

**JUDGMENT : MR JUSTICE CHRISTOPHER CLARKE** . Commercial Court. 11<sup>th</sup> October 2007

1. This is an application on the part of the Defendants, Holystone Overseas Ltd ("Holystone") to vary an order for a freezing injunction obtained by the claimant Pacific Maritime (Asia) Ltd ("Pacific") pursuant to section 44 (3) of the Arbitration Act 1996 ("the Act"). Holystone also applies to increase the security of \$ 500,000 that Pacific was ordered to give in respect of their undertaking in damages.
2. The freezing order was made by Simon J on 23<sup>rd</sup> May 2007. In substance it restrained Holystone from removing from England & Wales or disposing of, dealing with, or diminishing the value of any of its assets and in particular the vessel at the heart of these proceedings up to the value of \$ 4,000,000.
3. The vessel is an accommodation barge with no means of self propulsion, constructed in Finland in 1979. She used to be called the "Weare" and was later renamed "Jascon 27". I shall call her "the vessel", although she is not a vessel for the purposes of the Merchant Shipping Acts. She is some 28 years old and had between 1997 and early 2006 been used by her previous owner, HM Prison Service, as a prison ship – "HMP Weare". This sort of vessel is also used for offshore accommodation for oil and gas workers.
4. By a Memorandum of Agreement ("the MOA") dated 21<sup>st</sup> July 2006 Pacific, a Hong Kong corporation, agreed to sell her to Holystone, which is incorporated in the British Virgin Islands ("BVI"), for £ 1.5 million. The vessel, which was then and had been for some years at Portland Harbour, was taken over by Holystone on that date. She remains there to this day, having had extensive work carried out on her in order for her to be able to operate off shore. The MOA was subject to English law and to arbitration in accordance with the LMAA terms.
5. The making of this agreement enabled Pacific, whose managing director is Mr Robert Vogel ("Mr Vogel"), to fulfil a contract for the purchase of the vessel for £1,500,000, for which it had paid a deposit of £ 150,000 (which would otherwise have been lost), and which was due to be completed in July 2006.
6. Mr Jacques Roomans, who is based in Nigeria, is President of the Sea Trucks Group of companies of which Holystone is part. The Sea Trucks Group ("STG") is a large group which provides platform installation and accommodation services, supported by a fleet of tugs, to the oil and gas industry mainly in Nigeria and along the West African coast. It is also engaged in the construction of oilfield vessels in China. Mr Roomans is the President of Holystone.
7. Clause 6 of the MOA provided: *"The Buyers have agreed to return to the Sellers at no cost the forward block of accommodation modules on the Vessel as identified by and in accordance with the provisions of an Addendum to this Agreement and which is agreed or to be agreed between the parties as soon after the date of this Agreement as is possible."*
8. The parties entered into a First Addendum also dated 21<sup>st</sup> July 2006 which provided: *"It is hereby agreed that in relation to the accommodation modules referred to in clause 6 of the MOA:*
  1. *In consideration for the agreed amount of the Purchase Price, the Buyers agree to return to the Sellers at no cost those accommodation modules as are identified on the plan appended hereto (and for the avoidance of doubt illustrated on the plan as being the forward block of 5 x 5 accommodation modules) ("the Accommodation Modules"), or equivalent in accordance with the provisions of this Addendum.*
  2. *On delivery of the Vessel by the Sellers to the Buyers, the Buyers shall take the Vessel to a destination to be determined solely by the Buyers.*
  3. *If the Vessel is taken by the Buyers to Batan, Indonesia, then the Buyers shall authorise the Sellers at a time convenient to the Buyers to remove the Accommodation Modules from the Vessel at the cost, risk and expense of the Sellers. ...*
  5. *If the Vessel is taken by the Buyers to a destination other than Batan, Indonesia, the Buyers hereby agree to construct for and deliver in Batan, Indonesia, to the Sellers at the Buyer's cost an accommodation unit of similar size and volume as the Accommodation Modules."*
9. The effect of the First Addendum was to give Holystone the option that it wanted of taking the vessel to Batan for the removal of the forward block and having the vessel repaired there or somewhere else in the Far East. It also gave Pacific the prospect of doing some or all of the conversion work on the vessel at the yard of PT Uni-Marine Pacific ("Uni-Marine"), an Indonesian associate company of Pacific. Uni-Marine has a small ship repair and shipbuilding facility at Batan, where work on the vessel could be done relatively cheaply. Mr Vogel is also managing director of Uni-Marine.
10. The plan appended to the MOA showed the totality of the accommodation modules on the vessel, part of which was a forward block of 5 x 5 accommodation modules (resembling in appearance five portakabins stacked upon each other with 5 windows in each).
11. Negotiations took part for a second addendum to the MOA; but these proved abortive.
12. After the MOA was signed and delivery had taken place, there was communication between Pacific and STG/Holystone about the carrying out of the agreement. On 5<sup>th</sup> August 2006 Mr Roomans "reconfirmed" that he would build for Pacific an accommodation block of the same dimensions either in China or Batan. He did so in response to an e-mail from Mr Vogel in which Mr Vogel had recorded Mr Roomans' advice of the previous week that the vessel would be going to Rotterdam.

