IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC(I) 14

Suit No 6 of 2021

Between

PT Adidaya Energy Mandiri

… *Plaintiff*

And

MS First Capital Insurance Ltd

… *Defendant*

JUDGMENT

Insurance — Marine Insurance
Contract — Contractual terms
Evidence — Admissibility of evidence — Hearsay

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PT Adidaya Energy Mandiri
v
MS First Capital Insurance Ltd

[2022] SGHC(I) 14

Singapore International Commercial Court — Suit No 6 of 2021
Jeremy Lionel Cooke IJ
4, 5, 6, 9, 10, 12, 13, 17, 18, 23 May 2022

31 August 2022 Judgment reserved.

Jeremy Lionel Cooke IJ:

Introduction

1 The plaintiff claims from its insurer, the defendant, the sum of US$4,700,000 as the insured value ("the Insured Value") of a Single Point Mooring Buoy "Banner Hex SPM Hex 06" ("the SPM") as a constructive total loss ("CTL") as a result of damage which occurred in collisions with the storage vessel attached to the SPM. It also claims the sum of US$2,165,528.71 as Sue and Labour charges ("S & L") for expense incurred for the purpose of averting a CTL. The defendant denies liability on a number of different grounds. It denies that the SPM was a CTL, contending:

(a) that the reasonable costs of repair that would be incurred by a prudent uninsured do not exceed the Insured Value and that the

plaintiff had in fact effected permanent repairs to the SPM at a cost much less than the Insured Value;

(b) that the plaintiff inordinately delayed in tendering a Notice of Abandonment ("NOA"), waived its right of abandonment and elected to treat the damage as a partial loss, by continuing to operate the SPM, by deriving revenue from it and by selling the SPM at a gross undervalue;

(c) that the defendant breached express warranties of the cover ("the Warranties");

(d) that the plaintiff breached the Claims Notification Clause which was a condition precedent to liability under the insurance;

(e) that the insurance does not cover S & L;

(f) that the plaintiff did not in fact incur the expenses claimed as S & L or was under no legal liability to incur them; and

(g) that the majority of the expenses claimed as S & L were not reasonably incurred for the purpose of averting or mitigating an insured loss.

2 It was common ground between the parties that the following damage was found to the SPM, for which there were many photographs, but the experts did not agree that all had been caused by the collisions:

(a) one fracture in each of the side shell plating of Compartments Nos 4 and 5 ("the Compartments");

(b) the loss of skirts (pipe fender and attached plating) adjacent to Compartment Nos 1, 4, 5 and 6;

(c) sacrificial anodes lost together with the skirts and others lost from the side shell;

(d) a boat landing approximately below the level of the bolted flange connection and extension beam located above the mooring bridle were sheared off;

(e) one mooring hawser which parted after apparently being abraded whilst entangled and the first off string of floating hose was abraded; and

(f) two pipe chutes and one access ladder located on the topsides were abraded.

3 Due to the side shell fractures, the Compartments were flooded and in such condition, the relevant experts agreed that the SPM was at risk of sinking. Furthermore, the loss of buoyancy and entrained water inside the Compartments adversely affected the stability of the SPM.

4 The major issue in relation to the dispute as to CTL centred on the question whether or not it was reasonable or necessary for the SPM's skirting to be renewed which involved either the SPM being transported to a yard for work to be done, or heavy lift equipment to be utilised to take the SPM out of the water for such repairs/renewal to be effected. The cost of transporting the SPM or lifting it out of the water was substantial and made all the difference to the scale of expenditure in the context of the Insured Value of the SPM.

5 The plaintiff claimed four categories of S & L, as follows:

(a) Category 1: costs incurred in relation and/or incidental to the replacement of the mooring hawser, which was necessary as the previous mooring hawser rope fouled against the body bollards preventing the turntable from rotating further to the weather, amounting to US$102,997.57;

(b) Category 2: costs incurred in relation and/or incidental to the inspection and temporary leak repairs of the Compartments amounting to US$109,719.16;

(c) Category 3: Costs incurred in relation and/or incidental to conducting (i) the Remotely Operated Vehicle ("ROV") Mooring Chain Survey; and (ii) the ROV Survey for the SPM Riser and the Pipe Line End Manifold ("PLEM") amounting to US$308,689.56; and

(d) Category 4: costs incurred in relation and/or incidental to conducting the permanent repairs on the Compartments as they remained flooded in spite of temporary repairs which included installing and welding fabricating box plates on the damages hull section of the SPM, amounting to US$1,365,974.42.

6 A number of subsidiary issues arose on the pleadings which were either abandoned or not strenuously argued at trial. The defendant originally contended that the insurance did not cover CTL but only actual total loss. That defence was not pursued in its written opening submissions and was abandoned on the first day of the hearing. The plaintiff contended that its broker ("LCH"), in the person of Mr Ng Choon Kiat ("Mr Ng"), was the agent of the insurer and that the terms of the insurance were to be found in the LCH Cover Note dated 16 April 2018 ("the Cover Note") alone. It also sought

rectification of the policy, which was issued on 26 October 2018 ("the Policy"), some three months or more after the incidents in which the damage to the SPM occurred. Mr Peter Arista Pramana ("Mr Pramana"), a major shareholder of the plaintiff who dealt with LCH, agreed in his evidence that LCH had negotiated the terms of the insurance for the plaintiff with the defendant, thus effectively accepting that LCH was the agent of the plaintiff and that the terms of the Policy were binding on it. It was never clear, in any event how these arguments could advance the plaintiff's position since the Cover Note of 16 April 2018 specifically stated: "As per Machinery & Equipment All Risks Policy (Marine & Subsea Equipment Policy Wordings)", thereby incorporating the very warranties found in the Policy which were said to be breached and also the Claims Notification Clause relied on by the defendant.

The agreement to insure

7 As the evidence emerged, there was no basis available to the plaintiff upon which to pursue a claim for rectification of the Policy. In addition to the evidence of Mr Pramana, the documents also made it plain that the broker, in accordance with conventional practice, acted as agent of the insured plaintiff in negotiating the terms of the insurance with the underwriter, Mr Ramaswamy Athappan ("Mr Athappan" or "the Underwriter"), and secured his subscription to Slip No HMH 180152/001 dated 14 April 2018 ("the Slip"), upon which the Cover Note was based. There was no material difference between the terms of the Slip and the Cover Note and the dispute as to where the terms of the insurance were to be found was therefore arid. It is nonetheless clear, on the documents and the evidence of both the broker and the underwriter, that the terms of the insurance were originally to be found in the Slip dated 14 April 2018 which expressly incorporated the Machinery &

Equipment All Risks Policy (Marine & Subsea Equipment Policy Wordings), which was then superseded by the Policy issued on 26 October 2018 which properly reflected those terms.

