JUDGMENT : MR JUSTICE ANDREW SMITH : Commercial Court. 23rd February 2006

Introduction

1. The "Kent Reliant" was a bulk carrier built in 1977 that suffered bottom damage as a result of grounding off Puerto Rico in September 2003. She was salved and offered for sale by her underwriters.

2. Chenco Marine Inc ("Chenco") buy ships for demolition in China. By a Memorandum of Agreement dated 25 November 2003 Chenco bought the "*Kent Reliant" "as is where is"* San Juan, Puerto Rico from Atlas Navigation Company Limited ("Atlas") for US$530,031.84. A deposit of 10% of the purchase price was paid on 27 November 2003 and the balance on 3 December 2003.

3. Ease Faith Limited ("Ease Faith") carry on business as purchasers of ships that are sold for demolition. Their Chairman and Managing Director, Mr Zhong Weigo, who is also known as James Zhong, has contacts with ship-breakers in China. From time to time Ease Faith and Chenco have worked together, and in October 2003 Mr Chen Shou Jen, also known as Jimmy Chen, the President of Chenco, asked Mr Zhong whether he could find a ship-breaker in China who was interested in buying the "Kent Reliant". Ease Faith and Chenco decided to co-operate over her purchase and sale, and they entered into an agreement that was recorded in a memorandum dated 27 November 2003. Chenco were responsible for arranging the purchase of the "Kent Reliant" and for making towage arrangements. Ease Faith were responsible for selling the vessel to Zhanjiagang Wuyu Ship Recycling Company, whom I shall call "*the Yard*". The memorandum stipulated that the vessel was to be delivered at anchorage in Zhanjiagang, China before 31 March 2004. Ease Faith were to arrange insurance, to purchase the vessel, to take title to her and to sell her. The full purchase price was paid by Ease Faith. Mr Zhong's evidence was that Chenco provided a bill of sale for the "Kent Reliant" in favour of Ease Faith, and I accept this evidence, although the bill itself was not produced in evidence. (Mr Zhong explained that the original bill was handed over to the Yard and a copy of it was not kept). As for the distribution of profits between Chenco and Ease Faith, the memorandum of agreement (in translation) stated as follows: "Both parties will calculate its invested costs respectively after completion of physical delivery of the Vessel. Profit to be proportional distributed as mutually agreed". Chenco and Ease Faith, as I find on the evidence, have not yet decided how profits from the venture, if there are any, will ultimately be split between them.

4. The "Kent Reliant" was delivered by Atlas on 3 December 2003. By an agreement dated 15 December 2003 (to which I shall refer as the "sub-towcon"), Ease Faith as hirer agreed with Leonis Marine Management Limited ("Leonis") as tugowner that Leonis would use their best endeavours to have a tug called the "Naporistyi" ("the tug") take the "Kent Reliant" to Zhanjiagang. Leonis are a company incorporated in Mauritius for the purpose of chartering tugs for the business of Regulus Shipping Services LLC ("Regulus") of Dubai, who manage and operate deep sea towage and salvage tugs, and sometimes charter in tonnage if business so demands.

5. The tug was a Russian vessel equipped with two engines and two auxiliary engines. At the relevant time, her master was Captain Domenko. In order to fulfil the sub-towcon, Leonis entered into an agreement (the "head towcon") with Cloudfree Shipmanagement Limited ("Cloudfree") as tugowner for the services of the tug. The head towcon was dated 20 December 2003. Cloudfree were the bareboat charterers of the tug and she was managed and operated on behalf of Cloudfree by Russian Inspectors & Marine Surveyors Corporation ("Rimsco"), whose President is Captain Fazil Aliev. Rimsco are a substantial business with over 2,000 people working for them, and have their own technical department.

6. On 27 January 2004 the convoy of the tug and the "Kent Reliant" departed from Balboa. They arrived off Shanghai on about 24 April, but by then disputes had arisen between Ease Faith, Leonis and Cloudfree. The "Kent Reliant" was not delivered at Zhanjiagang until 2 May 2004 after a fund had been established under an escrow agreement dated 29 April 2004 to secure claims made by Cloudfree against Leonis and by Leonis against Ease Faith.

7. Although the sums in dispute are relatively small, the parties raised a multiplicity of issues, a good number of which have been abandoned during the trial. The costs involved in this litigation are clearly quite disproportionate to the importance of the dispute in financial terms.

The towcons

8. Both the head towcon and the sub-towcon were in standard International Ocean Towage Agreement form. They described the parties as the "*Tugowner"* and the "*Hirer"* and stated that it was mutually agreed between the parties that the tugowner should "subject to the terms and conditions of this Agreement which consists of Part I including additional clauses if any agreed and stated in Box 39, and Part II, use his best endeavours to perform the towage or other service(s) as set out herein". The agreement therefore comprised the boxes completed in Part I, any additional clauses mentioned in Part I (at box 39) and standard printed clauses in Part II. Among the printed clauses in Part II of both the sub-towcon and the head towcon were these provisions:
   i) Clause 16, which was headed "*Cancellation and Withdrawal*", inter alia entitled the Tugowner to end the tow and to leave the "*Kent Reliant*" for the hirer to repossess her in specified circumstances, including if any amount payable under the agreement had not been paid within "seven running days" after it was due.
   ii) Clause 18, which was headed "*Liabilities"*, excluded liabilities for certain losses.
   iii) Clause 21, which was headed "*Lien"*, provided the Tugowner should be entitled to exercise a possessory lien over the "*Kent Reliant"* in respect of "any sum howsoever or whatsoever due to the tugowner" under the agreement and should be entitled to a "*Delay Payment*" at a specified rate for any reasonable delay to the tug resulting from the exercise of the lien.

9. Part I and the additional clauses of the sub-towcon also included the following provisions :

   i) In box 5 the "Kent Reliant" was said to have a gross tonnage of 12,409 long tonnes and a light displacement tonnage of 6,795 long tonnes (the equivalent of 6,904 mt).

   ii) Box 6 stated that she had a length of 155 metres and a beam of 21 metres, and that her fore and aft towing draughts were 2.7m and 7.9m respectively.

   iii) She was described as "*out of class*" (box 9), and her "*General condition*" was "*satisfactory*" (box 11).

   iv) In box 12, which is headed "*Particulars of cargo and/or ballast and/or other property on board the tow*", it was stated "*Deadship in light ballast condition*".

   v) The tug was said to have a certified bollard pull of "*Abt 40 tons"* and her indicated horse power was stated as "*2 x 1,500 BHP"*.

   vi) In box 23, headed "*Contemplated route*", there was the provision "*direct safe route at tugmaster's discretion at utmost dispatch*".

   vii) The place of departure was given as Cristobal, although in the event she departed Balboa. The place of destination was Zhanjiagang.

   viii) There was a lump sum price for towage of US$550,000 if the tow was from the Atlantic side of the Panama Canal or of US$540,000 if the tow was from the Pacific side (as in fact it was). The towage price was to be paid in five instalments each of 20%, that is to say of US$108,000 each, the first payable upon signing of the agreement, the second upon the tug and tow leaving the place of departure, the third payable upon the convoy passing the 130 west degrees longitude, the fourth payable upon it passing the international date line and the fifth payable two banking days before the arrival of the convoy at the place of destination and the release of the tow. There was provision for interest to be paid upon outstanding sums at the rate of 10% per annum.

   ix) Leonis would advise Ease Faith every 24 hours of the tug's position, course and speed and of other matters.

   x) The "sea rate" for delay payments was to be US$3,750 per day pro rata.

10. Part I and the additional clauses of the head towcon, perhaps surprisingly, differed from the sub-towcon, and included these provisions:

   i) The "Kent Reliant" was said in box 5 to have a gross tonnage of "12,409" and a light displacement tonnage of *"abt 6,500T*".

   ii) Box 6 stated that she had a length of 159 metres and a beam of 21 metres, and that her fore and aft towing draughts were 2.7m and 7.7m respectively.

   iii) As in the sub-towcon, the "Kent Reliant" was described as "out of class", and her "General condition" was said to be "satisfactory".

   iv) In box 12 she was described as "*Deadship in light ballast condition*".

   v) The tug was said to have a certified bollard pull of 40 tons and her indicated horse power was stated as "2 x 1,500 BHP".

   vi) In box 23, there was the provision "*direct safe customary route at tugmaster's discretion*".

   vii) The place of departure was given as "*Balboa, Panama (Pacific side)"*. The place of destination was "*Shanghai range"*.

   viii) The towage price was US$490,000 to be paid in five unequal instalments: 10% was payable on the signing of the head towcon and the mobilisation of the tug; 10% was payable upon the tug passing the international date line eastbound to Panama; 25% was payable upon the convoy sailing from Panama; 25% was payable upon the convoy passing the international date line; and 30% was payable "*prior arrival Shanghai Pilot Station"*. Interest was to be paid upon outstanding sums at the rate of 10% per annum.

   ix) The tugowners were to advise Leonis every 24 hours of the vessel's position, course and speed and of other matters.

   No rate for "*delay payments*" was specified in the head towcon itself, but in the fixture note of 20 December 2003 the sea rate was specified to be $3,500 per day pro rata. It is not in issue that the head towcon is to be understood to include a provision to that effect.

11. The expert witnesses agreed that Zhanjiagang is in the "Shanghai Range", and this was not in dispute at trial.

The claims

12. In these proceedings Ease Faith claim damages on the grounds that the tug failed to proceed on the voyage with proper despatch, and that therefore Leonis were in breach of the sub-towcon. They say that in February 2004 the tug delayed in the course of her voyage after Ease Faith had failed to pay to Leonis sums due under the sub-towcon and Leonis had failed to make payments due under the head towcon, and they also complain about the delay after the convoy arrived off Shanghai and before the "Kent Reliant" was delivered on 2 May 2004. Moreover, for much of the voyage the tug proceeded on only one of her two engines. Ease Faith claim damages for loss in that:

   i) They incurred additional pilot and escort charges because the tug and the "Kent Reliant" arrived at the Shanghai pilot station shortly after the beginning of the May Labour holiday in China. They claim US$5,818 in respect of a pilot surcharge and US$16,363.63 in respect of additional escort charges.

   ii) They received a reduced price for the "Kent Reliant" from the Chinese purchasers. Their claim under this head is for US$101,929.20.

iii) The Chinese purchasers paid for the "Kent Reliant" later than they otherwise would have done, and Ease Faith claim in respect of the delay in them receiving payment.

Ease Faith also claim repayment of the funds that they provided under the Escrow Agreement.

13. Leonis defend these claims and also bring proceedings under CPR part 20 against Cloudfree on the basis that if they are liable to Ease Faith under the sub-towcon, that is because Cloudfree were in breach of the head towcon, and so they seek to pass any liability on to Cloudfree.

14. Cloudfree for their part defend the claim brought by Leonis, and make a claim for "delay payment" in respect of the period in February 2004 when the tug "drifted". They also bring a counterclaim on the grounds that it was represented to them and was provided in the head towcon that the "Kent Reliant" was in light ballast condition, that she was not, and that as a result they suffered loss because the tug therefore consumed extra bunkers. Cloudfree also claim interest under the head towcon upon monies paid late to them. Leonis defend these claims by Cloudfree and again seek to pass on any liability to Ease Faith by a counterclaim in the main action.

15. During the course of the trial, it became apparent that, because of the late service of expert evidence, it would not be possible for there to be a fair trial of the quantum of Cloudfree's counterclaim without an adjournment, and at the request of all the parties, I agreed that I should not determine that issue. (Accordingly, I do not determine the matters raised at paragraph 21 of the part 20 counterclaim pleaded by Cloudfree, nor those raised by Leonis in paragraphs 15,15A and 15B of their defence to the part 20 counterclaim and in paragraph 29 of the counterclaim in the main action in which Leonis seek to pass on to Ease Faith any liability to Cloudfree under the part 20 counterclaim.) One implication of this ruling is that I defer determination of an issue between Leonis and Cloudfree about whether the route that the convoy took was in accordance with the head towcon or whether, as Leonis contend, it was impermissible, in particular, because of the provision in box 23, "*Direct safe customary route at tugmaster's discretion*".

Witnesses

16. Ease Faith called oral evidence from Mr Chen of Chenco. Leonis called evidence from Captain Bhaskar Krishna, who is the Managing Director of Regulus. Cloudfree called two witnesses of fact to give oral evidence: Captain Aliev and Captain Vladimir Kazantsev, the President and principal shareholder in a United States company based in San Francisco called Northwest Ship Services of California Inc ("NWSS"), who provide broking and other services to tug owners and whose clients are largely from Russia and the Ukraine. Captain Aliev does not speak English and his evidence was given in Russian through an interpreter.

17. It appeared to me that all four of these witnesses sought in the course of their cross-examinations to argue the case for the party who called them, and to have difficulty in distinguishing between the facts which they themselves knew and the case that they wished to advance or had convinced themselves to be justified. This criticism applies especially to Captain Aliev. I have hesitated to accept his evidence, unless it is uncontroversial or is supported by documentary evidence. I have adopted this approach to his evidence both because of his demeanour when he gave it and because he is clearly a shrewd and experienced businessman, and I do not believe that he would fail to record contemporaneously in writing anything that he believed would assist Rimsco's or Cloudfree's commercial position and was important.

18. Ease Faith also put in evidence two witness statements from Mr Zhong. He was in China during the trial and Ease Faith did not call him to give evidence, but put his statements in evidence under the Civil Evidence Act, 1995. His evidence was particularly directed to the loss that Ease Faith claim to have suffered as a result in the delay in the delivery of the "Kent Reliant" to Zhanjiagang. Complaint was made that Ease Faith have not disclosed documents relevant to his evidence, and there is some justification for this complaint. However, there is, in my judgment, nothing improbable in Mr Zhong's account, and I accept it.

19. All three parties called an expert witness to give evidence. Ease Faith called Captain John Lloyd, a senior consultant with Noble Denton Europe Limited; Leonis called Captain Jeffrey Hammond of Hammond and Associates, who has experience as a consultant surveyor to the London Salvage Association and the United States Salvage Association in matters of Towage Surveys and Approvals; and Cloudfree called Captain Nicholas Paines of Newman, Giles and Company Ltd. All were qualified to give their expert evidence, all were, in my judgment, properly seeking to assist the court, and they had helpfully reached a good deal of agreement before the trial. However, Captain Paines had only limited experience of towage contracts, and in some respects I found his evidence less persuasive than that of the other experts.