13. It became increasingly apparent that Holystone was not minded to take the vessel to Batan and that Pacific wanted a cash settlement. On 30<sup>th</sup> September 2006 Mr Roomans told Mr Vogel that he would "be duly paid for the Accommodation Block once I have established the cost with our outfitters in China".
14. On 11<sup>th</sup> October Mr Vogel provided STG with a quote (dated 29<sup>th</sup> September 2006) from Uni-Marine for \$ 4.08 million for building a new forward accommodation block and repeated an earlier request for a cash settlement "as the block on its own is of no use to Uni-Marine". Mr Roomans had suggested to Mr Vogel that he should provide this quote on 22<sup>nd</sup> August. On the same day Mr Roomans forwarded the quote to a Mr Van Straten of the STG group stating "I am sending you Robert's quotation on the Accommodation Block that I owe him" (underlining added).
15. On 21<sup>st</sup> October Mr Vogel again told Mr Roomans that he could not use the block on its own and that he wanted a cash settlement of \$ 4 million. He pressed for that thereafter. On 12<sup>th</sup> February 2007 Mr Roomans offered \$ 1 million.
16. In early April 2007 Mr Roomans told Mr Vogel that Holystone would be returning the forward block which would be removed from the vessel and then shipped to Batan. A note in his handwriting records an apparent agreement to that effect. On 9<sup>th</sup> April Mr Vogel told Mr Roomans that he needed the forward block very quickly.

#### **The freezing injunction**

17. The freezing injunction was obtained upon the following basis. Pacific, it was said, had a good arguable case that Holystone was obliged to provide Pacific with an accommodation unit of similar size as "the Accommodation modules" but had failed to do so. The figure of \$ 4,000,000 was derived from the Uni-Marine quote which was said to be "the best evidence of the cost of constructing the unit in accordance with the MOA and Addendum No 1". Holystone was a BVI company believed to be without assets other than the vessel, which, it was anticipated, would leave the jurisdiction at the end of May or early June 2007 in order to be employed for a period of five years in West Africa. A sole arbitrator had not yet been appointed and it would take time for his appointment to take place. Further he would not have power to make an order that was the equivalent of a freezing injunction.
18. Since then Mr Baker Harber has become the parties' agreed arbitrator and extensive submissions have been filed in the reference.
19. Holystone applied on 17<sup>th</sup> July to discharge or vary the order. That application was supported by an affidavit from Mr Roomans in which he made a number of allegations. He expressed the belief that Pacific was not acting in good faith in putting forward an inflated figure of \$ 4,080,000 for the provision of a small part of a vessel sold for £ 1.5 million. He said that he was told by Mr Vogel that the vessel was in class, which he believed meant the whole vessel, and that the costs of refurbishment would be about \$ 1 million. He complained that whereas the vessel's hull and original superstructure were classed by DNV the accommodation blocks did not meet Class requirements. These matters were said to give rise to a substantial counterclaim. Holystone relied upon the non-disclosure of the matters which it claimed Mr Roomans had not been told about as a basis for discharging the order.
20. Mr Roomans described the Uni-marine quote of \$ 4,080,000 as "a poor and transparent scam driven by greed aimed at getting a lot of money for doing nothing and bearing no risk". He put forward a quote for cost of steelwork from one of the Chinese companies STG used – Wuxi Soho ("Wuxi") – of \$ 405,650 for 427 tons which he suggested was a quote for a block built to a higher standard than the existing block. He expressed the view that the cost would be significantly reduced to about \$ 250 -300,000 if the accommodation block was not built to class standards because the steel weight would be reduced by about 15%. He also relied on a report from Noble Denton to the effect that the value of the forward block as at July 2006 was in a range between £ 69,750, the scrap value of the steel and £ 139,500, which was said to be her market value. The £ 139,500 figure was reached by calculating the scrap value of the whole vessel at £ 750,000; and then applying the factor needed to bring that up to the contract price of £ 1,500,000 (i.e. 2) to £ 69,750.
21. That evidence was met by a second affidavit of Mr Vogel, who disputed all these points. That affidavit, Pacific contends, establishes that important parts of Mr Roomans' evidence are demonstrably untrue. Pacific relies on that as relevant to the exercise of the court's discretion. In his affidavit Mr Vogel demonstrated by reference to documents that the Uni-Marine quote was produced at Mr Roomans' suggestion and not, as Mr Roomans had said, on Mr Vogel's initiative; and that Mr Roomans had forwarded the quote to Mr Van Straten without suggesting that it was some form of scam (see paragraph 14 above); and that it was less than a quote he had received for a fully fitted accommodation block. The statement that the vessel was in class was not false, the vessel being in class and her hull, machinery and equipment having just passed the DNV 5 year Special Survey. The MOA provided for her to be delivered with her class maintained and she was. It is now common ground, as I understand it, that the modules themselves are not the subject of class being treated as non-permanent items. The vessel has a Class notation limiting her service area to "enclosed waters".
22. Mr Vogel's evidence was that the vessel, whilst owned by the Prison Service, had been maintained by Vosper Thornycroft at a reported cost of over £ 10 million. Prior to the MOA Mr Roomans was given a substantial quantity of documents, which Mr Vogel exhibits and many of which Mr Roomans admits having received, including a copy of the interim certificate of class, showing the true position. By the terms of the MOA Holystone confirmed that it had inspected and accepted the vessel's class records. In addition a report from London Offshore Consultants ("LOC") commissioned by Pacific shortly before sale showed that her condition was generally