8 There is no room for any suggestion that the Policy should be rectified to delete reference to cll 1, 2, 3 and 5–10 of the Warranties on the basis that they were inapplicable to the intended cover. The suggestion that was made by the plaintiff that there was a common intention to insure the SPM, that the plaintiff erroneously believed that the Policy gave effect to that intention, that the defendant knew that this was not the case by reason of the existence of these Warranties and failed to bring that to the attention of Mr Ng was not, and cannot be, supported on the evidence. There is no evidence of any mistake as to the terms of cover agreed between the professional broker and underwriter and Mr Ng's witness statement does not even hint at the existence of any such mistake, whilst Mr Athappan's evidence is that no mistake was made in the terms of the wording which was agreed between him and Mr Ng at a series of meetings. It cannot be said that there was anything remotely akin to unconscionable conduct on Mr Athappan's part which would justify the grant of the equitable remedy of rectification in the course of a standard negotiation of terms between a broker and underwriter.

9 Mr Ng produced a draft Slip to the Underwriter, which he, Mr Ng, had drafted with a Precedent Policy Schedule consisting of an earlier version of the Marine and Subsea Equipment Policy wording, which he had obtained from other LCH placings and which was materially the same as that which was ultimately incorporated in the signed Slip and upon which LCH had previously placed risks with the Underwriter. He then negotiated the terms of the cover in the usual way between broker and underwriter. Mr Ng produced further slips based upon his discussions with Mr Athappan, which he drafted

and which Mr Athappan altered and initialled which led to the final form of the Slip produced by Mr Ng to which the defendant subscribed. Mr Athappan did not know of any mistake made in the terms of the policy, which, because it was designed to cover various types of equipment, would necessarily be likely to include some terms which would apply to some types of machinery or sub-sea equipment but not to others.

10 It is clear that the parties, in the persons of Mr Ng and Mr Athappan, intended to, and did, embody their entire agreement in the written contract documents, namely the slip and incorporated terms, and then in the Policy which reflected those terms. The terms of the Machinery & Equipment All Risks Policy (Marine & Subsea Equipment Policy Wordings) were known to both of them and were the basis upon which the insurance was placed by LCH with the Underwriter. There was nothing "hidden" or covert about any of the terms which were first advanced by Mr Ng when seeking cover from Mr Athappan and there is no basis for any argument that any of them was not effectively incorporated into the Policy. Any reliance on the decision in *Blu-Sky Solution Ltd v Be Caring Ltd* [2021] EWHC 2619 at [111] is misplaced. The contract is complete on its face. No extrinsic evidence is therefore admissible to contradict, vary, add to, or subtract from its terms by reason of sections 93–94 of the Evidence Act 1893 (2020 Rev Ed) ("the EA").

11 In circumstances where the terms of the insurance were the subject of negotiation between a professional broker and an underwriter and were contained in documents agreed between them, there is no room for admitting evidence of negotiation, let alone subjective intention, as the parties sought to do in aid of their arguments on construction of the Policy. Whether S & L expenses are reimbursable under the cover and whether the Warranties and condition precedent relied on by the defendant are applicable are questions of

law and construction of the policy wording, having due regard to the factual background known to both the broker and the underwriter at the time that the contract of insurance was concluded. Issues relating to the NOA, waiver and election raise issues of law and fact, whilst the issue of the CTL depends, as both parties agreed, on what a prudent uninsured owner, in the position of the plaintiff, would have done in deciding whether or not to repair the SPM and where and how any such repair should be carried out.

The terms of the insurance

12 The Slip dated 14 April 2018, under the LCH header, named the plaintiff as the "Assured":

> … as owners and/or Sea Trust Marine Pte Ltd and/or PT Cakra Manunggal Semesta [another company owned and controlled by Mr Pramana] and/or PT Bahtera Niaga Internasional [another company owned by Mr Pramana] and/or Managers and/or Operators and/or Associated and/or Affiliated and/or Subsidiary companies and/or Charterers and/or Sub-Charterers and/or Mortgagees for their respective rights and interests.

The "Interests" were described as "Marine & Subsea Equipment Insurance" and the "Description" section of the Slip stated: "[The SPM]. Including additional fittings, connections, hoses as per the Assureds contractual responsibilities to be advised to insurers and held covered subject to additional terms if required to be agreed". The Insured Value was US$4,700,000 and the General Conditions included a waiver of rights of subjugation against any subsidiary, affiliated or interrelated company of the Assured as well as a deferred premium clause which referred to constructive total loss as well as actual total loss. The "Main Conditions" were stated to be:

> As per Machinery & Equipment All Risks Policy (Marine & Subsea Equipment Policy Wordings), **but amended to insure for total loss only on physical damage to property**,

> insuring against fire or theft or accidental all damage to the property arising from any external cause not otherwise excluded under the policy.
>
> [emphasis in original]

13 The "Clause Wordings" of the Slip, also under the LCH header, included a law and jurisdiction clause in favour of Singapore and a series of other specific clause wordings and "all other terms and conditions unchanged".

14 The terms of the LCH Cover Note issued on 16 April 2018 were identical to those of the Slip, with the express reference to Machinery & Equipment All Risks Policy (Marine & Subsea Equipment Policy Wordings) **but amended to insure for total loss only on physical damage to property**" [emphasis in original].

15 When the Policy came to be issued on 26 October 2018, the type of Policy was described as "Marine & Subsea Equipment Insurance Policy (Total loss only on physical damage to property)". The "Interest Insured" was the "Single point mooring buoy banner HEX SPM Hex 06".

16 In the Policy Definitions, the following appeared:

> **Conditions Precedent**
>
> Those clauses within the Policy expressly stated to be Conditions Precedent to Underwriters' liability. A Condition Precedent is a clause where compliance is strictly required in all respects. If you fail to comply with a Condition Precedent, this may prevent you from making a claim under the Policy or may discharge Underwriters' liability under the Policy.
>
> **Insured Equipment**
>
> The equipment identified as covered under the Policy in Appendix 1 in the Policy Schedule and any equipment added to the cover under this Policy by way of endorsement.

