specific packages of work by a signed Work Order given by the "Client" to the "Supplier". "Work Order" is defined in article 1.12 of schedule I as the formal document issued as schedule II instructing the implement of specific packages of work.

[93] As Supplier under the agreement, I would take the pursuers to be obliged to supply the Equipment specified in the Work Order and the description of the Equipment which appears in section 2.3 of tender Revision 005, unloaded from its transportation container, at the mobilisation port (revision 006 section 4 and article 6.6 of schedule I) which equipment, in terms of article 7.1 of schedule I, it warrants as complying "with the terms and conditions of this Agreement, and conform to the specifications provided by the Supplier". As far as "specifications provided by the Supplier" is concerned I would take that as including the characteristics ascribed to the scanmachine in Revisions 005 and 006 and anything further which may have appeared in the relevant Work Order (as to which latter document we have no information). I would see as being among the specified characteristics of the scanmachine its capability to carry out the dredging operations described in section 2 (Execution) of Revisions 005 and 006. However, article 7.1 of schedule I, and indeed the rest of the contractual documentation, must be read together with the other provisions of article 7, and in particular article 7.3 which begins:

> "7.3 This warranty is the sole warranty of Supplier. Any other warranties, express, implied in law or implied in fact, including without limitation any warranties of merchantability and fitness for a particular purpose or use, are hereby specifically excluded.
>
> (a) Client hereby waives all warranties, guarantees and representations, express and implied, including without limitation any warranties of merchantability, materials, workmanship, design and suitability for a specified or intended purpose, whether arising by operation of law, usage in trade, prior business practice or otherwise."

I agree with your Lordship in the chair that "the sole warranty" must be given effect but such effect is very much circumscribed by article 7.3. Just how far it is circumscribed may not matter in this case. I would accept that the pursuers were bound to deliver to the defenders a scanmachine (with associated personnel) which conformed to the description in

tender Revisions 005 and 006 and, at the point of delivery, was not only designed to carry out but was capable of carrying out the dredging operations described in these documents. However, given the terms of article 7.3, were the precise scope of the sole warranty to be in issue, I would not see it as extending the distance of a warranty against latent defect in the weld attaching the pad eye to the boom of the scanmachine.

[94] Why I say that the precise scope of the sole warranty may not matter is because before the commercial judge the defenders' counsel specifically disavowed making a case based on breach of warranty. In any event, regard would have to be had to article 7.3(c):

> "(c) Supplier's warranty, including any liability for any defect or malfunction, shall be limited exclusively to a credit against the charges issued under each Work Order which remedy shall constitute Client's sole and exclusive remedy whether in contract, in tort, or any other warranty at law."

That is not the way the defence to the action is pled. The defenders' position is that they are not obliged to pay, not that they are entitled to a credit against what is otherwise due.

[95] Your Lordship in the chair draws attention to article 7.2 of schedule I. Article 7.2 provides:

> "7.2 For rented Equipment without personnel: Notwithstanding anything stated herein to the contrary, if the Client alleges there is any fault, defect or failure of the Equipment then the Client must report such fault, defect or failure within twelve (12) hours of such fault, defect or failure being apparent (such reports to be included in the operational run reports, logs or equivalent). The Supplier will not accept any responsibility for any fault, defect or failure under this Agreement without such reports. In the event of dispute the Supplier shall be entitled to appoint an independent examiner to check the Equipment."

[96] Your Lordship in the chair implies from this refusal to take responsibility for any fault, defect or failure where there has not been timely notification, an acceptance of responsibility where there has been such notification. With respect, I am not persuaded that that implication is available to impose any responsibility beyond that which is expressly

imposed by article 7.1. True, article 7.2 appears to accept the possibility of liability on the part of the Supplier for fault, defect or failure (just as article 7.3(c) might be said to accept the possibility of liability for "defect or malfunction"). Nevertheless, I read both these provisions as having been included *pro majori cautela*, or to put the same point more familiarly, to add a belt to the braces provided by the exclusionary provisions of article 7.3.

[97] Mr Moynihan attached significance to article 9.2 of schedule I as imposing, or at least demonstrating, an obligation of maintenance and repair. I accept that if the Equipment is to be maintained and repaired onsite (thereby avoiding or remedying a "breakdown") it will be for the pursuers to do that. However, article 9.2 is in the following terms:

> "The Client acknowledges that the Equipment may require onsite maintenance and repair according to maintenance programme. In the event that such maintenance and repair periods are not used in any particular day such unused maintenance and repair periods shall be accumulated up to a maximum of nine hours and shall be available to be used by the Supplier on one or more future occasions without penalty. Supplier's Equipment and Personnel shall be deemed 'off-hire' on an hourly basis for maintenance hours over the allowed maximum until the Supplier's Equipment has been repaired."