satisfactory. Mr Vogel says that he did not represent that the vessel could be repaired and refurbished for \$ 1 million; and that, in any event, on Mr Roomans' evidence Mr Roomans did not think that figure was realistic. Mr Vogel produced a printed sheet given to Mr Roomans in July 2006 with some preliminary indications of costings of the work required for the vessel to work offshore in the sum of \$ 7.76 million, excluding any profit for Mr Vogel's company, or mobilisation to Indonesia. In the light of Mr Vogel's evidence, Holystone no longer seeks to discharge the order on the grounds of non-disclosure (or any other grounds).

23. In the light of this exchange of evidence it seems to me that I should look with some circumspection at Mr Roomans' assertions about the value of the forward block or an equivalent.

**The grounds of challenge to the freezing order**

24. Holystone's challenge to the continuation of the freezing order is now put forward on two bases. Firstly it is said that the freezing order should be drastically reduced in scope because the figure of \$ 4,000,000 has been reached by asking what is the cost of building a new forward accommodation block. That test, it is submitted, is clearly wrong in law. If the correct test is applied, Holystone's recovery is limited to the value of the actual forward block. This was not an argument that featured in the correspondence between the parties prior to the freezing order; nor is it consistent with the offer of \$ 1 million made on 12<sup>th</sup> February 2007 by Mr Roomans and statements from him to the effect that Holystone would provide an accommodation block for Pacific. Alternatively Holystone says that, even if the correct test has been applied, the quantum of \$ 4 million is very much overstated.
25. Secondly, Holystone says that, now that the arbitrator has been appointed, it is he who should consider the question of appropriate relief. The question of relief should be remitted to him and the freezing order varied so that it will be discharged upon the coming into force of any order of the arbitrator designed to take the place of the freezing order.

**Wrong test?**

26. Pacific's claim proceeds upon the basis that Holystone is bound to pay in damages the cost of constructing an accommodation unit of similar size and volume to the "Accommodation Modules" and delivering it in Batan. This, Holystone submits, is simply wrong. Under the MOA and its first addendum Holystone had a contractual choice; either to take the vessel to Batan and allow Pacific to remove the Accommodation Modules from the vessel at Pacific's cost; or to take the vessel somewhere else and then choose to construct and deliver (in Batan) a new forward block equivalent to the old. In calculating its damages by reference to the cost of a new forward block delivered in Batan, rather than the loss that Holystone has suffered by not receiving the vessel's old forward block, Pacific has quantified its claim on the basis that Holystone would have performed its obligations in the manner most beneficial to Pacific and most burdensome to Holystone. In fact they ought to be calculated on the basis that Holystone would have performed them in the manner least burdensome to Holystone.
27. The difference in calculation method is potentially very significant. Pacific claims that the cost of construction and delivery of a new equivalent unit is more than \$ 4 million. If, on the other hand, what is to be ascertained is the loss caused to Pacific by not receiving the 28-year old forward block, that loss is, according to Holystone, little more than the block's scrap value which, according to Noble Denton, Holystone's experts, is £ 69,750. Alternatively Pacific's loss is £ 139,500 at most.
28. The way in which Pacific puts its case is set out in paragraph 24 of Mr Vogel's second affidavit and paragraph 43 of Pacific's skeleton argument. It is put thus
- Pursuant to the terms of the MOA, the Defendant had a choice, following delivery of the barge to it, either to take her to Indonesia and deliver the existing unit to the Claimant or, if it chose not to take the barge to Indonesia, to construct and deliver to the Claimant in Indonesia, at the Defendant's expense, a new accommodation block;*
  - The Defendant chose not to take the barge to Indonesia;*
  - Thus, it was obliged to construct and deliver to the Claimant in Indonesia the new block provided for in the MOA;*
  - The Defendant has failed to construct or deliver that new block;*
  - The Claimant is entitled to claim damages in respect of the Defendant's failure to construct and deliver the new accommodation block – i.e. the market value of what it ought to have received at the time that it ought to have received it.*
29. This is, Holystone submits, a misreading of the MOA and its first addendum. By clause 6 of the MOA Holystone's obligation was described as an obligation "to return to the Sellers at no cost the forward block of accommodation modules". Addendum 1 then provided, in its first paragraph, that Holystone's obligation was to return the accommodation modules to Pacific at no cost, or to supply the equivalent. It then went on to provide that Holystone should take the vessel to a destination of its choice: either to Batan, where Holystone was bound to authorise the removal of the actual forward accommodation block; or to a destination other than Batan, in which case Holystone would be bound to construct for and deliver in Batan to the Sellers an accommodation unit of similar size and volume to the forward block.
30. The MOA and addendum do not, therefore, Holystone submits, provide that it is Holystone's exercise of a choice as to the destination of the vessel (either with or without communication of that choice) which determines the extent of Holystone's obligation. Holystone's obligation is to take the vessel to a destination of its choice. It is the taking of the vessel to that destination that is to determine what obligation arises thereafter.