…

Operational Activities

Activities when the Insured Equipment is being [utilised] on or under the surface of the water (to include any topside element of the Insured Equipment which may remain on board the Support Vessel) as part of the usual activities or operations for which the Insured Equipment is designed.

…

Warranties

Those clauses referred to in the Policy or Policy Schedule as Warranties. Warranties are clauses setting out information provided by the Assured as to the current or future state of affairs, requiring steps to be taken or not taken by the Assured and based upon which Underwriters have chosen to underwrite this risk. If you breach a Warranty in this Policy, Underwriters may have no liability in respect of any loss which happens after the breach has occurred but before it is remedied. Underwriters may elect to waive the breach but such waiver must be expressly communicated to you in writing.

17 The Policy also included the following:

Cover

Underwriters hereby agree, in consideration of the payment to the Underwriters by or on the half of the Assured of the premium specified in the Schedule, to insure against loss, damage, liability or expense in the manner hereinafter provided.

Section 1: Operational Activities

This Policy covers all risk of actual physical loss of or damage to the Insured Equipment whilst engaged in Operational Activities.

…

POLICY WARRANTIES AND CONDITIONS APPLICABLE TO SECTIONS 1 AND 2

Warranties applicable to Section 1 (Operational Activities)

The following are Warranties:

1 The Insured Equipment is only to be operated by and under the supervision of suitably trained and authorised personnel.

…

8 Suitable precautions and preservation/maintenance measures to be adopted when storing, handling, transporting and operating Insured Equipment.

…

POLICY GENERAL CONDITIONS APPLICABLE TO ALL SECTIONS

…

Law and Jurisdiction

It is hereby understood and agreed that this Policy shall be governed by and construed in accordance with the look Laws of Singapore. Each party agrees to submit to the exclusive jurisdiction of any competent court within Singapore.

Marine Insurance Act Clause

Notwithstanding the fact that some or all of the items covered by this Policy may not be subject to the Marine Insurance Act 1906 it is expressly agreed and declared that all of the terms, conditions, warranties and other matters contained within the Marine Insurance Act 1906 (as amended by the Insurance Act 2015) shall still be applicable to this Policy.

….

GENERAL CLAIMS CONDITIONS APPLICABLE TO ALL SECTIONS

Important

Procedure in the event of loss or damage for which Underwriters may be liable.

Underwriters will, in addition to any loss recoverable under this Policy, reimburse the Assured for any charge properly and reasonably incurred in pursuance of the duties contained within these General Claims Conditions applicable to all Sections.

Claims Notification Clause

It is a strict Condition Precedent to Underwriters' liability under this Policy (or otherwise) that in the event of the Assured becoming aware of any incident giving rise to a claim

> which may be covered under this Policy that Underwriters be given written notification of such circumstances within thirty days. …
>
> It is hereby agreed by both parties that as claims notification is a matter of fundamental importance to Underwriters that compliance with the time limits set out within this Claims Notification Clause are strict Conditions Precedent to Underwriters' liability to indemnify the Assured under this Policy. Should either time period, whether this be the initial notification or subsequent notification with provision of supporting documents, not be complied with then Underwriters will not be liable under this Policy or otherwise.
>
> …
>
> **Liability of Carriers, Bailees or Other Third Parties**
>
> It is the duty of the Assured and their agents, in all cases, the take such measures as may be reasonable for the purpose of averting or minimising a loss and to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised. …

18 In the Guidance Notes for Operational Activities, it was stated that the terms of cl 1 of the Warranties (*inter alia*) should be posted at each Supervisor's station and/or be incorporated in the Insurance section of the relevant Operations Manual. Nevertheless, the requirements were said not to be exhaustive and did not replace the need to operate to best practice Industry Standards at all times.

The essential facts underlying the claim

19 At the material time, the Yetagun Gas Field, where the SPM was situated, was operated by Petronas Carigali Myanmar (Hong Kong) Limited ("PCML"). PCML contracted with ENRA SPM Sdn Bhd ("ESPM"), a joint venture between SPM Terminals Pty Ltd ("SPMT") (a company related to the plaintiff through a common shareholder, Mr Kee Ju Tan ("Mr Kee")) and a company publicly listed on the Malaysian stock exchange, ENRA Group Berhad ("ENRA Group"), for the provision of a package consisting of a

condensate storage tanker with a proper mooring system, a mooring installation and for storage system maintenance for operation in the Yetagun Gas Field.

20 In order to fulfil that obligation, ESPM chartered an oil tanker from its wholly owned subsidiary ENRA SPM Labuan Ltd ("ESPML") on bareboat terms and engaged Sea Trust Marine Pte Ltd ("Sea Trust Marine"), a company which is effectively owned by PT Cakra Manunggal Semesta ("PTCMS") of which Mr Pramana is also a director, to operate and maintain the mooring system for PCML. ESPML, in turn, bareboat chartered an oil tanker from PTCMS, while Sea Trust Marine engaged the plaintiff to provide the mooring services, including the SPM itself, its operation and maintenance. As appears below, Mr Pramana and Mr Kee worked closely together, with their companies, in the provision of the services required by PCML in the Yetagun Gas Field.

21 It is common ground that following collisions between the SPM and the *Bratasena*, which was acting as the storage vessel (the "FSO" or "the Vessel") attached to the SPM, the SPM was damaged and that repairs were effected to the SPM, the extent and permanence of which is in dispute. It is however accepted that the total sum actually spent on repairs by the plaintiff could not give rise to a CTL. After obtaining quotations from reputable yards for further repairs, all of which exceeded the Insured Value, the plaintiff tendered the NOA on 22 May 2019, which was rejected by the defendant on 31 May 2019. Issues arise as to the need for such repairs, whether in a shipyard (as quoted by three repairers in December 2018) or on site (as quoted by a further repairer in April 2019). On 25 June 2019, the plaintiff sold the SPM to SPMT, a company related to it through Mr Kee, a common shareholder and his wife. The sale price was US$400,000, which was agreed,

in a joint experts' memorandum, to be a considerable undervalue. It is undisputed that the plaintiff informed the defendant of its intention to make that sale, with the defendant reserving all rights and saying that the plaintiff should act as a prudent uninsured. Subject to a period or periods when repairs were being conducted to the SPM in situ, the plaintiff continued to utilise the SPM at all times until sale, collecting revenue from it until that point. Following such sale, it has continued in operation in situ, with, as it now appears from the evidence at trial, further repairs being carried out there which took place in October–November 2019.