The condition of the "Kent Reliant"

20. When Chenco entered into the memorandum of agreement to buy the "Kent Reliant" on 27 November 2003, she was at San Juan, Puerto Rico. In view of her bottom damage, a study of her "towability" was commissioned from Ha-Ce Engineering BV of Rotterdam ("Ha-Ce"), who had available to them the report of a diver from Miami Diver Inc dated 11 October 2003. Ha-Ce's own report was dated 19 November 2003. It has not been suggested that it is inaccurate, and I accept what it says.

21. Ha-Ce reported that they had the impression that the "Kent Reliant" had sustained damage over a very large area of the bottom, but with a few exceptions it was "*not very excessive*". They said that, if she was in the ballast condition that they proposed, it would be feasible to tow her to the Far East via the Panama Canal and the Pacific on a route west of the Philippines. While the extent and location of the damage is not entirely clear from the report, it is apparent that some of her tanks were open to the sea and that she had taken in tidal water,

including (as is clear from Captain Lloyd's helpful guidance through the report) into her double bottom tanks where she would normally have carried ballast.

22. Ha-Ce described the ballast condition that they recommended if the "*Kent Reliant"* was to be towed. They aimed to reduce as far as possible the strain on the damaged bottom, and in particular to minimise the compression if the vessel took waves amidships. Ha-Ce calculated that with the recommended ballast the total weight of the "*Kent Reliant*" and her displacement would be just over 12,400 mt. This was calculated on the basis that her total fixed weight was 7,849.52 mt, including *"constants"* of 829mt. (As Captain Lloyd explained and I accept, the term *"constants*" means any weight that might have been added to the vessel over the years by changes made by the owners adding, for example, additional machinery. Captain Paines observed that in reality the term tends to be used to include any items not specifically identified in calculating a vessel's weight, suggesting, by way of example, that Ha-Ce had included the ramp.) Ha-Ce's calculation also supposed that the "Kent Reliant" would be carrying just over 4,550 mt of sea water in her ballast tanks and elsewhere, but it is not clear how much of this weight would be ballast water and how much would be water that she had in her holds because of the damage.

23. Ha-Ce also provided a "*fitness for towage*" certificate, certifying that *the "Kent Reliant*" was prepared for an *unmanned voyage from San Juan, Puerto Rico to China via Cape of Good Hope or Panama Canal*", Ha-Ce's approval for the voyage being stated to be subject to compliance with a list of recommendations, that is to say being "*as near as possible [in] the proposed ballast conditions*". The certificate stated that the vessel's displacement was 12,000 tons.

24. Before they entered into the agreements of 25 November 2003 with Atlas and 27 November 2003 with Ease Faith, Chenco had obtained a copy of the Ha-Ce report from their broker, Mr Ed McIlvaney of Simpson Spence & Young, and they also had a copy of the certificate.

Dealings with Beijing Green Vessel

25. On 3 December 2003 Ease Faith entered into a contract to sell the "Kent Reliant" to Beijing Green Vessel Co Ltd ("Beijing Green Vessel"). Beijing Green Vessel are a government agency authorised to import ships, who acted on behalf of Chinese ship-breakers. The commercial reality is that Ease Faith were dealing with the Yard and that the vessel was bought by the Yard.

26. The agreement provided for the "Kent Reliant" to be delivered before 31 March 2004 at a safe anchorage at the yard at Zhanjiagang; and that if Ease Faith did not deliver the "Kent Reliant" within the specified time, Beijing Green Vessel had the right to cancel the contract and Ease Faith would have to pay compensation for their losses and expenses. The decision whether to cancel or to maintain the contract was, as clause 7E stated, to be made within two banking days of Ease Faith giving written notice that the delivery date could not be met and that notice was to specify "*an alternative cancelling date*" (which I take to mean an alternative delivery date).

27. The price agreed was US$255 per long ton on the basis of a light displacement tonnage of 6,795.28, a total of US$1,732,796.40. It was negotiated by Mr Zhong, when scrap prices in China in October and November 2003 were very high. Payment was to be by irrevocable letter of credit to be opened upon receipt of ten days' notice of the vessel's arrival at Zhanjiagang.

28. The agreement stated that "*All negotiations/failure/eventual of the Contract to be kept private and confidential*". It also provided that "*Any difference of opinion or any claims or disputes in connection with this Contract shall be settled by amicable negotiation*" and there was an arbitration provision if settlement was not reached.

29. However, when she left Balboa, the Master of the tug gave an estimated time of arrival at Shanghai of 24 April 2004, and at an early stage, before the convoy left Panama on 27 January 2004, Mr Chen realised that Ease Faith would not be able to deliver the "Kent Reliant" in China by 31 March 2004. At some stage, apparently around the middle of March 2004, Mr Zhong spoke with a Mr Yao of the Yard and tried to reassure him that the vessel would arrive on 9 April 2004, weather permitting, and on this basis Mr Yao agreed to extend the contractual deadline for delivery to the end of April. No document has been disclosed recording or relating to this agreement, although, as Mr Holmes observed, clause 7E of the agreement contemplated that there should be a written notice. However, Mr Zhong's account is consistent with the Yard's later conduct, and, as I have indicated, I accept his evidence.

30. Learning that the reports from the tug indicated an estimated time of arrival of 24 April 2004, Mr Zhong *"gave indications"* to Mr Yao that "*there might be further slippage to 24 April 2004*". By the beginning of April 2004, it had become clear to Mr Zhong that the "Kent Reliant" would not arrive by 24 April 2004, and he told Mr Yao that she would now arrive on 29 April 2004. He asked Mr Yao for a letter of credit for the price, but when this was issued on 20 April 2004 it was not for the contractual price of US$1,732,796.40 but only for US$1,431,591.58, a difference of just over US$300,000. Mr Yao explained this reduction on the basis that the Yard had no faith that the vessel would be delivered by 29 April 2004, and said that the domestic market had dropped considerably and that the Yard would suffer a loss. Mr Zhong complained about the deduction and threatened that he would not deliver further vessels to the Yard if Mr Yao made deductions from purchase money in this way.

31. On 27 April 2004 Ease Faith's Hong Kong office received a fax from the Yard in which they informed Ease Faith (according to a translation made by Mr Chen and Ms Keiyen Wong, a secretary with Ease Faith's Hong Kong office) that "*due to devaluation of Chinese scrap prices, we shall instruct our agent to cancel the contract with you should you failed to deliver the ship at Zhanjiagang prior to May 1st 2004. We reserve the right to claim any damages caused"*. The communication was sent by Ease Faith's Hong Kong office to Mr Chen in the USA. Mr Chen prepared a rough

translation and asked the Hong Kong office to put a stamp on it. At one stage during the trial Cloudfree challenged whether these documents were genuine, but that challenge was, in my view rightly, abandoned.

32. Mr Chen's evidence was that, because the "Kent Reliant" was delivered after 1 May 2004, the buyers renegotiated the price that they were willing to pay, "because prices had dropped and also to cover the expenses they had incurred by virtue of the fact that the vessel had arrived during the 7-day Mayday holidays". Mr Zhong's evidence was that, had the "Kent Reliant" been delivered before the May Day holiday, the Yard would have paid the original contractual price of US$1,732,796.40, but because of the late delivery the sale price was reduced to US$1,630,867.20.

33. When the "Kent Reliant" arrived on 2 May 2004, Mr Zhong met Mr Yao and persuaded him to take delivery of her. Mr Yao agreed to do so and to deduct from the price US$101,929.20 (or $15 per ltd). The letter of credit was paid on 11 May 2004, and the Yard have agreed that Ease Faith should bring into account the sum of $199,275.62 (the difference between the underpayment in the letter of credit and US$101,929.20) in future dealings between them.

34. There is in evidence a letter from the Yard dated 5 May 2004 in which they state that the vessel should have been delivered under tow before 30 April 2004, and that arrival of the vessel during the seven days of Chinese holidays, in the words of the agreed translation, "caused us much extra expenses and gave us lots of trouble to take the delivery. Late delivery of the Vessel caused us serious economical losses due to the great devaluation of Chinese scrap prices at that period of time. In consideration of the good business relationship between us, we agreed to take delivery of the Vessel and managed with an effort to agree a deduction of US$15.00 LDT LT (Total: US$101,929.20) from the purchase price to compensate for part of our losses)."

35. Leonis and Cloudfree accept that if these were the facts, and I find that they were, Ease Faith acted reasonably in their dealings with the buyers, and in agreeing to the price reduction that they did, and do not argue that they failed properly to mitigate their loss.

Making the towcons

36. On 26 November 2003, Mr Chen started to make enquiries about having the "Kent Reliant" towed to China. He contacted amongst others Captain Krishna. In an initial enquiry by e-mail Mr Chen named the "Kent Reliant", stating that she was "ready prepared with fit to tow certificate for towage to China via Panama Canal" and she had a light displacement tonnage ("LDT") of 6,900 long tons. The LDT is the weight of the vessel herself and her additional items such as mechanisms and equipment that cannot readily be removed.

37. Captain Krishna considered the information about the LDT enabled him roughly to estimate the size of tug required, and he replied on the same day offering the services of two tugs: a tug with a 4,200 brake horsepower called "Melody 3" and a tug with 3,000 brake horsepower. He referred to the tow in the following terms, "'Kent Reliant' – as described (deadship in light ballast condition)". The "Kent Reliant" had not previously been described as being in "*light ballast condition*", and in particular Mr Chen had not so described her: he had said nothing about the vessel's ballast. Captain Krishna had not seen the "Kent Reliant": indeed neither he nor anyone else from Regulus or Leonis saw her at any time before the towcons were concluded. However, Captain Krishna's evidence was that in his experience "*Every scrap tow is a dead ship in a light ballast condition*" and I conclude that he simply assumed that the "Kent Reliant" was in that condition.

38. Mr Chen decided to have the "Kent Reliant" brought from Puerto Rico to Panama, believing that this would be cheaper than keeping her anchored at San Juan, and he asked Captain Krishna what prices he would quote for the vessel to be towed from the Pacific side of the Panama canal. In that e-mail he wrote "*Chinese scrap price is at peak, do not know when shall drop, hence trying to advance delivery to China to minimise risk of price changes"*.

39. In an e-mail dated 29 November 2003 Captain Krishna asked to be advised of the amount of ballast and "unpumpables" on board the "Kent Reliant", and what the displacement and the draught of the vessel were. Mr Chen replied on the same day that the current draughts were 2.72m forward and 7.92m aft respectively; that, according to the sounding, the ballast, together with the remaining fuel, was about 1,100 tons; and that he would confirm the displacement after checking the capacity plan and deadweight scale. Mr Chen's evidence was that this information had been given to him by the sellers. Mr Chen never told Captain Krishna that it had been calculated that the vessel would be towed with a displacement of 12,000 mt or more, although he had the Ha-Ce report and certificate that stated this.

40. On 30 November 2003, Captain Krishna asked whether the trim could be reduced, saying that 3m would be better than the present 5m. As Captain Krishna explained, this enquiry was not directed to reducing the displacement of the vessel but was simply about reducing the difference between the forward and the aft draughts.

41. On 27 November 2003, Mr Chen had asked Mr McIlvaney about the displacement of the "Kent Reliance", and on 1 December 2003 Mr McIlvaney reported the sellers' advice that the displacement of the "Kent Reliant" with a mean draught of 5.32m was about 11,630 mt. Mr Chen asked whether there was any possibility of reducing the total displacement to less than 10,000 tons, explaining that the tug company was "*crying loud for too much ballast*".

42. On 3 December 2003 Mr Chen went to San Juan and took delivery of the "Kent Reliant". He had arranged for the vessel to be towed from San Juan to Cristobal by the tug "Zeus". The "Zeus" arrived at San Juan on 9 December 2003 and she started the tow to Cristobal, Panama on 10 December 2003.

43. Mr Chen and Captain Krishna continued their negotiations about the hire of a tug to take the "Kent Reliant" to China. Since he planned to charter a tug, Captain Krishna decided that the contract with Ease Faith should be entered into by Leonis, rather than Regulus. On 15 December 2003 Captain Krishna sent to Mr Chen by fax a draft towcon agreement for towing the "Kent Reliant" from Panama to Zhanjiagang. At this stage it was uncertain what tug would be used: the draft named the tug as "Shuya", a sister ship of the "Naporistyi" that was also owned by Rimsco. In the draft Captain Krishna described the "Kent Reliant" as "Dead ship in light ballast condition", and gave her light displacement tonnage as 6,795 mt. The draft towcon did not state her displacement. Some of the boxes on the standard form (box 7, the flag and place of the tow's registry; box 8, her registered owners; box 9, the classification society; and box 10, the P&I liability insurers) were left blank. Having received the draft, Mr Chen provided details about how these boxes should be completed but did not comment upon the description of the "Kent Reliant" as a "*Deadship in light ballast condition"*.

44. The sub-towcon was concluded on or around 18 December 2003, the tug being named as the "Naporistyi". On 21 December 2003 Captain Krishna advised Mr Chen that the "Naporistyi" had left Vladivostok on 20 December 2003. He estimated that she would arrive at the eastern coast of Panama between 20 and 25 January 2004. On 23 December 2003 Ease Faith sent Leonis the first instalment of the hire: in fact they sent US$110,000 rather than the $108,000 that was due. On the same day the "Kent Reliant" arrived at Cristobal.

45. Captain Krishna really entered into negotiations for the Head Towcon through NWSS after 15 December 2003, although he had been in regular communication with Captain Kazantsev of NWSS about other matters, and had already asked him orally whether he had available a tug that could tow a vessel of some 6,500 tonnes from the Caribbean: specifically he expressed interest in hiring a tug with 3,000 brake horse power. Captain Krishna explained that it was as a result of his exchanges with Captain Kazantsev that the draft sub-towcon of 15 December 2003 named the "Shuya" as the tug to be hired. The negotiations led to the conclusion of the Head Towcon on 22 December 2003: it was drawn up by Captain Krishna or others at Leonis or Regulus.

46. On 16 December 2003 Captain Krishna sent to Captain Kazantsev an e-mail concerning "Towage – Panama/China" and headed "Details of tow". He did not name the "Kent Reliant", but he provided the dimensions of the vessel as being 159.0m in length and 21.0m in the beam, her LDT as about 6,600 tons, and her forward and aft draughts as 2.72m and 7.52m. (It will be noted that the aft draught that Captain Krishna gave was 0.4m less than that which he had been given by Mr Chen. The reason for this was not explored.)

47. Captain Kazantsev replied as follows:
"159.0 x 21.0 x 5.12 x 0.65 = 11,112.
This vessel has 11,000m tons present displacement, ie light weight + ballast + other left-overs (fuel etc)".