31. In fact Holystone has taken the vessel nowhere. I reject the suggestion that the vessel has been taken to Portland Harbour within the meaning of clause 2 of the first addendum. The clause contemplates that she will be taken from her port of delivery to some other destination. This has not happened. Holystone contends that that means that no obligation has arisen to pay any substantial damages; but accepts that it is arguable that Holystone was in breach in not taking the vessel to a destination "on delivery" or within a reasonable time thereof.
32. In those circumstances Holystone relies on the principle stated by Lord Cranworth in *Robinson v Robinson* (1851) 1 De G.M. & G 247: "Where a man is bound by covenants to do one of two things, and does neither, then in an action by the covenantee, the measure of damage is in general the loss arising by reason of the covenantor having failed to do that which is least, not that which is most, beneficial to the covenantee."
33. To similar effect is the following passage from McGregor on Damages (17<sup>th</sup> Edn) at 8-060.) "where the defendant has the option of performing a contract in alternative ways, damages for breach by him must be assessed on the assumption that he will perform it in the way most beneficial to himself and not in that most beneficial to the claimant".
34. Pacific submits that it is in principle entitled to a freezing order for the highest amount in respect of which it has a good arguable case, including a sum for interest and costs: Gee 5<sup>th</sup> Ed, page 117. I agree. The principal sum which Pacific claims is the value of a new equivalent forward block delivered to Batan.
35. The first question, therefore, is whether Pacific has a well arguable claim to such an entitlement. Notwithstanding the force of Holystone's submission, I am persuaded that it does.
36. The MOA and addendum do not simply provide that Holystone is to deliver the old forward block or an equivalent new one. The obligation expressed in the MOA is to deliver the old forward block at no cost. The first paragraph of the addendum then states that Holystone is to deliver the old forward block, or equivalent in accordance with the provisions of this Addendum. Only in the second paragraph does the agreement spell out the different consequences according to where the vessel is taken.
37. In that context it seems to me a possible construction of the agreement that the primary obligation is to deliver the old forward block but that, if Holystone does not do that, then it is to supply an equivalent. In other words the alternative applies if the primary obligation to supply the old block is not fulfilled, as is the case here.
38. Even if, contrary to what I have just suggested, the true analysis is that the contract falls into the same category as a simple contract to supply A or B, the application of the *Robinson v Robinson* principle to the facts of this case does not appear to me to be entirely free from difficulty.
39. Firstly, there is a potentially important difference between the principle as stated in *Robinson v Robinson* and that stated in *MacGregor*. The former assumes that the contract breaker will do that which is *least beneficial to the covenantee*. The latter assumes that the covenantor will perform in the way *most beneficial to the covenantor*. The two are often two sides of the same coin. But not necessarily. The course least beneficial to Pacific will probably be the supply of the old forward block, although in some circumstances it might be more advantageous to receive the old block sooner rather than a new equivalent later. But for Holystone, on the assumption that the vessel was to be taken on delivery to somewhere other than Portland, as the contract requires, it might be more beneficial to take her to a port other than Batan, perhaps in order to refurbish her at cheap rates for the purpose of an anticipated long term charter, or to let her out on such a charter, even if doing so exposed Holystone to a liability to supply Pacific a new forward block and not just the old one. The fact that the contract contemplates that Holystone may decide to take the vessel to somewhere other than Batan, even though that involves supplying Pacific with a new equivalent forward block, itself suggests that there may be circumstances where it will be to Holystone's benefit to do so. I should have thought that, in cases where the formulation of the assumption makes a difference, the assumption should be that Holystone would perform in the way most beneficial to itself, not that it should perform in the way least beneficial to the covenantee. On the present evidence it does not seem to me self evident that in July 2006, on the assumption that the vessel left Portland, taking her to Batan would have been the mode of performance most beneficial to Holystone. At any rate on an interlocutory application I decline to assume that that must be so.
40. Holystone's contention assumes that, if the vessel is not taken anywhere by the time when, under the contract, she ought to have been taken, it is irrelevant to consider where, if Holystone had carried out its obligations, the vessel is likely to have been taken. It is to be assumed that she would have been taken to Batan. If so, it would appear to follow that, if Holystone delayed 48 hours beyond the time when it should have taken the vessel somewhere, and then took her to somewhere other than Batan, Pacific would only be entitled to the value of the old forward block, which, ex hypothesi, it was never to receive. But, at any rate if there was no relevant change of circumstances in those 48 hours, the assumption would have been falsified by events. It would seem to me well arguable that the principle in *Robinson v Robinson*, which is expressed in terms of a general and not an immutable rule, does not compel the court to make assumptions that may well be wrong. If X agrees to supply Y with product A or B and supplies neither, the Court can reasonably assume that, if he had complied with his contract X would have supplied the product which it would cost him the least to supply. But in other circumstances, an assumption as to what X would have done may be less easily made.
41. I was told that Pacific had it in mind to plead a case to the effect that Holystone were estopped from disputing that an equivalent block was to be provided. Since that has not yet been pleaded I say no more about it.