The witnesses

22 I heard evidence from Mr Pramana, the ultimate beneficial owner of the majority of the shares in the plaintiff company, who appears, without expressly saying so in his affidavit of evidence-in-chief ("AEIC"), to have been responsible for making decisions as to repairs and sale of the SPM in conjunction with Mr Kee who not only acted as project manager for the plaintiff but was also, indirectly, a shareholder in it and the ultimate beneficial owner of SPMT, the manufacturer of the SPM and the purchaser of it from the plaintiff on 25 June 2019. Mr Pramana was also the ultimate beneficial owner of PTCMS, which, as set out above, had entered into a bareboat charter of the SPM from the plaintiff, under which it assumed responsibility for all maintenance and repair of the SPM. In practice, however, it was the plaintiff which provided a maintenance crew and charged PTCMS an additional US$4,500 per day for this on top of the bareboat charter hire of US$5,000 per day. Mr Pramana had no direct knowledge of the events surrounding the collisions between the SPM and the FSO, the *Bratasena*, which was, itself, owned by PTCMS, and which was moored to the SPM and which caused the damage leading to the claim. Nor did he ever see that damage himself.

23 I did not hear any evidence from Mr Kee who, as the project manager, gave instructions in relation to the repairs to be carried out on behalf of the plaintiff and then for further repairs on behalf of SPMT, as the buyer of the SPM of which he was the beneficial owner.

24 The plaintiff also adduced evidence from Mr Collin Law Lee Chuen ("Mr Law") who was the Supervisor of the SPM's maintenance crew ("the Maintenance Crew") but left in July 2019 to be employed by SPMT and has been involved with the SPM throughout its life. He was on board the *Bratasena* at the time of a collision between it and the SPM on 1 July 2018 which he said he felt, but did not see. He played a major role in the arrangements for the carrying out of repairs to the SPM in August/September 2018, December 2018, May 2019 and October–November 2019, taking his instructions from Mr Kee. His evidence is referred to in more detail below.

25 The plaintiff also relied on the evidence of a member of the Maintenance Crew, Mr Faris Azzam Hanny ("Mr Hanny"), who was on board the *Bratasena* at the time of two further collisions on 11 and 13 July 2018. He said he felt the contact on 11 July and on 13 July he saw the contact from his position on the bow of the FSO. He boarded the SPM on 17 July when seawater was found in two of the SPM's tank compartments causing it to tilt and opened one of the manhole covers to see the water for himself.

26 The plaintiff subpoenaed three further witnesses, the first being the broker Mr Ng, to whom I have already referred, and who provided a witness statement and testified at the trial. He gave evidence in his witness statement about the negotiation of the Slip and his own subjective intentions when drafting the wording, which was inadmissible. He accepted in cross-examination that he had negotiated on behalf of the plaintiff with

Mr Athappan. The second and third subpoenaed witnesses were, not, in the event, called by the plaintiff.

27 The defendant adduced evidence in the form of AEICs from its Manager and Head of Non-Motor Claims, Mr Zulqurnain Bin M A Salikin ("Mr Alex"), from a Senior Manager of the Marine Hull Department, Ms Govndasamy Neelamalar ("Ms Neela"), from the surveyor who inspected the damage to the Vessel and SPM on 10–11 October 2018 ("Mr Norhakim") and from the Underwriter, Mr Athappan.

(a) Ms Neela's evidence related to the sequence of e-mails detailing the placement of the risk in which Mr Ng sent copies of the various drafts and versions of the slips which had been annotated by Mr Athappan, and the issue of the Policy on the basis of the signed/initialled Slip. She also commented on the negotiations and her understanding of what was insured and the Claims Notification Clause, which was inadmissible in relation to issues of construction.

(b) Mr Alex's evidence related to the claim, of which notice was first given on 5 September 2018 but did not really add to the exchanges of e-mails between the parties and the provision of reports from the loss adjusters MatthewsDaniel International Pte Ltd ("MatDan"). He expressed the concerns of the defendant at what was seen as late notification of the loss, potential breaches of warranty, the continued use of the SPM despite the claim that it was a CTL (with the submission of repair quotations for repairs at a yard which were not perceived as necessary), and the NOA of 22 May 2019 followed by the sale of the SPM on 25 June 2019 to a related company.

(c) Mr Norhakim's evidence related to the survey he carried on the SPM and the FSO on 10 and 11 October 2018 and the information he gained then. It is referred to in more detail below.

(d) Mr Athappan, the defendant's underwriter and Chief Executive Officer, with 47 years of experience in the insurance industry, was responsible for the underwriting of any large and complex risk on its behalf. He gave evidence of the history of negotiations resulting in his agreement to the insurance contained in the Slip of 14 April 2018 and the incorporation of the "Marine & Subsea Equipment Policy" wording on a "total loss only" basis. He stated that he was not aware of any mistake in the Policy Schedule and was not cross-examined on the basis of any unilateral mistake on his part. The plaintiff's rectification case was therefore not put to him and his evidence of negotiations was inadmissible as an aid to construction of the policy.

28 The plaintiff relied on the expert evidence of Mr John Willis Manning ("Mr Manning") and Mr Michael Terence Clarke ("Mr Clarke"), both of whom were qualified Naval Architects. They gave evidence relating to the precautionary and/or maintenance measures required for the SPM, the reasonableness of the S & L expenses claimed, the reasonable costs which the plaintiff would have incurred to affect permanent repairs to the SPM, the value of it in its damaged condition and the reasonableness of the sale price achieved for it at US$400,000. The defendant relied on three expert witnesses: Mr Nigel David Carpenter ("Mr Carpenter"), a loss adjuster who provided views relating to the market value of the SPM in its damaged state on 25 June 2019; Captain White, a Master Mariner experienced in the handling of SPMs; and Mr Simon Burthem ("Mr Burthem"), a Naval Architect. The latter two covered the same ground as Mr Manning and Mr Clarke. There were four joint

expert reports compiled respectively on: cll 1 and 8 of the Warranties and the requirement for a static tow by Mr Manning and Captain White; the damage to the SPM, the repairs conducted, the necessity of repairing the skirts, reasonable costs of repair and S & L by Mr Manning and Mr Burthem, and Mr Clarke and Mr Burthem; and the valuation of the SPM by Mr Clarke and Mr Carpenter. In their joint memorandum, Mr Clarke and Mr Carpenter agreed that the SPM sale price of US$400,000 on 25 June 2019 appears to be "unreasonably low".