Strictly, this does not impose an obligation on the pursuers. Rather it benefits them, as Supplier, in that it permits the time allowed for maintenance in the maintenance programme (a document which was not available to us) to be accumulated up to nine hours without the Equipment being off-hire.

[98] Thus far, my reading of the contract: that the pursuers were obliged to deliver a scanmachine (and crew) with the operating parameters and technical specification set out in section 2.3 of tender Revision 005 which was capable of carrying out the dredging work described in Revision 006, and that the pursuers are entitled to carry out maintenance and repair in accordance with their maintenance programme, as extended by article 9.2; is perhaps not very different from that of your Lordship in the chair. I reserve for the moment,

however, consideration of the consequences of what the commercial judge found to be a latent defect in the weld fixing the pad eye to the boom arm of the scanmachine and whether, in what is quite a detailed written contract, there remains a place for the common law rule stated by Stair that in the contract of location: the use of that which is set for hire and the hire are mutual causes.

[99] What of course the case turns on is less the pursuers' obligations and more their rights and, in particular, their rights to payment. The scheme of the contract is that right to payment is coterminous with the duration of a package of work instructed by a Work Order. The Work Order begins with the date of start of mobilisation at Supplier's facilities (article 2.2). It concludes and is to be considered completed when all equipment and supplier personnel have returned to their point of mobilisation/origin (article 2.3). The more elaborate provisions of article 3.4 as to what rates are payable and when, are overlaid with the simpler statement found in tender Revision 006: "Day rate applies from delivery at terminal to redelivery from terminal". As I have already mentioned, the commercial judge held that the parties' contract was varied to the extent of deleting the provisions in Revision 005 regarding target lump sums and reduced day rates and by substituting the day rates specified in section 3.2 of Revision 006 (see opinion of 23 June 2017 para [33]). Nevertheless, both parties founded (and continue to found) on article 3.4 of schedule I for their respective purposes (in their pleadings the pursuers present their claim as based on Revision 006 but, *esto* that revision has no effect, rely on article 3.4 as in any event entitling them to the "full day rate"- see article 9(3) of condescendence). I therefore take it to be accepted that Revision 006 did not supersede article 3.4, which accordingly remains part of the contract. I do not see there to be any material inconsistency as between the two provisions.

[100] Your Lordship in the chair has quoted almost all of article 3.4. It might however be convenient to quote the full text:

> "3.4 Rates for Equipment
>
> | | |
> |---|---|
> | Day rate — Offshore operation | Applies for the time interval starts with a Pre-dive check and includes Post-dive check, and includes standby on seabed due to reasons beyond Company's control. |
> | Breakdown (Day rate ceases) | Applies from the moment the breakdown occurs, and last until the equipment is ready to resume operation. The breakdown time can be interrupted by standby if unable to resume operation due i.e. Client priority, weather etc. |
> | Day Rate Offshore Standby | Applies for the time interval during which the system is mobilized onto a vessel, and available for Client, but not in operation.
Standby rate applies also for temporary abandonment of the equipment (regardless of cause) until ready to resume work. |
> | Transit/ Onshore Standby | Transit / Onshore Standby Rate shall apply from delivery until start of mobilization onto vessel, and from offloading Client's vessel until redelivery

Onshore standby rates applies for periods when the equipment is put onshore between campaigns (unless demobilized from project)

Applies for the time where the equipment is exclusively reserved for the project, but not mobilized onto the vessel, and not available |
>
> Offshore Standby Rate shall be charged for any day during the Work Order excluding days during which the Transit Rate or Operating Rate is payable. Standby Rate shall be paid for all days when the Services are suspended by Client for convenience, all Force Majeure days and all days when the Supplier is available and able to supply Services after the Effective Date but is hindered by Client Group from gaining access to the worksite."