42. In my judgment, therefore, the appropriate figure to take as representing Pacific's best arguable case (loss of use apart) is (a) the value of new equivalent Accommodation Units; (b) a figure for interest and (c) a figure for costs.
43. As to (a) the first addendum calls for the provision of equivalent and not improved units. Holystone submits that the figure of \$ 4.08 million is far too high, an appropriate figure being no more than \$ 2 million, if that.

**Is the \$ 4.08 million figure too high?**

44. The Uni-Marine quote of 29<sup>th</sup> September 2006 is for the provision of an accommodation block of 110 units in Butan for \$ 4.08 million. In February 2007 Mr Roomans suggested a figure of between \$ 1.4 million for steel work plus outfitting and \$ 4.8 million for a fully equipped and furnished block including the fitting out of the working and navigation bridges as well as various other facilities (gymnasium, hospital etc).
45. LOC has obtained seven further quotes for similar 96 cabin accommodation blocks. These quotes vary from \$ 4.7 million to \$ 12.6 million, excluding delivery and, in the case of modular units, assembly charges, and are as follows:

Name of Company	Approximate Total (US\$)	Type
Consafe Engineering Services Ltd. Aberdeen	7,500,000	Modular
Ferguson Modular Ltd Aberdeen.	11,420,000	Modular
Elliott Modular Staffordshire	5,558,000	Modular
MML Marine Ltd Glasgow	6,918,000	Modular
PT Pan Utd Shipyard Indonesia	9,360,000	Modular
Nanghai Engineering Division. China	4,766,164	Single Unit
Bohai Oil Marine Engineering & Supply China	12,675,000	Single Unit

46. Mr Roomans expresses the view that only Chinese construction costs are relevant, because it is only in China that he would have constructed a new unit for Pacific. But, since he has not constructed a new unit and does not propose to do so, the China construction costs payable by his companies cannot be the only guide.
47. Pacific does not seek to include a figure in excess of \$ 4.08 million, but relies on the above quotes in support of its claim to include that figure. It submits that, given the buoyant state of the market, the cost of constructing and delivering a new block is likely to be at the bottom end of the possible value range. The \$ 4.08 million figure is said by LOC to be reasonable and is less than all the other quotes, including that of Consafe who were the manufacturers of the original block. It is also less than Mr Roomans' own \$ 4.8 million estimate for a fully fitted out shell, although that estimate seems to be based on a structure and content which is considerably more elaborate than the forward block.
48. If a new equivalent unit were to be constructed it could be built in a number of different places. In order to make a proper comparison of costs it would be necessary to add to any of the quotes for delivery otherwise at Batan the cost of transporting the vessel to Batan. The likely cost of delivery from China (say) to Indonesia of 48 individual modules is said by Mr Vogel to be in the region of \$300,000 but, if they had to be delivered as a single block with fittings in place the cost, according to him, would be at least \$ 1,000,000. These considerations militate against taking as a comparator the cost of building a new equivalent unit a long way away from Indonesia.
49. The quotations obtained by LOC have been the subject of a number of criticisms – in Noble Denton's recent second report – on which LOC has not had the opportunity to comment.
50. The quote of \$ 405,650 produced by Wuxi for STG, which is for a single unit, is markedly lower than all the other quotes, for reasons which are not wholly clear. Wuxi is a government company which is able to buy direct from Chinese steel mills and which offers STG preferential rates, which would not be available to Pacific. Their quote is also to be contrasted with the figures given by Mr Roomans in 2007 (see paragraph 44). I do not regard the Wuxi quote as a reliable guide to Pacific's best arguable figure.
51. Of material relevance is the fact that the Uni-Marine quote is for 110 cabins, whereas the Accommodation Modules consisted of 48 modules each of 2 cabins, making 96 cabins. Noble Denton expresses the view that the increase in costs due to the additional cabins is likely to be of the order of 20% to 25%, although the increase would be nearer 14% if the quote was for modular construction. The cabin area in the Uni-Marine quote is for approximately 2,200m<sup>2</sup> against an actual cabin area of 1,380m<sup>2</sup>. LOC say that the cost of construction of an accommodation block is not proportionate to the floor area and will be more sensitive to the number of cabins than the cabin area. Noble Denton agree with this but then say that there would be additional costs in respect of additional material and associated costs of installation for the larger rooms, such that the increase in overall costs due to the apparent increase in dimensions would be of the order of 20 – 30%.