29 The fact witnesses referred to above appeared at the trial and were cross-examined. I did not find the evidence of Mr Pramana helpful because of his limited knowledge of events and the repairs. The form of his witness statement was largely hearsay or consisted of argument and said little about the plaintiff's decision-making processes relating to repairs, NOA and sale of the SPM. His answers to questions under cross-examination were discursive and, on some occasions, evasive. He was not accurate or candid in stating what repairs had been done and when. The evidence of Mr Law as to the actual repairs carried out was much more reliable and painted a picture which differed from that given by Mr Pramana. Mr Law was a forthcoming and unreserved witness, whose evidence under cross-examination revealed that by October 2019, the SPM no longer had a skirt such that the Maintenance Crew "didn't have to remove [it]" but instead only had to grind off the "sharp edges" as requested by the classification society, American Bureau of Shipping ("ABS" or "Class"). Mr Ng had no relevant admissible evidence to give for the reasons given earlier and Mr Hanny's evidence did not advance matters much further than that of Mr Law, if at all, save in relation to what he personally saw on 17 July when boarding the SPM after the collisions.

30 As for the experts, because "hot tubbing" had been agreed for two experts at a time, with a protocol of the procedure to be followed, cross-examination of the conventional kind did not occur, but I gave each party the opportunity to conduct any cross-examination that it wished, which for the most part, was not taken up. Few questions were asked by the parties and where they were, they were almost invariably asked only of the expert instructed by that questioning party.

31 My views on their evidence are as follows:

(a) Captain White was the only witness with expertise in the area of ship management and I found his evidence to be both reliable and helpful in relation to the procedures that ought to have been employed in the operation of the Vessel and SPM. Whilst Mr Manning had experience in the operations of SPMs, as did Mr Clarke, these two latter experts, consulted by the plaintiff, disagreed between themselves as to the normal practice of utilisation of a static tow. Mr Manning's opinion was that it is "reasonable to assume" that a static tow was not required and, in his experience, the vast majority of all the single point moorings he had been involved in did not have a static tow applied to the Vessel. Mr Clarke commented that, what would "normally" be done in cases similar to the present is to "put a tug on the stern to control the FSO and try to mitigate against it doing exactly what it did actually, which was hit the buoy". Much of what Captain White said was not challenged, being the only witness with seafaring expertise, and in areas where there was some dispute, I preferred his evidence to that of the other experts, particularly where ship's practices were concerned.

(b) Mr Carpenter was the only witness with expertise in loss adjusting experience (38 years) in the marine and offshore energy sector who gave evidence of the value of the SPM at the time of sale, which, again, I found to be reliable, particularly as there was a measure of agreement between him and Mr Clarke on the point in the joint memorandum which they both signed, even though Mr Clarke attempted to row back from that in his evidence, as referred to below.

32 Mr Clarke and Mr Manning were both placed in an invidious position by the instructions that they had received and the apparently limited information made available to them at the time of their reports. Both were naval architects with substantial experience of working in the offshore oil and gas industry. The former's focus was on the operation and functionality of the SPM, the precautionary measures to be taken in relation to it and the S & L expenses, whilst the latter's focus, with his experience in fabrication and refurbishment of SPMs, was on the cost of repair in the light of the quotations obtained and the value of the SPM at the time of sale.

33 Mr Clarke was instructed on Sunday 8 May 2022, following the conclusion of the evidence of fact to the Court, to prepare a new calculation of the estimated cost of repair of the SPM in situ, which he presented when he gave evidence by video. The total figure at which he arrived was of the order of US$5.9m which differed from his previously reached agreement in a joint memorandum with Mr Burthem, that:

> 30) … there was plenty of opportunity [in the 5 months between August 2018 and January 2019] for a well-planned dive repair operation to be carried out enabling high quality and reliable repairs which would be permanent. …
>
> …

> 44) … the scope of work requested [in the repair quotations obtained by the plaintiff] included renewal of the skirts and therefore none of the quotes obtained reflected the actual circumstances whereby the skirts were cropped/ground … and the SPM operated without them. … the quotes for in situ repairs … were always going to be significantly increased by virtue of needing to allow for renewal of the skirts which necessitated a heavy lift marine spread. However, as renewal of skirts was unnecessary, the spread (and cost) could be commensurately reduced. …
>
> 45) … a considerably less expensive and just as effective permanent repair to the hull could have been completed afloat rather than taking the SPM to a repair facility.

34 Mr Clarke had agreed in his joint memorandum with Mr Carpenter that the sale price of the SPM obtained by the plaintiff (US$400,000) appeared "unreasonably low" and put forward a figure for the value of the SPM, "as is where is", at the date of sale, of US$2.839m. He opined that the SPM's depreciated value in good condition was US$4.375m and that a deduction should be made for repairs that he considered would amount to US$1,535,014, which gave rise to his estimate of reasonable market value of US$2.839m, as compared with Mr Carpenter's figure of US$4,222,500. Towards the end of his evidence in the "hot tubbing", he separated from the joint memorandum and sought to say that the SPM was "not worth anything to any new buyer", for which the "scrap value of the buoy" would be about US$400,000–500,000, and that the value of the SPM on an "as is, where is" basis was US$400,000, the sum for which the plaintiff had sold the SPM to SPMT. He sought to go back on his prior evidence by reference to his calculation of US$5.9m of repair costs required for in situ repairs, which I could not accept, for reasons which appear below. Moreover, when pressed in questioning, he accepted that his value of the SPM at US$2.839m had been based on what he saw as the cost of repair in situ without taking the SPM to a yard for such repair, including a figure for reinstating the skirts.

35 This did not reflect well on Mr Clarke who had received fresh instructions during the trial, but which could not justify the internal contradictions in his evidence.

36 Mr Manning had not had the benefit of all the materials which had been examined by Mr Burthem at the time of their respective reports. Mr Burthem had put together, from the documents, what turned out, when Mr Law gave his evidence, to be an essentially accurate summary of the repairs which had actually been carried out to the SPM and the approval thereof by ABS, although he did not know and could not have known the precise chronology or history of the repairs, as revealed by Mr Law, of what was done pre-sale and post-sale. Mr Manning said that he had only been asked to opine on matters pre-sale and gave no evidence in relation to repairs carried out after that sale. His comments on the need for repairs to the skirting as a "structural component" of the SPM were negated by two facts; first, the fact that neither the plaintiff, nor SPMT, had effected such repairs, merely grinding the remnant of the skirting to smooth the sharp edges, and; secondly, by the approval of ABS to such repairs, which demonstrated, to my mind, that such full repairs to the skirting were not what a prudent uninsured would do. Although it was part of the structure of the SPM the skirting did not add strength to its basic structure.