Cloudfree's pleaded case is that Captain Krishna approached Captain Kazantsev to do a rough displacement calculation for him and that he provided it as a favour for a business associate. I am willing to accept this, but undoubtedly Captain Kazantsev will have hoped that business might result.

48. Captain Kazantsev explained this calculation in his evidence, describing it as a "little known" formula for calculating the total weight of a vessel. He said that it was "*unofficial and empirical and born of the … experience"* of a tug master who taught it to him. I cannot accept that the formula is as obscure as Captain Kazantsev suggested. It is obvious that the amount of water displaced depends upon the underwater volume of the floating vessel. The unchallenged evidence of Captain Krishna was that this is a well-known and widely used formula, and is published in "*Ship Stability for masters and mates*" by D R Derrett. Captain Lloyd said that it was "*a well known calculation method for the approximate displacement of a vessel without access to an actual vessel's displacement scale or line plans*". He expressed the view that "*any tug owner or operator would know and understand the physics involved in this simple calculation method*", and I accept that assessment.

49. Captain Kazantsev explained that the co-efficient of 0.65 is the multiplier that he used when calculating the displacement of a "*regular cargo vessel*". The calculation depends upon what co-efficient is selected, and therefore it is clearly not precise. But I accept Captain Paines' evidence that despite this the formula is used by brokers to make a rough assessment of a particular tow before broking the business, although normally more precise information is obtained before a fixture is concluded; and that it was neither difficult nor unusual for brokers to make a calculation as Captain Kazantsev did.

50. Captain Krishna's evidence was that when he received Captain Kazantsev's calculation, he agreed with it, and indeed that he himself had previously made a similar calculation, and he reached a similar result. On 17 December 2003 Captain Krishna sent Captain Kazantsev's calculation on to Mr Chen as having been received from "Tug Owners". He went on to ask for a copy of the deadweight scale showing displacement, and confirmation of the depth of the "Kent Reliant". A deadweight scale, or loading scale, is a ship's document which states her displacement by reference to the draught of the vessel, and this would, of course, have provided more reliable and precise information than the formula used by Captain Kazantsev. Mr Chen replied that the "*depth moulded*" was 12.652m and continued: "*I estimated the total displacement is about 10,000 -11,000mt (Rimsco estimate is very good). I do not have my Deadweight scale with me. (sent to end receiver in China from San Juan)."* Captain Krishna was in error in saying that the calculation came from the tug owners, and I infer that Mr Chen's misdescription of it as "*Rimsco estimate*" derived therefrom.

51. Shortly after these exchanges, Captain Kazantsev was asked by Captain Krishna whether he could provide a tug to take the "*Kent Reliant*" to Shanghai or a port near Shanghai, and he contacted Captain Aliev to ask whether

Rimsco were interested in quoting a price to tow a vessel of 6,500 LDT in deadship condition from Panama to Shanghai. Captain Aliev told Captain Kazantsev that the tug "Naporistyi" was available, and Captain Kazantsev advised Captain Krishna that Rimsco would be interested in offering one of their tugs. Captain Kazantsev's evidence was that by that time he had established that the vessel in question was the "Kent Reliant". He also said that he had a conversation with Captain Krishna in which he asked "what the tow owners would be going to do with the extra weight of this dead vessel, if there was any"; and that Captain Krishna replied that the formula used by him for the calculation was not reliable and that there was a possibility that there was extra weight on the vessel: that there might be extra fuel or ballast or cargo remaining on the vessel. According to Captain Kazantsev, he was reassured by Captain Krishna that any extra weight would be removed before the vessel passed through the Panama Canal and in any event it would be removed before the ocean towage. Captain Kazantsev, as was clear from his evidence, was confident that there was extra weight and that the displacement would be reduced. Captain Aliev gave evidence that he was told of this conversation between Captain Kazantsev and Captain Krishna. However, neither witness said that Captain Krishna stated that the "Kent Reliant" was in fact carrying extra weight that would be removed before the tow, or that her displacement would be reduced, or that he gave any undertaking to that effect.

52. Captain Krishna did not recall such a conversation. He accepted that he probably had some discussion about the vessel appearing to be heavy and whether the vessel could be lightened. He said, however, that there was no question of the vessel carrying extra ballast.

53. I conclude that it is probable that there was some conversation between Captain Krishna and Captain Kazantsev along the lines that Captain Kazantsev described, but it was in general terms. Captain Krishna did not indicate that the "Kent Reliant" was carrying extra weight that could be removed, and he gave no firm commitment of any kind about removing weight from the "Kent Reliant". Had he done so, I believe that it would have been recorded in writing.

54. Captain Aliev was made aware of the dimensions of the vessel that was to be towed, and was told that she would be in light ballast condition. It was his evidence that Captain Kazantsev did not tell him the vessel's name or her draughts nor, according to Captain Aliev, was he told about the damage to the hull. I accept that evidence, but the more important question is what, if anything, he was told about the vessel's displacement and her LDT.

55. It is Cloudfree's pleaded case that "*Captain Kazantsev did not provide the figures for the Vessel's draught provided by Krishna to Captain Aliev, or provide him with the estimated displacement as these figures were apt to change. Instead he gave him the Vessel's LDT and basic dimensions and informed him that the Vessel would be in light ballast condition*".

56. In his witness statements made on 25 August 2005 and 7 October 2005 Captain Aliev's evidence was this:

i) He was not made aware of Captain Kazantsev's calculation of the displacement. He also said that before making his witness statement he had considered the calculation and that it was not "based on any recognised formula, certainly not one that I am familiar with". I cannot accept that the formula was one that Captain Aliev had not come across before.

ii) He considered that the tow would be of a vessel displacing about 8,000 tons or perhaps slightly less. He said that he reached this view because he was told that her LDT was 6,500 tons, and he thought that she would carry permanent ballast of about 1,500 tons. Captain Aliev explained his reasoning as follows: Rimsco had a vessel called the "Bereg Mechty", which was a reefer vessel of three decks with a LDT of about 7,300 tons, and she carried about 1,500 tons of ballast. He supposed that, since the "Bereg Mechty" had reefer insulation and three decks, she and the tow under discussion were comparable and would carry a similar weight of ballast.

57. Captain Kazantsev's evidence was that he told Captain Aliev that he calculated the displacement to be over 11,000 tonnes, and indeed that he had provided Captain Aliev with a written copy of his calculation: he said, "He had in his hands only my rough calculation as per empirical formula". Captain Aliev denied receiving Captain Kazantsev's calculation but he acknowledged that he and Captain Kazantsev had a telephone conversation about it.

58. I am prepared to accept that Captain Aliev did not receive Captain Kazantsev's calculation in writing. However, I cannot accept that Captain Aliev, or anyone else acting for Rimsco or Cloudfree, proceeded on the basis that the displacement of the "Kent Reliant" (or the unnamed tow) was 8,000 tons or thereabouts once there were serious discussions about the hire of a tug. Captain Aliev might well have been sceptical about whether Captain Kazantsev's calculation was reliable, and have hoped or even expected that the displacement would turn out to be less than he had calculated. Captain Paines expressed the opinion that Captain Aliev's method of estimating a potential tow's probable weight was "*perfectly valid*" and that, if used by an experienced professional, would provide a good estimate of a probable weight to be towed, and he might well in the initial stages of the negotiations have been thinking along the lines that he described. However, I consider that Captain Aliev was too shrewd and experienced to have done business assuming without proper enquiry that Captain Kazantsev had necessarily overestimated the tow's displacement and in reliance on the comparison with the "Bereg Mechty".

59. I am confirmed in this conclusion because Cloudfree did not complain about the displacement of the "Kent Reliant" before she departed from Balboa or at any time until 7 February 2004 when disputes about other matters had arisen. As I shall explain, I do not accept Cloudfree's explanation for this delay.

60. Indeed, I accept Ease Faith's further submission that it is probable that Captain Aliev was not even aware of the LDT of the prospective tow before he received the head towcon, and therefore could not have carried out the comparison with the "Bereg Mechty" that he described. He himself denied receiving Captain Kazantsev's calculation, and so it is improbable that he received a copy of Captain Krishna's e-mail to which the calculation

was a response and which stated the LDT. On 19 December 2003 Captain Krishna sent to Captain Kazantsev an e-mail by way of "recap of the fixture", which stated the length, breadth and forward and aft draughts of the vessel and described her as "deadship in light ballast condition". On 20 December 2003 Rimsco sent Captain Krishna a fixture note, naming the tug as the "Naporistyi". Neither document referred to the LDT of the "Kent Reliant". There is no written record of Captain Aliev seeing the LDT before he saw the head towcon itself. Captain Aliev's oral evidence about this was that he was told it on the telephone, but his evidence about what he was told was so inconsistent and self-contradictory that I cannot accept this.

The meetings at Balboa

61. The "Kent Reliant" was towed by Panama Canal tugs through the canal and arrived at Balboa on 24 January 2004. The "Naporistyi" had arrived there on 23 January 2004 and by the evening of 24 January 2004 she was alongside the "Kent Reliant". That evening Mr Chen, who had travelled to Panama on 21 January 2004, met Captain Domenko and the Second Officer of the tug. They had a second meeting on 25 January 2004. The tug moved to berth on 25 January 2004, and the tug and tow left Balboa on 27 January 2004 to begin their voyage across the Pacific. Upon departure, her displacement was, as I conclude from the evidence of Captain Lloyd and Captain Hammond, of the order of something over 11,000 tonnes, and no more than 11,500 tonnes, that is to say it was roughly in line with Captain Kazantsev's calculation and less than Ha-Ce had considered it would need to be. There is no evidence that enables me to say how much ballast she was carrying or where ballast was being carried.

62. Cloudfree explain as follows why, although the displacement was so much more than what Captain Aliev had estimated it would be, Rimsco and Captain Domenko did not complain about it at Balboa or at any time until dispute had arisen about other matters. Ease Faith, they say, did not provide the Master with plans and other documents for the "Kent Reliant" until immediately before the convoy sailed from Balboa, and so he had no chance to examine them before departure; and the Master had no copy of the loading scale because his copy of the general arrangement plan, unlike the copies in evidence, did not include it. About 2 or 3 days after departure the Master reported to Captain Aliev that he was having difficulty in maintaining speed on the anticipated fuel consumption, and then he went aboard the "Kent Reliant" and found the loading scale and the Ha-Ce report. Cloudfree say that thereafter there was further delay before Captain Aliev or others at Rimsco's offices learned of the displacement because the Master was not able to fax or e-mail copies of the documents to Captain Aliev until 8 February 2004: it was only then that Captain Aliev learned the position. In fact, on any view he must have received the information a little earlier: Cloudfree first complained about the displacement on 7 February 2004.

63. Ease Faith and Leonis dispute this account. According to Mr Chen, at the meeting on 24 January 2004 he gave the Master documents including the general arrangement plan, the capacity plan and the sounding record of the "Kent Reliant", and the general arrangement plan included the loading scale. However, Mr Chen said that Captain Domenko, whom he described as unfriendly at this first meeting, showed no interest in the documents, and left them on the table. Mr Chen also said that he showed the Master the Ha-Ce report, but explained that it was confidential and he would not let him have a copy of it. Mr Chen also showed the Master the certificate for fitness to towage, which stated that the displacement of the "Kent Reliant" was 12,000 tonnes. The Master told Mr Chen that the crew required $3,000 for preparation of the voyage.

64. The meeting on the following day was, according to Mr Chen, more friendly. Mr Chen gave the master $2,500 to prepare for the voyage, and he also provided him with copies of the documents that he had shown him the previous day, including the Ha-Ce report (which he had now decided need not be kept confidential). The Master toured the "Kent Reliant" with Mr Chen and commented that she was a good ship. Later in the Master's cabin, Captain Domenko told him that the convoy would proceed at 5 to 6 knots, although "his company" predicted a speed of only 4 knots.

65. On 26 January 2004 Mr Chen went to the tug with Mr Zhong and Chenco's agent in Balboa, Mr James Bamber. Mr Zhong and Mr Bamber did not give evidence about this visit, but in e-mails to Mr Chen Mr Bamber described it and referred to what documents the Master had been given. On 11 February 2004, when he was first told of Cloudfree's complaint, Mr Bamber wrote: "Didn't the Russians inspect vessel from top to bottom on the Sunday [25 January 2004] – Master, Chief Officer and the Engineers crawling all over?" In an e-mail of 12 February 2004 he wrote of Captain Domenko being provided at a meeting on Monday 26 January 2004 with Chenco's "complete file on the Kent Reliant – with all survey reports etc etc", and stated that the Master "appeared very happy with all of this and there certainly was no doubt about him being happy towing the vessel." In the e-mail sent on 20 April 2004 Mr Bamber said that the file was handed over at 19.00 hours or 19.30 hours on the evening of 26 January 2004 at the chart-table on the bridge and commented, "this was hardly prior to departure!" (meaning that it was not handed over immediately before departure). Mr Chen explained in cross-examination, and I accept, that he had previously handed over to Captain Domenko documents that included the loading scale and the Ha-Ce certificate and report (when Mr Bamber was not present), and he understood Mr Bamber to be referring to a further file of documents in the evening of 26 January.

66. Mr Chen was asked how he was able to provide a copy of the loading scale, having previously told Captain Krishna that the Chinese purchasers had his copy of it. Mr Chen explained that another copy was, as would be expected, on the vessel.

67. Captain Aliev was not in Panama during this period, but he said that Captain Domenko was in close contact with him by telephone and, to a lesser extent, by e-mail, and reported that Mr Chen was pressing him to sail

immediately. He responded that Captain Domenko should press for documents and plans that had previously been requested. In an e-mail of 25 January 2004 Captain Domenko reported, "*We ask agents to give us all documents for "Kent Reliant" but giving their up on account of confidentiality of such information" (sic)*. This, it seems to me, is consistent with Mr Chen's account and I take it to be a reference to him initially declining to provide a copy of the Ha-Ce report.

68. Captain Domenko did not give evidence, and there are no entries in the logs that support Cloudfree's case about what happened at Balboa. However, Captain Domenko did provide a report to Rimsco on 17 May 2004: he did not refer to finding the loading scale and learning the displacement of the "Kent Reliant" only after leaving Balboa. He reported that, when he inspected the "Kent Reliant", he found that the forward and aft draughts were 3.0m and 8.0m and that "*with this draught figures which were measured in fact at the moment of sailing of vessel from Balboa and according to ballast information submitted by charterer, there was discrepancy of weight figures about 4,000 tons, there was no possibility to check it*". He reported "*monitoring of tow condition*" during the voyage by measuring weekly the level of water in the bilge system and the engine room. I find it easier to reconcile Captain Domenko's report with Cloudfree's pleaded case, which is that "*the Master and crew only had access [to the loading scale] on departure from Balboa"* (and not that they found it only after departure from Balboa), than with Captain Aliev's evidence.