[101] Whereas article 3.4 provides for the possibility of a variety of rates applying in different situations, it is of relevance that it also provides for what might be described as a

default rate, in other words a rate which will apply unless another rate (the Transit/ Onshore Standby Rate or the Operating Rate) applies or a breakdown has occurred (in which case the day rate ceases). This default rate is the Offshore Standby Rate which "shall be charged for any day during the Work Order excluding days during which the Transit Rate or Operating Rate is payable". Thus, in terms of article 3.4, during the period of the Work Order, that is from the date when the Equipment is mobilised at the pursuers' mobilisation port until it is returned there, one or other of the contractual day rates are payable; only if and when "breakdown occurs" does the requirement to pay whatever is the appropriate day rate cease. Tender Revision 006 removed any differences between the rates which might be applicable depending on the activity of the scanmachine with the result that there is but one "Day rate" for the scanmachine irrespective whether it is in transit, onshore or offshore or whether it is on standby or operational (the same applies to the crew and the survey pole). By providing that "Day rate applies from delivery at terminal to redelivery from terminal" Revision 006 abolished any quantitive difference among the rates which might be applied but it retained the structure of article 3.4: the defenders, as Client, pay for every day from delivery until redelivery unless a "breakdown" occurs.

[102] As I read article 3.4 the pursuers might have chosen to rely on their entitlement to the Offshore Standby Rate (what I have referred to as the default rate) for each day from delivery of the scanmachine until it was redelivered. They did not do so. Rather, they relied on the assertion that the scanmachine had been temporarily abandoned and the provision in article 3.4 that, in addition to "the time interval during which the system is mobilized onto a vessel, and available for Client, but not in operation", Day Rate Offshore Standby "applies also for temporary abandonment of the equipment (regardless of cause) until ready to resume work". In argument Mr Borland pointed to the admission in the pleadings that the

scanmachine had been abandoned and the uncontroversial evidence that the abandonment had been temporary (albeit the duration of this temporary period was about four months). He emphasized the words in parenthesis: "regardless of cause".

[103] Where a piece of machinery has been left at the bottom of the sea because of pressure of circumstances, but is thereafter recovered, as a matter of ordinary language it is very difficult to dispute that the machinery has been temporarily abandoned. The wording "regardless of cause" would seem to close off inquiry as to the reason or purpose of an instance of abandonment. That is certainly so looking at matters with the benefit of hindsight. While I can see that a period of four months can be seen as stretching "temporary" somewhat, it would appear that the period during which the scanmachine remained on the seabed had more to do with a dispute over responsibility for the recovery operation rather than anything else. The scanmachine was neither lost nor treated as a total loss (commercial judge's opinion para [60]). The ordinary meaning of words may of course have to yield to context. "Temporary abandonment" is a somewhat unusual expression and I confess to being puzzled as to what was the intended purpose of including it, other than, again, *pro majori cautela*. The commercial judge hints at para [54] of his opinion that it may refer to circumstances where the crew has been demobilized. Your Lordship in the chair sees it as referring to a situation in which the scanmachine is in an operable or functioning state with the crew available but, nevertheless, temporarily abandoned for whatever reason "in a 'standby' mode". Although I remain puzzled by the purpose of the temporary abandonment provision, agreeing with the commercial judge, I consider the expression apt to cover what occurred in the present case. That is certainly so on the basis of the ordinary meaning of the words in question. Your Lordship in the chair considers that the commercial judge's approach fails to understand the words in their contractual context. I have the

misfortune to disagree. My reasons for coming to a different conclusion to that of your Lordship are, I think, twofold. First, I do not attach importance to what I accept was the fact that parties intended a relatively short contract of some 240 operational hours plus transit time. The provisions in schedule I of the Agreement were of the nature of standard terms and conditions; they were not tailored to this particular contract. In any event, it seems to me that all that can be said is that the duration of the contract, in so far as relating to a particular package of work, was the duration of the relevant Work Order and that it was within the power of the defenders to bring that period to an end by recovering and redelivering the scanmachine, as it was their contractual obligation to do. The second reason is that I do not see the structure of the contract as being such that payment of a hire charge was made to be dependent on the scanmachine being available to the defenders. I accept that payment of the hire charge can be described as the counterpart of the making available of the equipment in the general sense that these are the principal obligations of the two parties and that, broadly, one can be said to be the consideration for the other. I also accept that if this were a contract governed entirely by common law principles, in the words of Stair "that which is set for hire and the hire, [would be] mutual causes", in other words payment of hire could be withheld in the event that the item hired was not made available in working condition. However, this is not a contract where there is really any room for the application of common law principles as to the nature and extent of parties' rights and obligations and the circumstances in which they can be insisted upon. I see the contractual structure here as being that the defenders pay the applicable rate for every day of the duration of the Work Order, subject only to the day rate ceasing "from the moment [a] breakdown occurs". The contract specifies instances where the Client pays even although the Equipment is not available for use: transit, put ashore "between campaigns", equipment

exclusively reserved for the project but not mobilized onto the vessel, and Force Majeure days. For the Client not to be liable to pay at least the Offshore Standby Rate some other rate must apply or liability for the day rate must have ceased because breakdown has occurred. Given that Revision provides that there is only one "Day rate", that is what is payable by the defenders, unless there has been a breakdown.