52. The Uni-Marine estimate is based on 560 tons of steel when Noble Denton's estimated tonnage of the original forward block is 427 tons, a 33% increase. This is largely the result of the Uni-Marine quote being based on a thickness of steel of 8mm compared with the 4mm thickness steel reportedly used in the original forward block. That quote may also be based on a higher quality of cabin fittings than in the original although the extent to which this may be so is not at all clear.
53. Against these considerations the forward block is a modular block, which can be disassembled, and not a single unit, whereas the P.T. Uni-Marine and Wuxi quotes are for a single unit, which, according to LOC, may be less expensive to make than a modular block. The least expensive of the quotes for a modular block is \$ 5,558,000.
54. The \$ 1.4 million figure quoted by Mr Roomans (see paragraph 44) was based on approximately 560 tons of steelwork at \$ 1,000 per ton together with the amount specified in a quotation from a Chinese company, Shanghai Rising Shipping Engineering Ltd, for outfitting costs of \$ 1,080,500 producing a total of \$1,640,500. Mr Roomans reduced that to \$ 1.4 million by eliminating outfitting items such as cabin furniture and certain items of lighting and curtains which he did not regard Holystone as required to provide, and which he valued at \$150,000. All these costs are said to relate to a block built to class standards, which the original forward block is said not to have met. Given that the units are not the subject of Class, it is not entirely clear to me what standards are being referred to.
55. There is a dispute as to the state of repair of the vessel. LOC's view, expressed in its report of 29<sup>th</sup> April 2006, was that some work of upgrading cabins was required together with some minor deck recovering and the conversion of a visitor centre into a mess room. Otherwise LOC made no significantly adverse comments. Pacific has a well arguable case that the vessel was not in the state of disrepair that Holystone assert ("*Old and tired and very obviously of limited value*").

#### Discussion

56. I am highly sceptical as to the validity of taking, as Noble Denton does, a scrap value for the whole vessel, dividing the price by that value, and applying the resulting factor to the scrap value of the forward block, even as a means of determining the market value of the existing forward block, let alone the value of a new equivalent. I am even more sceptical of the appropriateness of taking the value of the forward block as being its scrap value. There is evidence that the market for accommodation barges has boomed in the last two years. The value of an accommodation block lies largely in the rental income that can be earned from it. It seems to me that a broker (which Noble Denton is not) would be unlikely to value the forward block in the way that Noble Denton has done. In addition there is reason to suppose that the price at which the vessel was sold was a very low one. Disquiet has already been expressed as to whether the British Government obtained a fair price. Shortly after the sale the Government apparently indicated that it would be prepared to charter her back at £ 10,000 per day, a sum which was rejected by Mr Roomans as inadequate. He re-tendered her to the Government at £ 25,000 per day.
57. I have set out the considerations that have been urged on me at some length in order to demonstrate the breadth of the points that have been made and the wide range of estimates resulting therefrom. In my judgment an appropriate starting point is the \$ 4.08 million Uni-Marine quote, since Pacific would have no difficulty in obtaining a new block in Batan for that price. If there was no doubt that the Uni-Marine quote was for an equivalent vessel it would be the most reliable guide to the cost of securing an equivalent forward block. It seems plain, however, that the quote is for a block which is not of "*similar size and volume*" in that it has more cabins, a greater cabin area, and a greater weight of steel, and possibly better fittings. If Uni-Marine were to construct an equivalent block its price could be expected to be less, save to the extent that constructing a modular as opposed to a single unit would increase the price. I cannot tell the extent of the difference that a modular structure would make.
58. Mr Jowell submitted that I should make a significant reduction and, at the highest, take a maximum figure of \$ 2,000,000, which itself, as he pointed out, is substantially above Mr Roomans' figure of £ 1.4 million.
59. If the only question was what was Pacific's best arguable case as to the cost to it of constructing a new equivalent block I would be minded to take a figure of the order of \$ 2,750,000. On any view, as it seems to me, allowance would have to be made for the difference in steel weight as between the original forward block and the Uni-Marine quote. I do not understand it to be disputed that there is a difference. It would appear to be at least 120 tonnes (570 tonnes minus the 450 figure taken in Noble Denton's first report -Bundle 1/49). According to LOC the Uni-Marine price of \$ 4.08 million equates to a street price of \$ 7.39 per installed kilogram. That would reduce the \$ 4,080,000 by \$ 886,800 (120 x 1,000 x 7.39) to about \$ 3.2 million. If Noble Denton are right that the increased price attributable to cabin numbers and volume is 20-25% in respect of the former and 20 – 30% in respect of the latter, the figure would reduce to around \$ 2.28 million or less. But there is obviously room for dispute as to the accuracy of these percentages, the extent to which they should be cumulatively applied, and the significance of modular construction. I also bear in mind that the other quotes obtained by LOC, although not for construction in Batan, are appreciably higher. Taking all these considerations into account I would regard \$ 2,750,000 as a fair figure to take.
60. However, the relevant question, on Pacific's best case, is what was the market value of a new equivalent block delivered to Batan in Indonesia at the time when she should have been delivered, which, if Pacific is right, would be in about January 2007. In this respect it is significant that in July 2007 Pacific received an offer of \$ 75,000