69. Mr Holmes put forward a number of reasons that I should not accept Mr Chen's evidence about these meetings. First, Mr Chen did not explain why on 24 January 2004 he regarded the Ha-Ce report as confidential, nor why he changed his mind about this. However, he was not pressed about this in cross-examination, and I do not consider this a sound reason for rejecting his account.

70. On 26 January 2004 Captain Aliev sent an e-mail to Captain Kazantsev stating that the owner of the "Kent Reliant" had refused to pass over documents, including the fitness to tow certificate, and stated "If these documents are not provided, we will decline all responsibility for safe towage. Moreover the vessel will not depart Balboa untill (sic) all questions are to be solved." However, Captain Aliev was not in Balboa and there is no evidence about what recent information he had when he sent this message. In fact, the vessel did in fact depart Balboa on 27 January 2004, and no contemporary written complaint was made to Chenco or Ease Faith.

71. Further, Mr Holmes asked Mr Chen in cross-examination about an e-mail sent by him on 12 February 2004 in which he described his meetings with the Master without mentioning that he had showed the Master the Ha-Ce report and certificate on 24 January 2004. Although during the trial this seemed to me somewhat surprising, on reflection I do not regard it as a remarkable omission given that the Master did not take the opportunity to look at the Ha-Ce documents at that meeting.

72. I recognise that criticisms can fairly be made of Mr Chen's account, but having considered them, they do not seem to me to provide a proper basis for rejecting it, and I have concluded that the evidence given by Mr Chen is essentially correct. In particular, I conclude that, by no later than 25 January 2004, the Master was provided with the general arrangement plan including the loading scale and with the Ha-Ce certificate and report, referring to the displacement of the tow with recommended ballast. I reject Cloudfree's contention that these were provided too soon before departure for the Master to consider them. There would be no sensible reason for Mr Chen to withhold such documents, and it seems to me improbable that the Master would depart port without them. I can accept that he might not have read the Ha-Ce report, but not that the Master was unaware that the displacement was of the order of 12,000mt rather than 8,000mt: this would have been apparent both from the Ha-Ce certificate and from the draughts read with the loading scale.

73. I am the more confident that I should reject Captain Aliev's evidence about these events for two further reasons. First, by a letter to Leonis dated 9 February 2004 Captain Aliev wrote that the Master had asked at Balboa for documents relating to the "Kent Reliant" but that the "charterers" did not provide them on the grounds of confidentiality. He continued, "The master of the tug couldn't check tow weight at berth being busy with preparing of tow for port exit. On tow and tug departure through (sic) Captain Kazantsev was said orally about vessel weight non-conformance to the contract one. Not long ago we received from master of tug the data, which confirms factual weight of tow. Delay in submitting of this calculation by master, was caused due malfunctioning of vessels' communication equipment…". Captain Kazantsev's evidence was that he did not have any such exchanges with either Captain Krishna or Chenco. Indeed, he never went to Panama and never saw the "Kent Reliant". When he was asked about this, Captain Aliev said that his reference to Captain Kazantsev was an error, and that he had intended to refer to Captain Domenko. However, he accepted that Captain Domenko told him only that he felt that the vessel was heavier than he had expected. His evidence did not support the complaint in the letter that the "Kent Reliant" was heavier than the head towcon provided, and this inconsistency was not satisfactorily explained.

74. Secondly, Captain Kazantsev gave evidence that shortly before the "Kent Reliant" departed from Balboa, Captain Aliev told him by telephone that the tug had extra weight but that they did not have the loading scale; and that his (Captain Kazantsev's) response was that promises to lighten the vessel were not being kept. It might well be that there was something said around this time about the weight of the tow: in a later e-mail on 13 February 2004 Captain Krishna wrote that he had "*taken up this matter [sc the weight of the tow] with Tow Owners the first time this was brought to my notice by Capt. Kazantsev. Capt Kazantsev himself had remarked to me that "It is not much…""*. Whatever was said, however, I do not accept that either Captain Kazantsev or Captain Aliev considered that Leonis were in breach of any undertaking: they made no such complaint, and it is clear from the correspondence and from his evidence in this case that Captain Aliev is far from reticent about raising matters if

he considers that he or Rimsco have been wronged. More importantly, however, this evidence is inconsistent with Captain Aliev learning of the displacement of the "Kent Reliant" only on about 7 or 8 February 2004.

75. In reaching the conclusion that I should reject Captain Aliev's evidence about this, I do not overlook a further argument that Mr Holmes advanced. He pointed out that the tug sailed with no more than 463 mt of marine gas oil on board, although she had capacity to carry more fuel. It is suggested that, if it had really been known that the "Kent Reliant" had the displacement that she did, the tug would surely have departed with more fuel (which was relatively cheap in Panama) rather than put herself in the position in which she would have to take on bunkers in the course of the voyage.

76. I consider this argument too speculative to be persuasive. Cloudfree did not put before me evidence that I can accept about calculations that they did in fact make about the fuel that they would require, and there is no proper or sufficient explanation for them not having done so.

The voyage

77. The progress of the convoy is not entirely clear for a number of reasons. There is no evidence from the Master or anyone else on the tug, the log books are inconsistent and incomplete, and despite the requirements of the towcons, the tug did not send reports after 7 February 2004 until 23 February 2004 and thereafter they were scanty. However, the following description of the voyage, which is taken from the unchallenged evidence of Captain Lloyd which I accept, is sufficient.

78. After the convoy left Balboa on 27 January 2004, the tug proceeded on one engine at about 4 knots until 30 January 2004. On 30 January 2004 speed was reduced when apparently it was observed that the draught of the "Kent Reliant" had deepened. A leak was discovered and repaired, and the tug resumed the voyage on 31 January 2004. She proceeded again on one engine with an average speed of about five knots until 7 February 2004. (Cloudfree pleaded that from 4 February 2004 the tug proceeded on one main and one auxiliary engine. This was not explored in evidence, and I do not propose to pursue the question because it does not ultimately affect the issues that I have to decide.) On 7 February 2004, upon orders from Cloudfree, the speed was reduced to one knot: from 7 February to 17 February 2004 the convoy proceeded at the minimum speed consistent with safety.

79. The convoy resumed the voyage on 17 February 2004, and proceeded on both engines and at an average speed of about 7 knots until the end of February, and then at more or less the same speed until 17 March. The tug did not have enough fuel to reach Shanghai without taking on bunkers (and Cloudfree attribute this to the excessive displacement of the "Kent Reliant"), and so east of the Marshall Islands, the convoy changed course to meet the tanker "Aktiva". The tug took bunkers from her on 17 March 2004 before returning to her former course. The convoy crossed the International Date Line on 20 March 2004.

80. On about 22 March 2004, as I find, one of the tug's engines was closed down, and the tug used only one engine until at least 10 April 2004. (This was recorded by the Master, and seems to be confirmed by the average speed over this period: between 22 and 31 March 2004 it was of the order of five knots. The records are not consistent in that the Chief Engineer's engine log book records the tug remaining on two engines until 31 March, but his records are not reliable: Captain Aliev explained in his evidence that the Chief Engineer did not keep his records correctly and was dismissed for that reason.) On 10 April 2004, after passing the Mariana Islands, the convoy altered course and reduced speed because it was steering from the planned route to avoid an unseasonal typhoon, "Sudal". Nevertheless, heavy weather was encountered, and on 13 April 2004, in heavy seas and a wind at Beaufort Scale 14, the "Naporistyi" suffered a crack to the port-side shell plating of her engine room and she turned to take the weather on her starboard side during emergency repairs. Repairs were completed, the heavy weather was cleared by 16 April 2004 and the convoy continued to Shanghai, with the tug operating, I infer from the speed, on two engines. The convoy arrived about 80 miles off the Shanghai river on about 24 April 2004. The voyage to the Shanghai pilot station was some 10,050 nm, including deviations to bunker and due to the weather.

The February delay

81. As I have said, the first instalment of the towage price under the sub-towcon was paid by Ease Faith to Leonis on 23 December 2003, together with an extra US$2,000. The second instalment was due when the tow sailed from Balboa, but it was paid late: US$50,000 was paid on 5 February 2004 and the outstanding balance of US$56,000 was paid on 12 February 2004. In a telex to Captain Krishna dated 9 February 2004 Mr Chen explained that Ease Faith had "*some serious internal cash flow issues to resolve till week of 16th when all cash shall return*".

82. Leonis also defaulted in paying under the Head Towcon, and Cloudfree did not receive the third instalment of hire of US$122,500, which was also due upon departure from Balboa, until 18 February 2004. Captain Krishna's evidence was that Leonis were unable to pay because of Ease Faith's default under the sub-towcon. That evidence was not challenged and I accept it, although I observe that Leonis did not offer Cloudfree payment of the US$50,000 when it was received from Ease Faith, or even advise Cloudfree that they had received it.

83. Captain Domenko's report for 5 February 2004 had said that the tug's position was 103° 05' north and 093° 36 West and her speed was 5.5 knots. On 5 February 2004 Ms Irina Kouznetsova of the Rimsco advised Leonis that because of the late payment of hire, *"Due to clause 21 (part 2) Owners charge you for demurrage since 28/1/04 at sea rate USD 3,500 pdpr [sc. per day pro rata] and have to stop towage untill (sic) full payment USD122,500 + demurrage USD31,500 … to Owners"*. Cloudfree do not seek either to justify demand for "*demurrage*" from the day after the instalment was due or to maintain that they were entitled to stop the tow pending its receipt.

84. In response on 6 February 2004 Captain Krishna on behalf of Leonis wrote, "*We do not agree with yr interpretation of the Contract. Towcon never mentions that there will be "sea demurrage" for delay payment. As per Clause 16c(iii) you are free to stop and charge sea demurrage. Pls advise if you intend to do so*".

85. At the time of these exchanges, the convoy had not stopped and on 6 February 2004 Leonis were sent a situation report that the convoy had covered 133 nautical miles that day and her speed was 5.5 knots. Nevertheless on 6 February 2004 Regulus sent Chenco and Ease Faith what purported to be a copy of the tug's report for 5 February 2004 stating that the convoy had stopped, and Captain Krishna sent a message to Mr Chen stating that the tug had stopped towing because the instalment of hire due on departure had not been paid. He also told Mr Chen that the tug was incurring delay payments from 5 February 2004 and would remain so until receipt of funds. He said that under clause 16 (c)(v) of the towcon the tug owners had "no option but to stop towage until funds are remitted and received in Tug Owners' account". A copy of this message was sent to Captain Kazantsev (but there is no evidence that he forwarded it to Rimsco or informed them of what it said). On 7 February 2004 Regulus sent to Chenco and Ease Faith what purported to be a copy of the tug's report for 6 February 2004 that stated that her position on 6 February was still 103° 05' North and 093° 36' West and she had stopped.

86. The tug was in fact ordered to stop (or to proceed at minimum speed) on 7 February 2004, and Captain Domenko reported this to Captain Kazantsev and Captain Krishna on the same day, the last position report that the tug sent until 23 February 2004. Her position was then 113° 3' North and 097° 13' West, although on 8 February 2004 Regulus told Chenco and Ease Faith that in the report of 7 February 2004 Captain Domenko had reported the position as still being 103° 05' North and 093° 36' West.

87. On 7 February 2004 Rimsco responded to Leonis' request of 6 February to be advised whether Cloudfree intended "to stop and charge sea demurrage". They said that "Owners gave instructions for Master of Naporistyi to stop towage till freight is paid. Time spend for delay of payment to be for Charterers account USD 3,500 pdpr [sc. per day pro rata]". They continued, "As per fact the actual light displacement of tow is more than Charterers declare in towcon. That's why all extra expenses considering extra weight to be refund by Charterers to Owners". That was the first complaint about the displacement of the "Kent Reliant".

88. Captain Krishna sent Chenco a further communication on 7 February 2004 stating that the convoy had stopped because hire had not been paid, and that the tug was "*on sea demurrage from Feb 05/0800 lt [sc. local time] until receipt of funds"*. Again a copy was sent to Captain Kazantsev, and Captain Krishna added on this copy: "*Hence, if any enquiry comes to Owners regarding whereabouts of Tug & tow, pls advise them to tell all that convoy has stopped and drifting since Feb 05/0800 LT. We appreciate Owners continuing with voyage and we assure you that any payment received as sea demurrage will be split with you/them"*. I do not find the last sentence easy to understand, but it was not put to Captain Krishna that he was dishonestly suggesting a split of money unjustifiably demanded of Ease Faith. Mr Holmes submitted that the reference to appreciation that the Owners were continuing with the voyage was a reference to the Owners electing not to abandon the tow altogether under clause 16. If necessary I would accept that interpretation, but this question is not important to my decision upon any issue in this case.

89. On 7 February 2004 Captain Krishna also responded to Rimsco's complaint about the displacement of the tow. He stated that he understood that Captain Domenko had been instructed to stop towage until they received the instalment due upon departure, without indicating whether or not he considered that Cloudfree were entitled to give that instruction. He rejected the claim for extra payment, characterising it as "unethical" to raise the matter so long after sailing. Captain Aliev responded robustly on behalf of Rimsco, complaining that the Master had not been provided with documents before departing from Balboa.

90. As I have mentioned, on 9 February 2004 Mr Chen admitted to Captain Krishna that the payment of hire was delayed by cash flow difficulties. On the same day, Captain Krishna replied to Mr Chen's message of 9 February 2004 that the Tug Owners did not accept the reason for the delayed payment, that the convoy had stopped and would not resume the voyage until funds were received, and that the tug would continue on sea demurrage until she resumed towage.

91. On 10 February 2004 Captain Krishna sent an e-mail to Rimsco that read as follows: *"At the outset, you must understand that we are 'on yr side'. Let there be no misunderstanding on this. We are well aware of the fact that 'Leonis' has a Contract with you. However, if Tow owners do not pay us, it is difficult for us to cough up so much funds. You, as Tug Owners, have the tow with you. And we can only pressurize Tow Owners to pay us by stopping the convoy and charging sea demurrage. The Tow Owners are very well known to us and Capt. Kazantsev, though not for the right reasons. In the circumstances, since he has advised that he has "cash flow problems and cannot pay until Feb 17-18" we would request you to advise Tug Master to hold on to tow and drift with the tow until receipt of funds. We intend to advise Tow Owners accdgly. Sea demurrage will continue to incur. If and when funds are received, we will resume towage. Then, we will raise out Invoice for sea demurrage. If that is not paid within 7 days, we once again stop the convoy. This Tow Owner only understands tough measures! Thanking you for yr continued co-operation."*

92. Throughout these exchanges Captain Krishna had not let Rimsco know that Leonis had in fact received from Ease Faith $52,000 of the hire payable under the sub-towcon. On 12 February Ease Faith sent Leonis the further US$56,000.