37 I found Mr Burthem, with his Naval Architectural expertise, his experience with ABS over eight years, and his experience in consultancy since 2010, to be a careful, measured and reliable witness whose evidence I preferred, where it was in conflict with the opinions of other experts. It is helpful perhaps to summarise his conclusions at this point, referring to those of Mr Manning and Mr Clarke, where they differed:

(a) Mr Burthem concluded that the damage suffered by the SPM as a result of the collisions put the SPM at risk of sinking with its stability and safe operation compromised. The shell plating breaches in way of the Compartments which resulted in those compartments flooding to the equilibrium waterline, gave rise to a loss of buoyancy of the SPM, a changed attitude, an increased susceptibility to destabilising moments, and a reduction in the range of positive stability and the ability of the Vessel to weathervane. Mr Manning, Mr Clarke and Mr Burthem agreed on this point.

(b) The initial temporary repairs which took place in August and September 2018 focused on the restoration of watertight integrity by sealing the fractures in the shell plating and pumping out the water in the Compartments. The two sets of repairs involved the application of an epoxy type resin ("Belzona") with, initially, wood and cloth in August 2018 and, later, with steel plate reinforcements, in September 2018. These were a well-recognised type of temporary repair that should have been effective to restore watertight integrity and the buoyancy of the SPM once the water was pumped out. Both Mr Burthem and Mr Manning agreed that these repairs were necessary to mitigate the risk of the SPM sinking. Mr Manning's view was that these repairs had been carried out with some skill by the Maintenance Crew and he agreed with Mr Burthem that, with the watertight integrity of the Compartments restored and the spaces de-watered, the risk of the SPM sinking was effectively mitigated.

(c) Mr Burthem concluded that a permanent repair could be, and subsequently was, effected in situ by restoring the full metallic integrity of the shell plating. This could be done, as was actually done,

by welding the fractures directly and fitting steel boxes inside the Compartments over the fractured areas. It was his view, however, that repairs effected in December 2018 had not been properly carried out, as shown by ABS' refusal to accept them as permanent, but that what was actually done in May/June 2019 and November 2019 in fitting larger steel boxes, with proper procedures, could and should have been done in December 2018 and would have been accepted by ABS. Mr Manning disagreed that a repair utilising steel welded boxes fitted internally over the fractures would be sufficient to restore the integrity of the hull and be acceptable to Class. He considered that proper permanent repairs could not reasonably be done in situ. The evidence, however, as it emerged, was that such repairs, which had been effected in situ in 2019, were accepted by ABS when the SPM was classed in March 2020.

(d) Mr Burthem's view was that it was not necessary to reinstate the skirting to a pre-incident condition in order to restore the SPM to safe operation. The skirts were not required by ABS and there was no reason why the SPM could not be safely operated without them, which is what actually happened. The plaintiff's plan, as understood by him from the documents, was to crop the skirt remnants and fit brackets at the connections to the chain stoppers and to operate without the skirts (although Mr Law's evidence was that they did not actually fit such brackets in fact and that ABS accepted the cropping of the skirt remnants as satisfactory for the continued operation of the SPM). Mr Manning agreed that the reinstatement of the skirts was not necessary for ABS classification and expressed that he was "not surprised" at this because ABS "really focused only on the major integrity … within the buoy body itself". Mr Manning nevertheless

disagreed with this aspect of Mr Burthem's evidence, which was the most critical area in relation to cost of repairs and the allegation that the SPM was a CTL. He maintained that the replacement of the skirting was necessary for the SPM's continued safe operation without an FSO equipped with a controllable pitch propeller ("CPP") and bow thruster. As a result, the removal of the SPM to a shipyard for the effecting of repairs, or the effecting of repairs to the skirting on site, as described in a quotation obtained from Boskalis in April 2019, with a spread involving a heavy lift crane, was necessary.

(e) It was this element which constituted the major cost in the repairs that the plaintiff alleged was such as to give rise to a CTL. There was, however, disagreement between the experts as to whether such reinstatement of the skirting could be deferred to the next scheduled drydocking of the SPM in 2025 which would mean that there was no need to transport the SPM from its site to the yard for that repair in 2018 or 2019, and back again afterwards. Mr Burthem considered that, had it been necessary or appropriate to restore the skirting, this could have been deferred to the next scheduled drydocking of the SPM which would mean that there was no need to transport the SPM from its site to the yard for that repair in 2018/2019, and back again afterwards. It was this expense which Mr Manning did not agree, but Mr Clarke accepted that as long as the classification society, ABS, approved of the SPM's operation without skirts, the sensible course would be to defer any repairs to the skirting until the next drydocking. He accepted that ABS did in fact give such approval.

(f) All the other repairs to the collision damage were above the waterline which could easily be carried out in situ with a minimum of

outside assistance. Mr Manning agreed that these repairs, to the boat landing structure, the access ladder, the hose chutes and the mooring platform extension beam were of secondary importance and could be carried out in situ. The spread necessary to complete these repairs would include an offshore support vessel with a deck crane but not a heavy lift vessel. The nature of the repairs to these items was not especially unusual in an offshore context and there was no reason why such a repair could not be completed if the necessary spread, manpower, equipment and materials were mobilised. It is not clear, on the evidence, whether and when all these repairs actually did take place but, in the context of the dispute, this is immaterial.

(g) In the circumstances it was not necessary, in Mr Burthem's view, for the plaintiff to incur the disproportionately high cost of mobilising a large and expensive marine spread to disconnect the SPM from the seabed and FSO in order to take it to shore for repairs and then bring it back, nor to incur the cost of a different expensive marine spread to effect repairs to the skirting in situ, by lifting it out of the water for such repairs to be done.