per module by French buyers, which would give an indicative figure of \$ 3,600,000 for 48 modules. It is not clear whether this offer was for a new unit. It was put forward on the basis that the unit was fully furnished (which is not a requirement of the MOA) and ready to install, and called for provision of a full specification and inspection. Whether this offer would have been maintained and, if so, at what level (whether higher or lower), if the block was available, is, also, unknown. But, taken at face value, it indicates that, as at July 2007 the market value of 48 modules was appreciably more than the cost figure that I have been considering.

61. Further, according to Mr Vogel, in October 2005 Mr Roomans offered \$ 8.5 million for a block of 120 cabins over 30 years old which had been removed from the vessel "Olympia", a sum which was rejected as insufficient. These were later installed on the "Offshore Olympia II", and then reportedly fixed at \$ 38,000 a day. She has recently been fixed at \$ 45,000 per day with 400 beds. Mr Roomans does not comment on this evidence, although Mr Jowell submitted that it must relate to a block of a different standard, as the price differential would tend to suggest.
62. In this state of the evidence I do not propose to take a figure higher than \$2,750,000. Pacific, whilst submitting that the cost of construction is likely to produce a result at the lowest end of the possible value range, has not adduced any broker's evidence as to the value of a new forward block in January 2007 and any attempt on my part to adjust a figure derived from the cost of construction, the latter being quite generously assessed, in order to reflect a market value would be largely conjectural. I propose, therefore, to stay with the \$ 2,750,000 figure.
63. To the principal figure of \$ 2,750,000 there must be added a sum in respect of interest and costs. Pacific submits that the principal should be increased by say 10%, representing interest for a period of 1.5 to 2 years and a sum of \$180,000 for costs. This seems to me reasonable. The resultant figure is \$3,205,000, which I propose to round down to \$ 3,200,000.
64. Pacific also seeks to maintain a claim for loss of use. LOC states that a unit manufacturer based in Aberdeen has quoted a rental rate of £ 150 per day for a 4 man module. This is equivalent to £ 2,628,000 per year for 96 2-man modules or about \$ 5 million per year. On that basis Pacific puts forward a figure of \$ 5 million. The claim is that the replacement block ought to have been delivered within about 6 months i.e. by about January 2007 and will take another six months or so to obtain. On that footing a year is said to be a modest estimate of the time lost during which the vessel could have been hired out. At any rate it seems to me to be a reasonable period to take.
65. Less clear is whether rates of this kind can be obtained for modules limited in use to coastal waters. Mr Roomans expresses the view that there is no call for accommodation units that cannot be used offshore. Mr Vogel's evidence is that there is a very good market for the forward block either for rental or sale; and that he has been unable to respond to numerous enquiries from brokers asking for accommodation barges or pure accommodation.
66. Questions may obviously arise as to the extent to which the quote obtained by LOC reflects the rate that Pacific could charge for an equivalent forward block if delivered to it, particularly if, as I assume, the modules the subject of that quote are for offshore use. I note, however, from a report given by the MN Partnership to Holystone that, although the vessel in her configuration when sold was not suitable for use offshore, the forward accommodation modules are described as Consafe Type 5 "stand alone" offshore accommodation modules.
67. In the light of the evidence referred to in paragraph 64 (and also the evidence that an offer was made to charter the whole vessel at £ 10,000 a day which was turned down as inadequate - see paragraph 56) I am prepared to take the \$5 million figure as an appropriate estimate, on the present evidence, of Pacific's best arguable case.
68. Accordingly in my judgment the sum in respect of which the freezing order should be continued is \$3,200,000 + \$ 5,000,000 = \$ 8,200,000.
69. If, contrary to my view, the amount for which the freezing order should be continued should reflect the value of the existing accommodation units, delivered Batan in January 2006, it does not follow that that value is their scrap value, for the reasons set out in paragraph 56 above. The evidence to which I refer in paragraphs 60 and 61 above suggests that substantial prices are being paid even for very old modules.
70. I do not, however, propose to add to an already lengthy judgment, a consideration of the appropriate figure to take as the market value of the old block, delivered to Batan in January 2006. The evidence has predominantly been directed at the valuation of a new block by reference to the cost of constructing one. Indeed, in his second affidavit (paragraph 25) Mr Vogel asserts that the valuation of the existing block "*is of little (if any) relevance to the proper amount of our claim which is to be measured by the value of the new block that the defendants ought to have delivered*". If he is right the value of the new block is of little relevance to the value of the old. It would not, however, be wholly surprising to find that, where there is a strong market for accommodation blocks, the difference between a new block and an old one only in average condition (or worse) is not as marked as one might expect, if, for instance, one was comparing, a new trading vessel with an over age one. But to make a proper assessment of the value of the old block would seem to me to require some evidence from brokers.
71. All these matters are of course ultimately for the arbitrator who will be free to take whatever view he thinks right on the (no doubt to be tested) evidence before him.