93. Rimsco continued to maintain a firm position. On 11 February 2004 they requested Captain Krishna to pass a message to the tow owners asserting their claim to a lien and stating that they had stopped towing activities and

sending daily reports until they received the outstanding instalment of hire and were paid US$3,500 for each day's delay and an extra payment of US$100,000 for the extra weight.

94. On Friday 13 February 2004 Captain Krishna wrote this to Rimsco: "Please be advised that we have today remitted instalment of lumpsum due on sailing from Panama in full to yr account from Barclay's Bank. We will fax you copy of bank swift copy on receipt today. Also, be advised that Tow Owners have promised to remit funds today and we are sending you funds in good faith in order not to lose weekend idling and increasing liability for Tow Owners and adding to existing disputes. We will be sending to Tow Owners 'demurrage incurred due to waiting for funds' after we receive Tug Master's report of resuming voyage. We will be requesting Tow Owners to remit sea demurrage within 7 days on receipt of invoice failing which we will once again stop the convoy". Rimsco's response was that they would "give the relevant order to master of Naporistyi" only when the three claims made in their message of 11 February 2004 had been resolved.

95. Captain Krishna sent a further e-mail to Captain Aliev later on 13 February 2004, expressing disappointment with this response and saying that Regulus "*cannot support your stand since, it does not comply with the Towcon Contract for the following reasons"*. He explained that funds for the third instalment of hire had been remitted and said that Cloudfree were "*delaying the convoy unnecessarily*". As for delay payments, he said "*We can only raise an invoice for sea demurrage from the time convoy stops until it resumes voyage. Invoice is then raised and as per Towcon, Tow Owners have 7 days to make payment (Clause 16(c)(iv)). It is only if funds are not remitted after 7 days, that Tug Owners can consider any action"*. It is clear that the comment was directed to Ease Faith's obligations and not those of Leonis. He described the claim for excess weight as "*disputable"* and not a basis for "*hold[ing] the tow to ransom in midsea"*. He requested Captain Aliev to instruct the tug to resume the voyage "forthwith".

96. Cloudfree in fact received the payment of the third instalment of hire payable under the head towcon on 18 February 2004 and ordered the convoy to resume its voyage that day. However, they maintained their claims for "sea demurrage" in the sum of US$48,750 and for excess weight, arguing that because they were unable to proceed on one engine, they were having to operate both engines and so were using extra fuel.

The April delay

97. Cloudfree's claims for sea demurrage and in respect of the displacement of the "Kent Reliant" remained unresolved, and on 26 March 2004 Cloudfree gave Leonis notice that unless their claim in respect of her displacement was settled, they intended to exercise a lien over the "Kent Reliant". On 13 April Rimsco reiterated that claim, and said that the convoy would not go to port until there was a "guarantee" for the "extra weight fee" and "sea demurrage"; they called for a fund to be deposited by way of security. Captain Krishna relayed this to Mr Chen.

98. Mr Chen rejected Cloudfree's claims: his evidence was that he considered them to be "invalid". There is some evidence that in the middle of March 2004 both Chenco and Ease Faith were short of funds: in an e-mail dated 16 March 2004 Mr Chen told Ease Faith that he was unable to find any funds to pay the fourth instalment of hire and Mr Zhong responded that he had difficulty in paying it. Mr Chen accepted that as at 21 April 2004 he was not in a position to provide cash security for the claims. On 19 April 2004 he had proposed to Captain Krishna that security might be provided by an assignment into an escrow account of the proceeds of the sale of the "Kent Reliant" and this suggestion was repeated on 21 April 2004, but it found no favour. However, Mr Chen's evidence was that he could have put up other security for the claims had it been necessary, and there is no reason, in my judgment, to reject that evidence. I also accept his evidence that he regarded Cloudfree's claims as unjustified.

99. On 18 April 2004 Rimsco advised Captain Krishna that the convoy had an estimated time of arrival at Shanghai of 24 April 2004, but reiterated that the convoy would not come into port until their claims for "sea demurrage" and an "extra weight fee" had been resolved and the final instalment of hire paid. On 21 April 2004 Rimsco sent Regulus, and Regulus sent on to Chenco, a message from the vessel giving an estimated time of arrival at Shanghai of 23 April 2003 at 23.00 hours local time, and the tug master requested two tugs to accept the tow at the Shanghai pilot station. Meanwhile Captain Krishna was pressing for payment of the final instalment of hire under the sub-towcon, but on 21 April 2004 Mr Chen insisted that the last instalment could not be wired until the convoy came inside the Zhanjiagang anchorage. On 22 April 2004 Captain Krishna gave Cloudfree notice that the owners of the "Kent Reliant" had advised that the final destination was to be Zhanjiagang and that the Master should be instructed to proceed accordingly. In a telephone conversation on 23 April between Mr Chen and Captain Krishna, Captain Krishna gave an estimated time of arrival at Shanghai outer anchorage of 24 April 2004 and said that at noon on 25 April 2005 the convoy was scheduled to arrive at Zhanjiagang. After this telephone conversation, Ease Faith paid the last instalment of the hire. Captain Krishna acknowledged receipt, but said that Leonis would not remit it to the tug owners until they were certain about the condition and location of the "Kent Reliant". He estimated the time of arrival at Shanghai pilot station would be 18.00 local time on 24 April 2004, but said that he did not know the Tug Owners' intentions.

100. It is not entirely clear from the evidence quite when the convoy arrived off Shanghai but I conclude that the convoy approached the Shanghai pilot station on 24 April 2004. At all events, Cloudfree would not allow her to enter Chinese waters until the hire had been paid and security provided for their claims. According to Captain Aliev this was because Cloudfree feared that Mr Chen might "exert his influence" and that the "Kent Reliant" might be "arrested or simply taken from the tug by force". Cloudfree claimed that they were exercising their lien. It was only on 26 April 2004 that Rimsco told Leonis that the tug and tow had arrived at the Shanghai pilot station on 24 April 2004 at 18.00 hours.

101. On 23 April 2004 Ease Faith paid the fifth and final instalment of hire under the sub-towcon. On 26 April 2004 Leonis told Chenco that they had paid the final payment of hire to Cloudfree, and had asked that the tug approach the pilot station. On 28 April 2004 Cloudfree were given notice that the final instalment of hire under the head towcon had been received with a value date of 27 April 2004. Arrangements had been made for the tug to present herself at the Shanghai pilot station to collect a pilot at 05.00 hours on 29 April 2004, but the Master refused to do so because he did not have Cloudfree's permission. They still required security in respect of their claims and, as Captain Aliev put it, he was *"conscious that if [they] did enter Shanghai or Chinese territorial waters [they] might lose control of the situation"*.

102. Security was put in place when an Escrow Agreement was finalised on 29 April. The parties to it were Ease Faith, Leonis, Cloudfree and the firm of Hill Taylor Dickinson, Leonis' solicitors, in the capacity of Escrow Agent. Under it, Ease Faith agreed to place US$250,000 and Leonis agreed to place a further US$13,500 into an escrow account. The funds were to remain in the account pending the final resolution of what were called "the Head Claims" and the "Sub Claims". The "Head Claims" were claims made by Cloudfree against Leonis "pursuant to the Head Towcon ...for sea demurrage and for alleged breach of the Head Towcon and for the cost of the upriver passage to Zhanjiagang in the sum of US$186,000". The "Sub Claims" were claims made by Leonis against Ease Faith "pursuant to the sub Towcon...for sea demurrage and for the alleged breach of the Sub Towcon in the sum of US$166,000". Ease Faith and Leonis agreed to deposit the funds in consideration of Cloudfree agreeing to refrain from taking action which would result in the arrest of any ship or assets in their ownership for the purpose of obtaining security for any claim that they might have against Ease Faith or Leonis.

103. The Escrow Agreement having been concluded, a pilot was arranged for 30 April 2004, but the arrangements were cancelled because of strong winds. Eventually, the pilot came on board on 1 May and the "Kent Reliant" was delivered on 2 May 2005. The Tug sailed the next day.

104. It is Cloudfree's case that by 24 April 2004 the convoy had arrived outside Shanghai and thereafter they were waiting pending provision of security for their claims, and that they were entitled so to exercise a lien over the "Kent Reliant" to secure their claims for the delay in February 2004 and in respect of the displacement. I accept that by 24 April 2004 the convoy had arrived off Shanghai and I accept that the reason that the convoy then delayed was because Cloudfree were claiming to exercise a lien under the head towcon.

The Issues

105. The following are the main issues that arise between the parties:

Upon the claim of Ease Faith against Leonis

i) Whether the tug proceeded at utmost dispatch in accordance with the terms of the sub-towcon.
ii) If not, when the "Kent Reliant" would have arrived had the tug proceeded at utmost dispatch.
iii) If the "Kent Reliant" would have arrived earlier than she did had the tug proceeded at utmost dispatch, whether Ease Faith suffered loss because she did not do so.
iv) If so, whether Ease Faith are prevented from recovering for such loss, or any of it, because of clause 18.3 of the sub-towcon.

Upon the claim by Leonis against Cloudfree

v) Whether it was a term of the head towcon that the tug would proceed with all reasonable dispatch.
vi) If so, whether the tug proceeded with such dispatch.
vii) If not, whether Leonis are prevented by an estoppel by convention from asserting the complaint that the tug did not proceed with proper dispatch.
viii) If the "Kent Reliant" would have arrived earlier had the tug proceeded with such dispatch, whether Leonis incurred liability as a result of Cloudfree's breach of the head towcon.
ix) If so, whether Ease Faith are prevented from recovering for such loss, or any of it, because of clause 18.3 of the sub-towcon.

Under the counterclaim by Cloudfree against Leonis and by Leonis against Ease Faith

x) Whether the "Kent Reliant" was in light ballast condition.
xi) Whether in the head towcon, Leonis undertook that the "Kent Reliant" was in light ballast condition.
xii) Whether Cloudfree have a claim in misrepresentation in respect of the displacement of the "Kent Reliant".
xiii) Whether in the sub-towcon, Ease Faith undertook that the "Kent Reliant" was in light ballast condition.
xiv) Whether Leonis have a claim in misrepresentation in respect of the displacement of the "Kent Reliant".

106. It is convenient to consider first the issues relating to Cloudfree's and Leonis' counterclaims arising from the displacement of the "Kent Reliant". However, before doing so, I record that the following issues arose upon the pleadings but were abandoned or not pursued:

i) Ease Faith's complaint against Leonis and Leonis' complaint against Cloudfree of breach of the obligation in the towcon to provide reports about the convoy's position and other matters every 24 hours.
ii) Leonis' complaint that the tug was unseaworthy because in the course of the voyage, on 13 April 2004, the tug's engine room flooded due to cracking in her shell plating and emergency repairs were required.
iii) Leonis' and Cloudfree's arguments that the February delay was justified and delay payments were incurred under clause 21 of the towcons because the tugowner was properly exercising a lien. They had maintained that the lien gave them the right to stop or to proceed at minimum speed consistent with safety, a contention that was clearly unarguable.
iv) Cloudfree's allegation that the February delay was justified because Leonis had ordered it.

v) Cloudfree's argument that the February delay was in accordance with a collateral contract between them and Leonis, or in accordance with the head towcon as varied by agreement between them.

vi) Cloudfree's allegations against Leonis and Leonis' similar allegations against Ease Faith of breach of contract and misrepresentation because of false information about the LDT of the "Kent Reliant" and about her draughts.

vii) Leonis' claim against Cloudfree for commission.

viii) Cloudfree's claim for rectification of the head towcon so as to introduce a provision that Zhanjiagang should not be the place of destination. Cloudfree applied during the trial for permission to amend their pleading to assert a collateral contract to similar effect, but I refused them permission to do so.

ix) Leonis' and Cloudfree's plea that Ease Faith's claim for damages resulting from being paid a reduced price for the "Kent Reliant" is too remote to be recoverable, and any argument that Ease Faith acted unreasonably in agreeing to the reduction in price.

Did the towcons include undertakings that the "Kent Reliant" was in light ballast condition?

107. In my judgment both the head towcon and the sub-towcon included undertakings by the hirers, Ease Faith and Leonis respectively, that the "Kent Reliant" was in light ballast condition. That is the effect of box 12 in Part I of the towcons being completed as it was. After all, the wording of the towcons that I have already cited in paragraph 8 above indicates that the provisions in Part I are "terms and conditions" of the agreements, and I consider therefore that the details by way of "*Particulars of cargo and/or ballast and/or other property on board the tow*" are to be interpreted as undertakings by the hirers, who were the party responsible for the tow and her condition. I am unable to accept that the details in box 12 are simply representations and not intended to be contractual terms.

108. It is therefore necessary to consider what a contractual undertaking by the hirer that the tow would be in "light ballast condition" means in the context of the towcons. Cloudfree's pleaded case was simply that the displacement of the "Kent Reliant" upon departure from Balboa was at least 12,250 tons or, on the basis of the details about her draught in the sub-towcon, at least 11,600 tons, and in these circumstances she could not be said to be in light ballast condition. In fact I have held that her displacement was less than this, and was of the order of 11,000 tons and no more than 11,500 mt, but this does not in itself answer Cloudfree's case.

109. Mr Holmes sought to support this argument with opinions expressed by the expert witnesses about the ballast that would normally be carried by a vessel with a LDT of about 6,500 mt if she was sound and in light ballast condition. Captain Paines said that she could be expected to be carrying about 1,000mt of ballast in her double bottom tanks, and that in total a displacement of about 7,700 mt might be expected. Captain Lloyd considered that about 2,000 mt by way of ballast might be considered normal for a vessel of this size. Captain Hammond considered that the displacement of such a vessel would be unlikely to exceed 9,000 mt. However, these were assessments concerning vessels in sound condition, and the "Kent Reliant" was damaged: some of her holds were tidal.

110. There was no dispute between the experts about what the term "light ballast condition" means when it is applied to a vessel in sound condition. A vessel is normally said to be in "light ballast condition" when she is carrying (as well as any "constants" and consumables) the minimum ballast that will enable the particular vessel to proceed safely and in a seaworthy condition on her intended voyage. I cannot accept that the parties to the towcons intended that, because the "Kent Reliant" was not sound, the expression should bear a meaning directed not to what ballast was carried but to the total displacement of the tow. The implication of Cloudfree's complaint is that if the displacement of a vessel is very much more than would normally be expected of a vessel of her size and type, she cannot be said to be in light ballast condition, but it seems to me that the towcon form does not contemplate the particulars in box 12 should state the tow's total displacement, that the words "Light Ballast condition" are not descriptive of the total displacement, and that in any case the parties are to be taken to have intended the expression to have a more precise meaning than Cloudfree attribute to it.