(h) Mr Burthem concluded that the true cost of reasonably necessary repairs was in the region of US$970,000 and could have been completed in one well planned and organised campaign in December 2018 instead of two separate campaigns in December 2018, which would have reasonably cost US$900,000, and May 2019, which would have cost about US$750,000 in addition to the remaining repairs which would not have exceeded US$350,000. The reasonable cost of the December repairs which were actually done, the May 2019 repairs which were actually done (and the Compartment No 5 repairs which he

thought had been done then, but which were actually done in November 2019) and the repairs which remained to be done after that, was thus of the order of US$2m, if the remnants of the skirting had to be removed, with grinding and underwater welding and brackets welded to the exterior of the SPM (which was not actually done in October/November 2019). Mr Clarke's view, as expressed in his report was that the reported cost of the initial and temporary repairs was approximately US$2m to which the costs of permanent repair at a yard had to be added with all the transportation costs involved in that, amounting to a figure of US$6,521,028.51, well in excess of the Insured Value.

(i) In his report, Mr Burthem concluded that, if there was entitlement to S & L expenses, only two of the four categories of expense claimed could relate to repairs to prevent the SPM from sinking when there was a real risk of that occurring and that, even if all of the repairs in those categories were accepted, the total would amount to US$773,767.14. Having considered the matter further and accepted some costs of Marine Gas Oil as part of the necessary cost, in his evidence he accepted that the total would amount to US$931,097 for the Category 4 expenses, but that the expense actually incurred to avert the sinking of the SPM was only US$20,875 (the Category 2 expenses). This compares with Mr Manning's figure of approximately US$1.585m, consisting of US$92,219.25 for Category 2 expenses, US$336,837.56 for Category 3 expenses, and US$1,155,636.51 for Category 4 expenses.

38 The plaintiff gave limited disclosure of documents passing between itself and the ABS in relation to the repairs of the SPM, as appears below. No

Class records were disclosed as such, but the SPM was only classified in March 2020, after the sale to SPMT. Most of the documents disclosed in relation to ABS related to third party advice given by it to the plaintiff and not to communications in its capacity as a classification society, but there were, in the internal exchanges between representatives of the plaintiffs, and in exchanges between the plaintiff and ESPM or PCML, references to the approach and decisions taken by ABS prior to such classification and thereafter.

39 No documents other than a Bill of Sale were disclosed in relation to the sale of the SPM to SPMT, it being said that there were no other documents relating thereto. No disclosure was given of any other arrangements made between PTCMS, SPMT/ESPM and PCML.

40 No disclosure was given of documents in the hands of PTCMS, the company related to the plaintiff, of which Mr Pramana was the ultimate beneficial owner, whether in relation to a Terminal Handbook/Operations Manual applicable to the Yetagun Gas Field or to the Vessel, its Officers or crew, other than Log Extracts and the Vessel's Daily Progress Reports. The plaintiff also gave no disclosure of documents in the possession of SPMT despite it being owned by Mr Kee, an indirect shareholder in the plaintiff (through his wife) and the plaintiffs' project manager with whom Mr Pramana evidently worked closely. In particular, no documents were disclosed of the details of repairs carried out by SPMT, after the sale of the SPM to it and the costs of such repairs (or, as mentioned above, of classification documents). It can, however, fairly be said that disclosure was sought by the defendant only of repair documents preceding the sale.

41 As to the documents referred to in the preceding paragraph, where the plaintiff would say there was no obligation to disclose, it seems to me that, regardless of requests for disclosure and what is technically in the possession custody and power of a party such as the plaintiff, it is obvious that, when putting forward a case of CTL, the actual repairs carried out and their cost, and the approval of Class to repairs are relevant to questions of what a prudent uninsured would do. The absence of a full and candid explanation by the plaintiff of what was done in those respects by itself or others, with accompanying documents and evidence does not assist it. Inferences may fall to be drawn where, regardless of the fact that documents are held by different legal entities from the plaintiff, they are closely related. Mr Pramana was in a position to gain access to such document by reason of his shareholdings in other companies and his connection to Mr Kee, as he suggested he could when giving evidence to the Court. Similarly, when an allegation of breach of warranty in relation to the Officers and crew and procedures on board a vessel in the ownership of another company under the control of Mr Pramana (PTCMS), there is room for the Court to draw an adverse inference if such documents are not forthcoming.

The SPM and its operation

42 The evidence was that the SPM was successfully commissioned and installed at the Yetagun Gas Field in the Andaman Sea, some 120 miles of the coast of Myanmar on or about 26 April 2018. Mr Law described the SPM in this way:

> The SPM is a CALM buoy that serves as a mooring place for storage tankers. Crude oil tanker [the *Bratasena*] operated as the [FSO] in this instance. …
>
> Tankers are secured to the SPM using mooring hawser. The hydrocarbon product [condensate] will be pumped from the

> Yetagun Platform via subsea pipeline and through the riser go to the SPM piping system and via floating hose the product will enter the storage tanker.
>
> [The SPM] is moored to the seabed using 9 set of mooring chain at three locations on the SPM skirt area with 120-degree intervals, each location consisting of 3 chains.
>
> The buoy body section consists of 6 compartments, each compartment is filled with foam, this is to ensure that this buoy will remain afloat even if one of its compartments is leaking.
>
> The hydrocarbon product is transferred from Yetagun Platform to SPM through subsea pipeline, to riser, then to SPM piping and to the Vessel via 2 floating hoses.

43 As described by Mr Manning, the SPM had a body of hexagonal external plan form and was larger than that of a typical CALM, with a body of 14m breadth (face-to-face of the outer flat shell plating) or 16.23m in diameter across a diagonal and a moulded hull height of 6.49m. Its Stability Calculations indicated that, prior to damage, it had a lightship mass of 300mt in its towing condition (*ie*, when free-floating and unmoored).

(a) The hexagonal design provided for the use of flat shell plating and internal shell stiffeners. Half round, six-inch diameter fenders were installed around the top outer edge of the buoy and, vertically, where the internal bulkheads met the out of body.

(b) Internally, a circular centre well, 3.6m in diameter, was fitted and six radial water pipe bulkheads extended from this to the external shell, thus dividing the SPM into six watertight compartments. These watertight compartments provided buoyancy and each was fitted with polyurethane foam to mitigate against flooding in the event of damage to the body of the buoy.

(c) Around the periphery of the SPM, a circular skirt was fitted at keel level and the outer circumference of the skirt was fitted with a ten-inch diameter, 80 tubular bar which resulted in an overall skirt diameter of 20.76m. According to Mr Manning, the skirt is a major structural component of the buoy and acts to provide a degree of protection to its body in the case of a minor collision and to support the chain hawse connections to the nine catenary mooring legs, which are configured in three sets of three (3.25-inch studless chain) arrangement.