[104] I would however agree with your Lordship in the chair that when considering whether, on the facts of the case, there has been "temporary abandonment" as that expression is used in the contract, little weight is to be attached to the evidence of a finance officer in reply to a question as to whether a certain state of facts which are admitted to amount to abandonment was "temporary". It is for a witness to speak to facts, for example the time that a particular state of affairs lasted or the date when it came to an end. However, when a witness is asked whether a particular state of affairs was, as a matter of ordinary language, "temporary", and there is no question of the witness being called on to draw on any special expertise, the answer relates not to any fact or to any opinion on a matter within the witness's expertise but rather simply to the witness's understanding of English.

[105] Was there then a "breakdown" when the pad eye broke off on the weld failing with the result that the day rate ceased, and because the equipment was never thereafter "ready to resume operation", ceased permanently? The commercial judge thought not. Your Lordship in the chair finds that conclusion to have been in error. I have not found this to be an easy question to answer but I have come to agree with the commercial judge.

[106] The very concise terms of the relevant text provides only limited help with construction. In that a situation of breakdown lasts from "the moment [it] occurs" until "the equipment is ready to resume operation", a breakdown is something which happens to the equipment and which renders it unready for, or incapable of operation. I agree with the

commercial judge that "breakdown" has a connotation of mechanical breakdown in the sense of a failure of machinery. If anything, the definition from the Oxford English Dictionary which was relied on by Mr Moynihan, "a fracture or dislocation of machinery resulting in a stoppage", supports that. I took Mr Moynihan to attach weight to "a fracture … resulting in a stoppage" and to equate that with the fracture of the weld holding the pad eye in place. That is a rather selective approach to the dictionary definition, which, as I read it, refers to a fracture or breakage of machinery resulting in an immediate (and not consequential) stoppage in the operation of a mechanism. A dictionary definition is not of course determinative but I would not consider the failure of the weld securing the pad eye to the boom to have constituted a fracture or dislocation of the *machinery* of the scanmachine. Its moving parts, the means by which it propelled itself and carried out excavation works were not directly affected. The pad eye was no more than a point of attachment to the hook of the crane and, from the fact that the scanmachine was eventually recovered, apparently not the only means of attaching it to a crane or other lifting device.

[107] As the commercial judge observed, the main reason why the scanmachine could not continue dredging was because it was stuck in clay. Had it been able to be freed from that, any restriction in its capacity would have been the result not of a breakdown but of such consequential damage it sustained as a result of the pad eye being torn from the boom arm.

[108] In introducing his submissions, Mr Borland posed, as the first of five critical questions: On the available evidence was it open to the commercial judge to find that the scanmachine had not broken down? Agreeing with your Lordship in the chair, I do not see that to be a critical question. Mr Borland's formulation suggested that whether a "breakdown" had occurred was purely a question of fact which, once determined by the commercial judge as fact-finder, could only be revisited by this court if there was insufficient

evidence to justify the conclusion. Whether a "breakdown" occurred was not purely a question of fact. Rather, it was that slippery thing, a question of mixed fact and law, in other words a question of what was the effect of the contract, properly construed, when applied to the primary facts of the case. That said, I would see there to be more scope for the court, whether at first instance or on appeal, to have regard to the evidence when considering whether a breakdown had occurred than when considering whether an instance of abandonment was temporary. In the latter case, as I have already indicated, the witness in question was doing no more than demonstrating his understanding of English. The evidence of Mr Vestly and Mr Braid recorded by the commercial judge at para [33] of his opinion was of a rather different nature. These witnesses had a degree of expertise in underwater excavation and dredging using a remotely controlled vehicle. They had been directly involved in the supervision and operation of the scanmachine and had been able to appraise the situation as it was after the fracture of the weld securing the pad eye and the consequent descent of the machine to the seabed. They were not being asked about the meaning of a word; they were being asked about matters of primary fact or opinion on a matter within their expertise based on primary fact. Their evidence, both of primary fact and opinion, once accepted, therefore had weight. In my opinion the commercial judge was accordingly entitled to have regard to Mr Vestly's view that the damage to the boom would not have affected the functioning of the scanmachine and to Mr Braid's assessment that it was still operational despite being stuck in the mud. In that that was evidence that the machine remained capable of operation it tended to negative the proposition that a breakdown of the scanmachine had occurred.

[109] I respectfully agree with your Lordship in the chair and the commercial judge that the indemnity provisions have no application to the circumstances of this case.

[110] I would refuse the reclaiming motion.