111. Moreover, the wording in box 12 is not to be interpreted in isolation from the other terms of the towcons. As Captain Kazantsev's exercise makes clear, the information in boxes 6 of the sub-towcon and the head towcon is sufficient to make a rough calculation that the tow's displacement would be over 11,000 tons. As I have found, the formula used is well known to those in the towing business and, in my judgment, the parties to the head towcon and the sub-towcon are to be taken to be familiar with such calculations and indeed, as I find, were so familiar. The calculation demonstrates that if the expression "light ballast condition" were given the meaning for which Cloudfree contend, the information in box 12 would sit uneasily with the information in box 6, if not directly contradict it. Of course the calculation depends upon the co-efficient used, but it suffices for this argument that the information in box 6 gave a general indication of the vessel's likely displacement to parties in the position of Ease Faith and Leonis (in the case of the sub-towcon) or of Leonis and Cloudfree (in the case of the head towcon). For this reason too I do not consider that the expression "light ballast condition" when used in the towcons is directed to what the displacement of the tow would be.

112. However, Cloudfree seek to introduce another argument, and have applied to amend their pleading to do so. In the course of his oral evidence Captain Paines expressed the opinion that the expression "light ballast condition" should not be used to describe a vessel that needs to have ballast outside her normal ballast system in order to be stable: the term "light ballast condition" is not, he thought, appropriate to describe a vessel if as a result of damage she needs to carry ballast water in spaces that would not be described in a capacity plan as "ballastable" space.

113. This case had not been put to Captain Lloyd or to Captain Hammond when they were cross-examined. Therefore, when Captain Paines finished his evidence, I invited Mr Holmes to apply to re-call Captain Lloyd and Captain Hammond to put it to them. I allowed such an application, leaving in abeyance the question whether the pleadings allowed Cloudfree to pursue the new point.

114. When he was recalled, Captain Lloyd expressed agreement with Captain Paines: he said that it would be inappropriate to use the description "light ballast condition" of a damaged vessel carrying ballast outside her ballast system. Captain Hammond disagreed, and said "*if the circumstances demanded that the ballast was put in systems outside the normal system, whether it was in that system or not, it would still be, could be, classed as a light ballast condition... If you have deep sided tanks other than ballast tanks, water tanks or some other cargo-carrying tanks, [and] it was necessary to fill these with ballast to make sure that the ship was safe, to make sure she was stable, that would be light condition*".

115. Cloudfree applied for permission to amend their pleading and to plead that Leonis were in breach of the head towcon because "*at the outset of the voyage [the "Kent Reliant"]* was carrying ballast water outside her ballast system". The application was opposed, and I indicated that I would decide in this judgment whether the amendment is necessary to allow Cloudfree to advance the argument, and if so whether it should be permitted.

116. I have concluded that this argument is not one that Cloudfree can advance on the pleadings as they stand. In their present pleadings Cloudfree do not assert that the "Kent Reliant" was carrying ballast outside her ballast systems. I have also concluded that I should not give Cloudfree permission to amend their pleading. First, there is no evidence before the court that I accept that the "Kent Reliant" was carrying ballast water outside her ballast system. Her heavy displacement is likely to be attributable in part if not in whole to tidal water in her holds as a result of her bottom damage. In order for Cloudfree to establish their new case, it would be necessary to adjourn the trial to allow Cloudfree to adduce further evidence about this, and the sums involved in the case as a whole and in this counterclaim of Cloudfree in particular are too small to justify an adjournment.

117. Secondly, it would not be just to allow Cloudfree to introduce this new case unless Leonis were permitted to introduce a similar case into their counterclaim against Ease Faith. However, Mr Jacobs submits, and I accept, that, had they faced such a counterclaim, Ease Faith would have adduced evidence about the knowledge of Mr Chen and Captain Krishna of the actual condition of the tow. It would have been Ease Faith's case, Mr Jacobs argued, that Captain Krishna was aware of the damaged condition of the "Kent Reliant" when the towcons described her as a "deadship in light ballast condition", and that Ease Faith could have put forward arguments of rectification or estoppel by convention. For this reason too, I do not allow the amendment.

118. I add that I would in any case have rejected Captain Paines' evidence upon which the proposed amendment was based. He did not explain why the expression "light ballast condition" should be inapplicable simply because some ballast was carried outside the normal system. After all, this need not necessarily increase the total weight of the ballast carried or affect the displacement of the vessel. While Captain Lloyd expressed agreement with Captain Paines, he too did not explain his reasoning. I would have preferred the evidence of Captain Hammond. At its simplest it comes to this: ballast is any material placed on board the vessel to add weight and the reference to "light" refers to the least amount of ballast with which the vessel can safely and properly proceed on her voyage.

Was the "Kent Reliant" in light ballast condition?

119. The question, therefore, whether there was a breach of the undertaking in the towcon that the "Kent Reliant" was in light ballast condition depends upon whether she was carrying more ballast than was necessary to ensure her stability for the voyage. There is no evidence that she was: indeed, the Ha-Ce report indicates the contrary. I conclude that the "Kent Reliant" was in light ballast condition, that she was carrying no more ballast than was necessary and that Cloudfree have not proved any breach of the head towcon and Leonis have not proved any breach of the sub-towcon.

Do Cloudfree have a claim in misrepresentation in respect of the displacement of the "Kent Reliant"?

120. In view of my conclusion that the "Kent Reliant" was in light ballast condition, I need deal further only briefly with Cloudfree's claim on the basis that Leonis misrepresented the condition of the "Kent Reliant" to them when they described her as being in light ballast condition. She was so described on 19 December 2003 in the e-mail by way of a "recap of the fixture" and in the head towcon itself. However, I do not consider that either communication is to be interpreted as referring to the condition in which the vessel then was, or making a representation of facts as they then were. In both cases the expression is to be understood to be directed to the condition of the "Kent Reliant" when she was to be towed. Indeed, any other interpretation is inconsistent with Captain Kasantsev and Captain Krishna discussing the vessel being lightened before she was towed. Moreover, there is no evidence that I accept that Cloudfree relied upon the representation that they allege. I add only that it is also unclear what remedy Cloudfree seek in respect of the alleged misrepresentation: there is no claim for damages pleaded on the tortious measure.

Do Leonis have a claim in misrepresentation in respect of the displacement of the "Kent Reliant"?

121. For similar reasons, I reject Leonis' claim that Ease Faith misrepresented the condition of the "Kent Reliant" when she was described as being in light ballast condition. She was first so described in Captain Krishna's e-mail to Mr Chen of 26 November 2003, and the nature of Leonis' case in misrepresentation is that Mr Chen and Chenco did not correct that description either then or when it was repeated in the sub-towcon and its draft. They contend that

Ease Faith made representations (a) when Mr Chen returned the draft sub-towcon on 15 December 2003 without commenting upon that part of it, and (b) by signing the sub towcon.

122. I do not interpret these documents to be referring to the condition of the vessel as she was at that time, and do not consider that Chenco, by failing to comment upon or to correct the description of the "Kent Reliant", represented that the vessel was then in the condition described. (I recognise that Captain Kazantsev's calculation was said to be of the "present displacement", but that was later.) Moreover, there is no evidence that Leonis entered into the sub-towcon in reliance upon that description or that they were under any misapprehension about the condition of the vessel when they concluded the sub-towcon. Their case, as Miss Jones explained it, was that they relied upon the misrepresentation in entering into a head towcon that contained a similar description of the "Kent Reliant". I reject that contention because, before doing so, Captain Krishna had received and expressed agreement with Captain Kazantsev's calculation. I conclude that Leonis did not rely upon any understanding about the condition of the vessel that Chenco brought about or encouraged, but even if they had done so, this could not have vitiated the sub-towcon, which had already been concluded, or give rise to any claim for damages in respect of it. I add that Leonis plead no claim in tort that Ease Faith's negligence led them to enter into the head towcon or to agree to the terms of it.

Conclusion on counterclaims

123. I therefore reject Cloudfree's and Leonis' complaints of misrepresentation.

Did Leonis proceed on the voyage at utmost dispatch in accordance with the terms of the sub-towcon?

124. It was provided in the sub-towcon that Kent Reliant should be towed "at utmost dispatch". Although this provision appears in box 23 of the towcon form, which is directed to the route of the voyage, it was not argued, and in my judgment could not properly be argued, that the provision for utmost dispatch refers only to the route. Ease Faith maintain that apart from short periods when routine maintenance might have been carried out, the tug should, under the terms of the sub-towcon, have proceeded on both engines.

125. There is no need for the purposes of deciding this case to attempt an extended definition of the obligation to proceed "*at utmost dispatch*". Mr Jacobs effectively confined his argument to three points:

i) He submitted that the tug should not have been delayed between 7 and 18 February 2004

ii) He submitted that the tug should not have delayed outside Shanghai from 24 April 2004.

iii) He submitted that the tug should not have used only one of her two engines as she did.

126. Miss Jones did not dispute Mr Jacobs' first complaint. Between 7 February and 17 February 2004 the convoy proceeded at the slowest speed consistent with safety and that constituted a breach of the sub-towcon.

127. I understand it to be common ground that if the tugowner under the towcons was entitled to exercise a lien, the convoy could properly remain outside Chinese territorial waters and not proceed to the Shanghai pilot station: see ***The "Chrystovalandou",*** [1981] 1 Ll L R 159,165. On 18 April 2004 Cloudfree gave notice to Leonis that they intended not to call at port until their claims for "*sea demurrage*" and an "*extra weight fee*" had been resolved and the fifth instalment of hire had been paid. Captain Aliev's evidence was that he was concerned that the convoy should not enter Shanghai or Chinese territorial waters because "Leonis had failed to pay the final instalment of hire under the towcon and there was still no agreement to the manner in which tow owners were going to provide security for Cloudfree's claims for sea demurrage and excess weight". It has not been suggested that there is any other basis upon which Cloudfree could exercise a lien against Leonis or Leonis could exercise a lien against Ease Faith.

128. Clause 21 of the towcons gave the tugowner a lien "*in respect of any sum howsoever or whatsoever due to the tugowner under this Agreement*". I have held that Cloudfree had no claim for an "*extra weight fee*", and in any case such a claim for damages would not be a sum "*due … under [the] Agreement*". Leonis do not assert a claim in respect of "*sea demurrage*". Under the sub-towcon the last instalment of hire, which was due two banking days before the arrival of the tug and tow at the place of destination and the release of the tow, was paid on 23 April 2004. Thereafter, Leonis had no basis to exercise a lien against Ease Faith and the tug was not proceeding "*at utmost dispatch*" when she delayed proceeding to the pilot station and taking her pilot on board until 1 May 2004.

129. There remains the question whether there was a breach of the sub-towcon because the tug proceeded for extended periods on one engine. Mr Jacobs cited the speech of Lord Hobhouse in ***The "Hill Harmony",*** [2001] 1 AC 638. Lord Hobhouse referred to the observation of Lord Sumner in ***Sukuzi & Co Ltd v T Benyon & Co Ltd.,*** (1926) 24 Ll L R 49, 54 that an "*utmost despatch*" clause is a merchant's clause with the merchant's policy of saving time, and continued (at p.653): "*As a matter of this mercantile policy and, indeed, as a matter of the use of English a voyage will not have been prosecuted with the utmost despatch if the owners or the master unnecessarily chooses a longer route which will cause the vessel's arrival at her destination to be delayed. … To proceed by an unnecessarily long route delays the vessel just as surely as if the vessel had sailed at something less than full speed*". It is implicit in Lord Hobhouse's reasoning, Mr Jacobs argued, that the obligation to proceed at utmost despatch amounts to an obligation to proceed at "*full speed*".

130. In response, Miss Jones drew attention to the precise decision in the ***Sukuzi case.*** It arose from a claim that a captain was in breach of an obligation (in clause 9 of the charterparty) to *"prosecute his voyages with the utmost dispatch"* on the ground that he had "*neglected to increase the speed of the vessel by means of increased coal consumption*", a claim that was upheld. The owners sought to rely upon an exception clause in the charterparty, which excluded liability for "*negligence, default or error in judgment of the pilot, master or crew or other servants of the owners in the management or navigation of the steamer*". In his speech (at p.51), Visc Cave LC referred to

clause 9 as being intended to include an undertaking by the owners "*that the captain should maintain a reasonable speed while the vessel was at sea*". Miss Jones also referred to the dissenting judgment of Scrutton LJ in the Court of Appeal, (1924) 20 Lloyd's LR 179, 181, in which he said that the obligation that the captain should prosecute the voyage with the utmost dispatch "means no more than that he should prosecute it with reasonable dispatch".

131. Mr Jacobs did not argue that an obligation to proceed at utmost dispatch requires a vessel to use her full engine power at maximum continuous rating ("MCR") or to operate at more than 90% of the MCR. He acknowledged that that would not be a normal use of the engine or usual navigation of the vessel and he did not contend anything other than normal navigation is required. He submitted that the requirement to proceed at utmost dispatch is an obligation to proceed at the maximum speed that is consistent with normal navigation and normal use of the engine power. I agree with that submission and to that extent the obligation is qualified by reference to what is reasonable. This, it seems to me, is entirely consistent with the authorities to which Miss Jones referred.

132. However, it has not been and could not be argued that it would not have been normal for the tug to have used both her engines throughout the voyage (apart from any short and insignificant periods when one of the engines had to be shut down for routine maintenance). In my judgment, when the tug operated on one engine between 27 January and 7 February 2004 and from 22 March until at least 10 April 2004, that is to say for a period of at least 30 days, she was not proceeding at utmost dispatch and therefore Leonis were in breach of the head towcon.

133. Mr Jacobs advanced a further argument that the tug was obliged to use both her engines during the voyage, except during maintenance periods. The sub-towcon stated that the tug had a certified bollard pull of about 40 tons and twice 1,500 brake horse power. The tug had to use both engines to achieve that bollard pull and there would have been no point in specifying the maximum bollard pull unless both engines were to be used. Moreover, Mr Chen said in evidence, and I accept, that the greater the horsepower of a tug, the more expensive the hire will be. Mr Jacobs submitted that for this reason it was implicit in the sub-towcon that the tug would use both her engines in order to proceed at utmost dispatch. Although Mr Jacobs does not need to rely upon this argument, I accept it and it does, in my judgment, reinforce the conclusion that the sub-towcon required routine use of both engines.