#### **Security for the Cross Undertaking.**

72. Simon J ordered Pacific to provide cross security in support of the undertaking in damages in the amount of \$ 500,000. Holystone say that that is far too low since the vessel, in her rehabilitated state, is expected to be available for charter at \$ 38,000 per day. That lies well within Mr Vogel's estimate of \$ 30- 50,000 per day. If so, the amount of security would be exhausted in about two weeks. Holystone invites me to increase the security so as to be in the same amount as the sum specified in the freezing order.
73. Pacific submits that this demand, made only on the Thursday before the hearing of the application on 18<sup>th</sup> September, is no more than a tactical ruse. In any event, no damage has been suffered to date; and STG could very easily post security for Pacific's claim, should it care to do so. If it chooses not to do so, and the group loses work that the vessel might otherwise attract, then the loss is of its own making.
74. In the somewhat unusual circumstances of this case I do not propose to order the provision of further security, essentially because I take the view that there is a markedly greater risk of injustice if I require it than if I refuse it. Pacific has a well arguable claim to a sizeable amount on either of the two bases. Indeed it can scarcely be disputed that Pacific is entitled to damages on one or other basis. If no freezing order subsists the claim is, in practice, likely to be lost. Pacific will probably be unable to put up anything like the amount sought by way of security so that the likely effect of requiring further security is to stifle the claim. Mr Jowell on behalf of Holystone submitted that the evidence of Mr Vogel on this topic was thin, being confined to the last paragraph of an affidavit sworn very shortly before the hearing. The meagreness of that material is itself a result of the fact that the suggestion that Pacific's undertaking should be further fortified was put forward very late in the day.
75. So far as Holystone is concerned it is plain that STG could easily provide security. It operates yards in China which construct vessels up to the value of \$ 700 million each. It has proved able to provide sizeable sums at short notice in the past; and has spent between £ 10 and £ 15 million on the vessel, which could, itself, afford security for the claim. The costs of putting up a guarantee are likely to be covered by the amount already deposited by way of security. The appropriate course for all concerned is to apply to the arbitrator for a speedy determination of the reference.

**Remitting the matter to the Arbitrator**

76. The freezing order was made pursuant to section 44 of the Act. Under that section the court has, for the purposes of and in relation to arbitral proceedings the same power of making orders about granting interim injunctions as it has for the purposes of and in relation to legal proceedings: section 44 (1) and 44 (2) (c).
77. Those powers are circumscribed by Section 44 (5) which provides that:  
*"(5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively."*
78. Holystone submits that, now that the arbitration is in place, the arbitrator has power to protect Pacific's position. He cannot grant a freezing order. But under section 38(4) of the Act he has power to: *"give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings (a) for the...detention of the property by the tribunal, an expert or a party"*.
79. So the arbitrator can make an order for the detention of the vessel. This would, Holystone submits, give Pacific effectively the same relief as a freezing order. The Court should remit the question of what order should be made to the arbitrator, and make an order discharging the freezing order upon the coming into force of an appropriate order from him.
80. In my view the arbitrator tribunal lacks the power, in the circumstances of this case, to act *effectively* in relation to the preservation of assets. This is because any order that he may make will not bind third parties and will not be buttressed by sufficient sanctions. The present dispute is not one between two large and reputable corporations whose likely compliance with any order of the arbitrator can be taken for granted. The Court has already been persuaded that there is a risk of dissipation by Holystone. If the freezing order is discharged and the vessel is removed in breach of an arbitrator's order, that will be a non-compliance with the order by Holystone, a corporation in the BVI with no other apparent assets. Third parties, such as the harbour authorities, are most unlikely to assist the removal of a vessel if aware of an order of this Court which has the effect of preventing it. But they may well both feel and be unable lawfully to take any steps to prevent the vessel's departure if the only order is that of an arbitrator.
81. Mr Jowell submitted that, if this view were taken, it would leave little scope for the arbitrator to make an order for the detention of vessels. In a case such as this that may well be so; but that does not emasculate the section nor does it produce an unacceptable result.
82. I decline, therefore, to leave the matter to the determination of the arbitrator.

Robert Thomas (instructed by Curtis Davis Garrard ) for the Claimant  
Daniel Jowell (instructed by Ross & Co) for the Defendant