When would the "Kent Reliant" have arrived at Zhanjiagang if the tug had proceeded at utmost dispatch?

134. It is agreed between the experts, and I accept, that if the tug had proceeded continuously on two engines for the voyage distance of 10,050 nautical miles from Balboa to Shanghai, the convoy would have proceeded at an average speed of at least 6.0 knots and the voyage would have taken 70 days. I therefore conclude that, but for the breach of the utmost dispatch obligation, the "Kent Reliant" would have been delivered during the week commencing 4 April 2004, some three or four weeks earlier than she was.

135. The conclusion that the breach of the sub-towcon delayed the delivery of the "Kent Reliant" by at least three weeks seems to me confirmed by the following. First, there was some ten days delay because of the slow-steaming between 7 and 17 February 2004 (although I recognise that some small progress was made because the tug was proceeding at minimum speed and did not come to a complete halt). Secondly, there was a further delay of about a week in April 2004 when the convoy waited before proceeding to the Shanghai pilot station. Thirdly, while this is a rather more uncertain calculation, on the most conservative estimation Ease Faith have shown that some five days were lost because the tug was operating on one engine. During the periods between 27 January and 7 February 2004 and 23 March 2004 to 10 April 2004 when the tug was using one engine, the convoy proceeded at an average speed of less than 5 knots. (I accept the unchallenged evidence of Captain Lloyd that from 27 to 30 January 2004, the average speed was about 4 knots; that from 1 to 7 February 2004, the average speed was in the region of 5 knots; and that from 23 March to 10 April an average of 5 knots was maintained.) It is not disputed that the average speed of the convoy had the tug operated on both engines would have been at least 6 knots, and in any case I would have inferred that from the progress of the convoy when the tug was using both engines. Mr Holmes calculated from the deck log, and it was not disputed, that her average speed on the days during the voyage when she made continuous progress whether on one engine or two was only 5.59 knots: on any view it was less then 6 knots. I conclude that if the convoy had achieved on average a speed that was one knot faster during those thirty days when one engine was used, at least five days would have been saved.

Did Ease Faith suffer loss?

136. Leonis and Cloudfree did not dispute that Ease Faith incurred a pilot surcharge of US$5,818 and additional escort services associated with the Chinese May Labour holidays of US$16,363.63, and I accept that they suffered those losses because the "Kent Reliant" did not arrive at the pilot station in time to reach Zhanjiagang before the end of April. There is, however, dispute about the claim in respect of the Yard paying a reduced price for the "Kent Reliant".

137. I accept Ease Faith's evidence that the Yard reduced the price that they were willing to pay for the "Kent Reliant" by US$101,929. I also find that the Yard had agreed in about March 2004 to extend the time for delivery of the vessel to the end of April 2004 on the basis that Ease Faith then expected that in fact she would arrive on about 9 April 2004. In my judgment, had the "Kent Reliant" been delivered as soon after that estimated arrival date as 11 April 2004, it is likely that the Yard would have paid the full price of US$1,732,796.40 for the vessel. Moreover, although the evidence is somewhat exiguous, I accept that Ease Faith have proved on the balance of probabilities that, had the vessel been delivered at any time during the month of April 2004, they would have persuaded the Yard (if persuasion was necessary) to pay the full price. After all, by extending the delivery date to the end of April 2004, the Yard, as I interpret the evidence, accepted implicitly if not expressly that the full price should be paid in these circumstances. The Yard would, as far as I can tell, have had no legal or

reputable commercial excuse for paying less. It is significant that they opened the letter of credit for less than the full price at a time when Mr Zhong had indicated to them that there might be further slippage in the delivery date. It is understandable that they would be concerned that if they paid the full price by the letter of credit, they would have no effective redress, or at least would be in a weak negotiating position, if Ease Faith did not meet the extended deadline. Even when Ease Faith did miss the delivery deadline by two days, the Yard was not inflexible over the original deduction of some US$300,000 from the price and reduced the deduction by about two thirds. They agreed to do so despite evidence that by then the market in China for scrap vessels was weakening. The picture, it seems to me, is that the Yard was not trying to renege on its obligations to Ease Faith, and was seeking to maintain its commercial relationship with them. Despite the criticisms made by Miss Jones and Mr Holmes of Ease Faith's evidence on this part of the case, I am persuaded that, had the extended delivery deadline of the end of April 2004 been met, Ease Faith would have been paid US$1,732,796.40 by the Yard.

138. At one point it seemed that there would be an issue between the parties whether Ease Faith were entitled to recover in respect of any loss suffered as a result of the Yard paying less for the "Kent Reliant" by reason of her late delivery because of the arrangements between Ease Faith and Chenco. The suggestion was, as I understood it, that some or all of the loss might have been suffered by Chenco, and so was not recoverable, by Ease Faith. However, in the closing submissions Mr Holmes and Miss Jones acknowledged that if Ease Faith owned the "Kent Reliant", then their claim is not to be reduced on account of the fact that, had they recovered further sums from the Yard, they might have had to pay some part of them to Chenco under or as a result of the arrangements between them. The only question, raised by Mr Holmes, was whether Ease Faith had shown that ownership of the "Kent Reliant" had been transferred to them. I conclude that they have established this. Indeed, this was implicit in the insurance arrangements made in respect of the vessel during her tow. The loss resulting from the reduced price was suffered by Ease Faith, and is recoverable by them.

Clause 18.3 of the sub-towcon

139. Cloudfree and Leonis submit that Ease Faith's claims are excluded by clause 18.3 of the standard wording of the Towcon form, which was included in both the sub-towcon and the head towcon. This provided that "Save for [specified provisions] neither the Tugowner nor the Hirer shall be liable to the other party for loss of profit, loss of use, loss of production or any other indirect or consequential damage for any reason whatsoever".

140. Cloudfree argue, and Leonis adopt Cloudfree's argument, that Ease Faith's claim is for loss of profit, specifically for loss of profit on the contract between Ease Faith and Beijing Green Vessel for sale of the "Kent Reliant". They rely upon the way the claim was described by Mr Zhong, who put it as follows: "*Had the Kent Reliant been delivered before the May Day Holiday, Beijing Green Vessel Co Ltd would have paid the contractual purchase price of US$1,732,796.40. This would have given a joint venture profit of US$423,686.22*". He explained that because of the delay the sale price paid was reduced, additional expenses were incurred and the escrow fund had to be established with the result that *"The profit of US$423,686.22 which would have been available for distribution diminished to US$49,565.39*". Thus Mr Holmes was able to submit that the claim is candidly described by Mr Zhong as a loss of profit.

141. In response to this, Ease Faith firstly dispute that the claim is properly characterised as one for loss of profit, and secondly they say that clause 18.3 excludes loss of profit only if it is indirect, and argue that their claim is for direct loss.

142. In construing the expression "*loss of profit"* in clause 18(3), it seems to me significant (i) that the expression, being in an exclusion clause, is to be interpreted contra proferentem, that is to say, without imposing a strained meaning upon the words, the clause is to be interpreted in the event of ambiguity restrictively against the party seeking to rely upon it on the facts of the particular case; (ii) that clause 18(3) is a clause in a standard form agreement that is directed to excluding liability of both the hirer and the tugowner; and (iii) that the clause excludes liability for loss of use and loss of production as well as liability for loss of profit, and that the expression "*loss of profit*" is to be interpreted as being eiusdem generis.

143. I interpret the term "*loss of profit"* as referring to loss of profits generated by future use of the tug or the tow by the towowner or the hirer as the case might be. It seems to be that these losses are similar in kind to loss of use or loss of production and are naturally connoted by the phrase "*loss of profit*" when read in its context.

144. I recognise, of course, that the losses incurred by Ease Faith were such as to reduce the profits of the company generally and more specifically the profits of the particular venture in which the company was engaged. That is reflected in Mr Zhong's evidence. However, there are few, if any, losses suffered by a commercial concern that could not be described as amounting to or producing a reduction in the profits, or loss of profit, in this very general sense, for the concern as a whole and for a particular venture or part of the business. The term "loss of profit" in clause 18(3) was, in my judgment, intended to have a more restricted meaning, and is directed to protecting the tugowner from a claim for loss of productive use of the tow and the hirer from a claim of loss of productive use of the tug.

145. I am encouraged in this view by the decision of Clarke J in ***Tsavliris v OSA Marine Ltd,*** 19 January 1996. The facts of this case are not exactly similar, but it does seem to me that here too the loss, in the words of Clarke J, "i*s more akin to a diminution of price than a loss of profit"*.

146. If this is so, it is not necessary for Ease Faith to rely upon their alternative argument that clause 18(3) excludes liability only for indirect, and not direct, loss of profit. However, I should briefly express my view of this argument.

Clarke J in the ***Tsavliris case*** decided that clause 18(3) is directed only to indirect loss: this is indicated by the expression "*any other indirect or consequential damage*", and I respectfully agree that the inclusion of the word "other" must be recognised when interpreting clause 18(3) and its impact is to confine the clause to excluding liability to indirect loss of profit.

147. Mr Holmes submitted that the decision of Clarke J was wrong, or at least that his reasoning was wrong, in interpreting clause 18(3) as applying only to indirect losses, or only to losses falling within the "*second limb*" of ***Hadley v Baxendale,*** (1854) 9 Ex 341. His criticisms reflect those in Rainey on Tug and Tow, 2nd Ed, (2002) pp.138-141. First, it is said that so to restrict the effect of clause 18(3) excessively limits a knock-for-knock regime for which the towcon provides. Secondly, it is said that if the clause excludes liability only for consequential losses, the specific exclusion of liability for loss of profit, loss of use and loss of production is otiose. Thirdly, it is said that the impact of the words "*any other*" is that loss of profits and the other identified types of loss are to be regarded for the purpose of interpretation of the clause as indirect or consequential losses. I do not find these criticisms convincing: I do not consider that the natural meaning of the words "*any other*" is that all loss of profit, use or production is intended to be regarded as an indirect loss. I prefer the view that the impact of the words "*any other*" is that which Clarke J explained and that clause 18(3) is not to be interpreted as covering direct losses of any kind.

148. Mr Holmes also referred to the decision of Rix J in ***BHP Petroleum v British Steel,*** [1999] 2 Ll L R 583, in which, in the context of a contract for the supply of steel for a pipeline, he considered the effect of a clause which excluded liability for "*loss of production, loss of profits, loss of business or any other indirect losses or consequential damages*", and referred to what he called the conundrum caused by the inclusion of the word "other". Rix J regarded this as a conundrum because there is authority that "*loss of profits*" is prima facie an example of direct loss and loss of production and loss of business are merely variations on that theme. In particular Mr Holmes relied upon the following passage (at p.600): *"In my judgment the best solution is to construe the clause as though it read "for loss of production, loss of profits, loss of business or indirect losses or consequential damages of any other kind" and accept that the parties may have been in error to permit the inference that the former phrases are examples of indirect or consequential loss. At least in that way, each of the phrases is given its authoritative meaning, which is what the parties must be supposed to have given their closest attention to. If, however, only production, profit, or business which is within the second limb of* ***Hadley v Baxendale*** *is intended to be referred to, then everything in the clause other than "indirect losses or consequential damages" become redundant and the previous phrases become dangerously misleading and potentially valueless".*

149. For my part, I do not find it easy to attribute to the parties the error that Rix J supposes and, in effect, to deprive the word "other" of any real force. It is true that loss of profits is capable of being a direct loss, but it need not be. For my part I do not find it remarkable that parties seeking to exclude all indirect loss but being particularly concerned about indirect loss of profit should agree upon provision that makes specific reference to loss of profits. If it were necessary for my decision to determine this point, I should respectfully prefer the approach of Clarke J to that of Rix J. However, since I do not regard Ease Faith's claim as one for loss of profit within the meaning of clause 18(3), I do not need to put my decision on this basis.

150. In my judgment, clause 18(3) does not preclude Ease Faith from recovering damages for any part of their claim.

Conclusion on Ease Faith's claim

151. I therefore conclude that Ease Faith's claim against Leonis in respect of pilot and escort charges and in respect of the reduced price paid for the "Kent Reliant" should succeed. I shall invite further submissions about the order that I should make in light of this conclusion, including further submissions about their claim, characterised as one for "interest", because of the delay in payment for the vessel and about repayment of the monies paid into the escrow account. I record that Ease Faith acknowledge that there is to be brought into account their obligation to pay interest in the sum of US$505.45 in respect of late payment of hire.

Was it a term of the head towcon that the tug would proceed with all reasonable dispatch?

152. The head towcon did not contain any express provision about the speed with which the tug should proceed. It is Leonis' contention that Cloudfree were obliged to complete the towing operation with all reasonable dispatch: they argue

i) That this obligation arises from the provision in the Head Towcon that Cloudfree should proceed by the "direct safe customary route".

ii) Alternatively, that an obligation to proceed with all reasonable dispatch is to be implied into the Head Towcon.

I accept the latter submission, and consider that such a term is necessary in order to give business efficacy to the parties' contract. In my judgment, the implication of the term does not depend upon the provision in the contract about the route that should be taken. In the case of charterparties, it is well established that, in the absence of a relevant express term, "*The shipowner impliedly undertakes that his vessel …shall proceed upon and complete the voyage agreed upon, with all reasonable dispatch"* (see Scrutton on Charterparties, 20th Ed (1996) p.103, article 52) and, in my judgment, a comparable term is to be implied into the head towcon. Miss Jones also cites Rainey on The Law of Tug and Tow, 2nd Ed, at p.118 in which it is said that deviation, "*consists either of the departure of the vessel, here the tug with the tow under towage by her, from the usual and customary course of the contractual voyage or of the prosecution of the contract voyage by the vessel without exercising all reasonable despatch, for example by slow steaming or by having idle periods whilst on passage".*

153. Mr Holmes does not, I think, strongly dispute that in the absence of any relevant express term it is to be implied that Cloudfree undertook that the tug would proceed with all reasonable dispatch, and the real issue between the parties is what is reasonable speed in the context of this towcon.

Did the tow proceed with all reasonable dispatch?

154. Leonis' complaint, reflecting those of Ease Faith, is focused upon the delay in February, the delay in April and the fact that the tug used one engine for parts of the voyage. Cloudfree accept that the delay in February was not justified under the terms of the head towcon, but they argue that Leonis are debarred by an estoppel by convention from complaining about it. For reasons that I shall explain later in this judgment, I reject that argument.

155. The question whether Cloudfree were justified in waiting outside Chinese territorial waters depends, for the reasons that I have explained, upon whether Cloudfree were entitled to exercise a lien over the "Kent Reliant" under clause 21. I have rejected Cloudfree's complaint that the "Kent Reliant" was not in light ballast condition, and so Cloudfree have no claim for an "excess weight fee". Their claim for "sea demurrage" depends upon their submission that Leonis are debarred by an estoppel by convention from disputing their claim, and, as I shall explain, I reject Cloudfree's argument about that. The question, therefore, is whether Cloudfree were entitled to exercise a lien in respect of the final instalment of hire.

156. The final instalment of hire under the head towcon was to be paid "prior arrival Shanghai Pilot Station". In fact it was paid on 27 April 2004 and Cloudfree received notification of the payment on 28 April 2004. Even if they were entitled to exercise a lien before payment of the hire, and even if they could not be said to be in breach of an obligation to prosecute the voyage with reasonable dispatch until they learned on 28 April 2004 that the last instalment of hire had been paid, thereafter the delay cannot be justified on the basis of a lien. If they had then prosecuted the voyage with reasonable dispatch and ordered the tug to proceed to the pilot station, she would have picked up the pilot, as had been arranged by Ease Faith, on 29 April 2004 and the "Kent Reliant" would have been delivered before the end of April 2004. This conclusion is demonstrated by the fact that, the tug having picked up the pilot on 1 May 2004, the "Kent Reliant" was delivered on 2 May 2004.

157. It is not necessary, therefore, to decide whether Cloudfree were entitled to exercise a lien until the last instalment of hire was paid, so that the delay between 24 April and 27 or 28 April 2004 was justified. Leonis pointed out that, although, as I conclude, the tug arrived off Shanghai on 24 April 2004, Leonis were informed of this only on 26 April 2004, and the last instalment was paid the next day. I see force in a complaint that Cloudfree were not prosecuting the voyage with reasonable dispatch if they failed to claim the instalment of hire or even to inform Leonis that the tug was in a position to proceed to the pilot station. However, this was not explored in argument, and I need not decide the point.

158. In support of her argument that Cloudfree were in breach of their obligation to proceed with all reasonable dispatch, Miss Jones argued that there is no significant difference between an obligation to proceed at utmost dispatch and an obligation to proceed with all reasonable dispatch, and so that if Leonis were in breach of the sub-towcon by proceeding on only one engine, likewise Cloudfree were in breach of their obligations to Leonis under the head towcon. In support of this contention she relied upon the references to "*reasonable speed*" and to "*reasonable dispatch*" in the speech of Visc Cave and the judgment of Scrutton LJ in ***Sukuzi & Co Ltd v T Benyon & Co Ltd*** (cit sup) to which I have referred. I do not find this argument compelling. What is reasonable in the context of a contract providing for utmost dispatch is not necessarily the same as what is reasonable in the absence of that stipulation.

159. Miss Jones also relied upon the fact that the head towcon provided that the tug should have a certified bollard pull of 40 tons and a horsepower of *"2 x 1,500 bhp"*. Like Mr Jacobs, she pointed out that the more powerful the tug, the more expensive the hire. In order to achieve the certified bollard pull, the tug had to use both the engines that she was stated to have, and Miss Jones argued that in the context of a towcon containing such provisions, progress at reasonable speed or all reasonable dispatch is a speed that can reasonably be achieved if both engines are routinely used. As I have explained, that would in this case be a speed of at least 6 knots. I accept that submission.

160. Mr Holmes argued that it was not a breach of any implied obligation under the head towcon for the tug to proceed on only one engine as she did. He submitted that, given that the head towcon was an agreement whereby the tow was to be undertaken for a price that included the cost of bunkers, no term should be implied into it that prevented Cloudfree from economising on bunkers by running on one engine. I am unable to accept that argument, even assuming that the tug was operating on one engine for substantial periods in order to economise on fuel (and there is no satisfactory evidence about this). I consider that this fails to recognise that the hirer is likely to have paid more for a more powerful tug. Of course, as Mr Holmes pointed out, it might be that in severe weather conditions the full power of the tug would be necessary in order to control the tow, and the certified bollard pull bears upon safety and insurance considerations, but I am unable to accept that therefore it has no affect on what speed the tug is to achieve in order fulfil an obligation to proceed with all reasonable dispatch.

161. Mr. Holmes also relied upon the fact that the Salvage Association Guidance for Surveyors contains notes to formulae for the approximation of power requirements for towing that suggest that a speed of 100 nautical miles per day or just under 4.2 knots is "*satisfactory*", and that if the speed is over 5 knots questions of wave making resistance arise. The notes are not directed to what is a reasonable speed to be achieved under contracts and I am not persuaded that they have any bearing upon the issues that I have to decide.

162. I conclude that, because the tug proceeded at a reduced speed as a result of using only one engine from when she departed Balboa until the order to slow-stream was given on 7 February 2004 and again from 23 March until at least 10 April 2004, Cloudfree were in breach of an implied term of the head towcon.

Estoppel by Convention

163. Cloudfree contend that Leonis are precluded from disputing that they were entitled to have the convoy stop or slow steam from 7 February 2004 until payment of the outstanding hire, and that therefore they are not entitled to complain about this period of delay, or to dispute Cloudfree's claim for payment for this period. They argue that the facts give rise to an estoppel by convention. Such an estoppel will arise where the parties to a transaction act on an assumed factual or legal basis, that assumption either being shared by the parties or being made by one and acquiesced in by the other. If there is such an assumption, then a party is not permitted to deny what was assumed if it would be unjust to allow him to do so: ***Republic of India v India Steamship Co (No 2),*** [1998] AC 878, 913 per Lord Steyn.

164. Captain Krishna explained why he sent the communications that he did on and after 5 February 2004. He said that it became clear to him that Cloudfree had made up their mind not to continue with the voyage because the instalment of hire had not been paid and that he would not be able to dissuade them from this course. He was anxious that the claim in respect of the displacement of the "Kent Reliant" should not aggravate the dispute. He was therefore, he said, trying to placate Cloudfree and press Ease Faith to pay the hire due from them. I regard this evidence with some scepticism in view of the fact that he did not let Cloudfree know that Leonis had received part of the instalment of hire, but I do not need to reach a concluded view about Leonis' intentions. Captain Krishna's reasons for sending his e-mails are irrelevant to the question whether there is an estoppel by convention.

165. Captain Aliev's evidence was that, after Captain Krishna sent his e-mails of 6 February 2004, his clear impression was that he and Captain Krishna had a common understanding that Cloudfree had the right to stop the convoy because of Leonis' failure to pay hire and the right to charge for any resultant delay, and that he proceeded on that basis. He gave the order to stop only on 7 February 2004, after these e-mails had been sent. However, Captain Aliev did not state that, but for what Captain Krishna wrote in his e-mails, Cloudfree would not have ordered the convoy to stop. There is no evidence that Cloudfree were influenced in any way by Leonis' apparent understanding of what they were entitled to do or what they should do, and no evidence that Cloudfree would have acted differently had Leonis adopted a different position.

166. Cloudfree's pleaded case is that *"there were conventional understandings and/or assumptions among Cloudfree and Leonis … that Cloudfree were entitled to stop the Tug and Tow at sea pending payment of sums outstanding under the Head Towcon and to recover Delay Payments for delay to the towage during such stoppage or slow steaming"*. To establish this contention, Cloudfree must show that there were such understandings or assumptions evinced in communications between Cloudfree and Leonis: the internal understanding of the parties about their rights and obligations is not in point, nor do their communications with third parties (including Leonis' e-mails to NWSS, since there is no evidence that NWSS conveyed any relevant communications to Rimsco and Cloudfree) assist Cloudfree. In this case Cloudfree and Leonis both accept that all their relevant exchanges were written, and neither relies upon any oral exchanges.

167. The only communications before the order to stop was given on 7 February 2004 upon which Cloudfree rely are Cloudfree's e-mail of 5 February 2004 and Leonis' response of 6 February 2004. Leonis submit that those communications do not show any common understanding or assumption between them and Cloudfree. Cloudfree asserted on 5 February 2004 that they were entitled under clause 21 of part II of the Head Towcon to stop towage until payment was received, and had put forward a claim for "*sea demurrage*". Leonis' response was to dispute Cloudfree's understanding of the towcon but to acknowledge that under clause 16 Cloudfree were "*free to stop and charge sea demurrage"*. Miss Jones pointed out that clause 16 did not allow Cloudfree to stop them temporarily as they proposed, but allowed them to abandon the tow altogether, leaving the hirer to repossess her.

168. Mr Holmes submitted that it is irrelevant that Cloudfree based their understanding of the towcon on clause 21 whereas Leonis considered that clause 16 defined Cloudfree's rights, arguing that what matters is the parties' understanding of the position under the towcon to be, and not how they reached that understanding. I accept this submission as far as it goes, but it does not engage with Leonis' point. It is not that Cloudfree were relying upon different contractual provisions for their understanding that Cloudfree were entitled to halt the tow and charge for the delay, but that the nature of the right that Cloudfree asserted, a right temporarily to stop the tow, was quite different from that which Leonis acknowledged, a right to elect to abandon the tow once and for all. I accept Miss Jones' submission that the exchanges of 5 and 6 February 2004 do not show a common understanding or a common assumption, nor that Leonis were acquiescing in Cloudfree's understanding of the position.

169. Accordingly, Cloudfree's case that there was an estoppel by convention depends upon the exchanges after the order to stop had been given. (It is not entirely clear whether any of the communications on 7 February 2004 to which I have referred were sent before the order was given, but Cloudfree do not plead, and Mr Holmes does not argue, that they are relevant to Cloudfree's case that there was an estoppel by convention.) The first communication after the order upon which Cloudfree rely is Captain Krishna's e-mail to them of 10 February 2004. In it,

i) he stated that pressure could be put upon Ease Faith only by *"stopping the convoy and charging sea demurrage";*

ii) he requested Cloudfree to instruct the Master to "*hold on to the tow and drift with the tow until receipt of funds";*

iii) he said that Leonis would raise an invoice for sea demurrage; and

iv) he contemplated again stopping the convoy if the sea demurrage was not paid within seven days.

The e-mail did not indicate a view whether this conduct was in accordance with the towcons, and was not, on its face, concerned with the parties' contractual rights. It did not directly express a view about the matter that, as Cloudfree plead their case, was then the subject of the alleged conventional understandings and assumptions, namely that Cloudfree were *entitled* under the head towcon to stop the tug and tow pending payment of the outstanding sums and to charge "*sea demurrage*". However, in my judgment, in this e-mail Leonis acquiesced in Cloudfree's claim that they were so entitled. This leads to the question whether it is unjust to allow Leonis to deny this.

170. The following considerations seem to me particularly relevant to this question:

i) Cloudfree were not, as I conclude, influenced by Leonis' views about what they were entitled to do or what they should do when they took their decision to delay the convoy and to make a claim for sea demurrage.

ii) Cloudfree took that decision before Leonis sent the e-mail of 10 February 2004 and so before they had acquiesced in Cloudfree's views about their rights under the head towcon.

iii) Despite Leonis' request on 13 February 2004 that the convoy should resume its progress, Cloudfree insisted upon waiting until 18 February 2004 when they had received into their bank the instalment of hire. They did so although Captain Krishna told Captain Aliev that Regulus and Leonis could not "support *your stand since it does not comply with Towcon Contract*".

171. Mr Holmes accepted that, in order to demonstrate that it would be unjust or unconscionable to allow Leonis to resile from the common assumption (or the assumption in which Leonis acquiesced), they must show that Cloudfree acted on the basis that the assumption was correct: see Wilken & Villiers, The Law of Waiver, Variation and Estoppel, para 10.10, p.228. It is not necessary for Cloudfree to show that they have suffered "detriment" by acting in reliance on the position that Leonis adopted, but generally, I think, "It is necessary … to establish that [the person asserting an estoppel by convention] was induced to act in reliance on the shared convention so that it would be unjust to permit [the other party] to depart from it": Snell's Equity, 31st Ed (2005) para 10-06. I do not say that this is an invariable rule limiting what view the court can properly take about what might be unjust or unconscionable on the facts of the particular case. However, I do conclude that it would be neither unjust nor unconscionable to allow Leonis to dispute Cloudfree's claim that they were entitled to delay the convoy in February 2004 and to claim payment for the delay when the position adopted by Leonis in their communication of 10 February 2004, and indeed before and after that e-mail, did not, as I conclude, in any way affect or influence the course adopted by Cloudfree.

172. I therefore conclude that Leonis are entitled to complain that the delay between 7 and 18 February 2004 was in breach of the towcon. I also reject Cloudfree's claim for sea demurrage.

173. I should mention that Leonis also dispute that Cloudfree would be entitled to deploy an estoppel to assert a positive claim for *"sea demurrage*" or payment in respect of the delay. I see force in their argument, but the question when an estoppel can operate only as a shield and not as a sword is not straightforward, particularly in respect of estoppel by convention. Since the question does not arise in view of my other conclusions, I do not express any concluded view about this.

Was Leonis' liability to Ease Faith caused by Cloudfree's breach of the head towcon?

174. I therefore conclude that Cloudfree were in breach of the head towcon and that it was as a result that Leonis were in breach of their obligations to Ease Faith under the sub-towcon and incurred their liability to Ease Faith. I have rejected Cloudfree's argument that an estoppel by convention precludes Leonis from complaining about the delay between 7 and 18 February 2004, but even if I had not done so, Cloudfree's breaches in respect of the delay in April 2004 and because they proceeded on one engine are each an effective cause of Leonis' incurring their liability to Ease Faith, and so my conclusion about the estoppel by convention in the event does not affect my decision about Cloudfree being liable to Leonis in respect of their own liability to Ease Faith. Indeed, in order to establish this, it suffices for Leonis to succeed in only one of the three aspects of their complaint, that is to say to succeed in respect of the February delay, or of the April delay, or of the use of one engine.

Clause 18.3 of the head towcon

175. Mr Holmes did not argue that Cloudfree could exclude their liability under clause 18.3 of the head towcon if Leonis did not escape liability under the corresponding clause in the sub-towcon.

Conclusion

176. I therefore conclude that Ease Faith's claim for damages against Leonis succeeds, and that Leonis are entitled to recover against Cloudfree in respect of their liability to Ease Faith, subject to bringing into account the interest to which they are entitled in respect of the late payment of hire, Cloudfree's claims fail. I shall invite submissions about the order that I should make to give effect to this judgment.

Nigel Jacobs and Paul Toms (instructed by Brookes & Co) for the Claimant
Susannah Jones (instructed by Hextalls LLP) for the Defendant/Second Part 20 Claimant
Michael Holmes (instructed by Clifford Chance LLP) for the Part 20 Defendant/Second Part 20 Claimant