(d) Close to the inner shell surrounding the centre well, the upper deck of the buoy's body was fitted with a machined ring which supported a slewing roller bearing fitted to the buoys turntable. Greasing of this bearing was done manually by personnel who periodically boarded the SPM as part of its planned maintenance.

(e) The turntable comprised a rotating box structure which provided a boarding and boat landing platform, a Vessel mooring platform, fluid export piping, a pipe support platform, a deck house above the centre well, overhead protective rope guards and ancillary equipment such as navigational aids. The turntable deck was 7.54m above the keel and the overall height of the buoy to the top of the navigation light was 12.28m.

(f) The Vessel was moored to the turntable by means of a mooring bridle comprising two mooring lugs, bridle chains, a link bar, triangular plate and two chains, each connected to a 128mm diameter, 200-foot-long nylon mooring hawser of 350 tonnes maximum breaking

load (when wet). The mooring bridle was fitted with grease nipples for manual lubrication.

(g) In operation, the slewing bearing and Vessel mooring system allowed the turntable to rotate around the buoy body, passively, to align with the forces imparted by the Vessel under the action of wind, waves and current. The Vessel, dependent upon its loading condition, could align itself primarily to current (in a loaded condition) or wind and waves (in a ballast or lightly loaded condition) – "weathervaning" round the SPM. The elasticities within the mooring hawsers would cause the vessel to surge, in a cyclical fashion, towards the SPM following their maximum excursion away from the SPM.

(h) When metocean conditions were extreme, such as during a monsoon, it would be expected that the surge of the Vessel towards the SPM would not be such that a collision would occur. This was because the spring force (arising from hawser elasticity) causing the surge towards the SPM would be expected to be much lower than the environmental loads being experienced by the Vessel and the resultant force would act to push the Vessel away from the SPM. Conversely, under calm conditions, it would not be uncommon for a vessel to gently nudge the SPM (sometimes referred to as "kissing the buoy"). Such gentle nudges would not lead to the extensive damage to the SPM that is the subject of the claim.

44 It is common ground that the SPM was to serve as a permanent mooring SPM for the FSO which was initially the *Bratasena*, owned by PTCMS. It was connected to the SPM by two 16-inch circumferential mooring hawsers. The depth of water in the area of installation was approximately

103m and the area is dominated by the south-west monsoon during the months of May to October when winds and waves are predominantly from the south-west. The north-east monsoon which occurs from November to March is much less vigorous. Records of tropical cyclones affecting the area are sparse.

45 The Vessel, moored to the SPM, received the condensate and stored it pending discharge to off-taking tankers, which came to receive it approximately once every two months. The Vessel remained moored to the SPM as an essential part of the operation of storage prior to such discharge.

46 The SPM was designed to conform to ABS Rules for Building and Classing Single Point Moorings 2014 but was not so classed on installation because, it was said by Mr Pramana, of the use made of the existing anchor chains remaining from the prior installation on the site. The intention always was, the Court was told, to obtain such classification. At the time of the incidents giving rise to the damage which is the subject of the CTL claim it was not classed by ABS, but when repairs were to be made the evidence was that they were made with Class approval in mind which was ultimately obtained in March 2020.

47 There is an issue between the parties in relation to cll 1 and 8 of the Warranties which refer to the "operation" of the Insured Equipment. Under cl 1, it is only to be operated by and under the supervision of suitably trained and authorised personnel and under cl 8, suitable precautions and preservation/maintenance measures are to be adopted when handling or operating it. The defendant alleges that both warranties were breached. It is the plaintiff's case that neither warranty has any application to the SPM because it is an unmanned buoy with no control over its own movements. The plaintiff contends that it was the Vessel's obligation to maintain station keeping away

from the SPM, that the Maintenance Crew were suitably trained and authorised to maintain the SPM itself and that there were no precautions and preservation/maintenance measures which applied to it in connection with the avoidance of collision with the Vessel. As an unmanned buoy, the plaintiff would not have to handle or operate it for its ordinary functions.

48 The question therefore arises as to whether the Warranties can apply to the SPM. Whilst that issue is the subject of a later section in this judgement, the relevant facts relating to the SPM and the potential for the Warranties to apply can be stated relatively shortly.

49 The evidence before the Court from Mr Law and Mr Hanny is that the former was the supervisor of the Maintenance Crew whilst the latter was one of its members. The Maintenance Crew lived on board the *Bratasena*. To conduct any necessary maintenance, they would take a tugboat from the Vessel to the SPM. They would attend daily unless the weather prevented the boarding of the SPM which was a not infrequent occurrence during the monsoon season. Mr Law had a diploma in project management and had worked with Banner Engineering Consulting Services Sdn Bhd from 2006 onwards in relation to single point moorings. From 2010 onwards he had been involved in the development of the new SPM Banner Hex (SPM 01, SPM 02 and SPM 06, the last being the SPM which is the subject of this action). Mr Hanny had a high school qualification in naval architecture, obtained between 2011 and 2013 and had been involved in the fabrication of SPM 01 and SPM 02 as a drafter and scheduler, and as a site operation coordinator after January 2015 until July 2019, including project planning for the installation of SPM Hex 06 offshore and coordinating its maintenance thereafter. Résumés and *curricula vitae* were produced for members of the

Maintenance Crew but no evidence was adduced in relation to the qualifications and experience of the Master, Officers and crew of the Vessel.

50 There were two manuals that set out the maintenance procedures for the SPM, namely the "SPM Banner Hex-06 Manual Book" (the "Manual Book") and the "Maintenance Plan SPM and Hex6" (the "Maintenance Plan"). The Manual Book was the primary document produced by SPMT to all buyers and users. It set out an explanation of how the different parts of the SPM were designed and how it was to be used, as well as the maintenance requirements for it. The Maintenance Plan provided further details in relation to the periodic maintenance schedule and the daily, weekly, monthly, quarterly (*ie*, once every three months) and biannually (*ie*, once every six months) reports which acted as a checklist for the Maintenance Crew. The periodic timetable procedures were produced in evidence.

51 The SPM did not require daily maintenance checks and/or procedures but the Maintenance Crew was provided with daily maintenance report sheets so that they could monitor the position and report on anything done. The daily maintenance reports would include the execution of a number of tasks including attending to the mooring hawser, the release of the floating hose and monitoring the SPM. The Manpower Log revealed the periods of time spent by the members of the Maintenance Crew on the Vessel, who worked on rotation between onshore and offshore work. Various weekly and monthly maintenance reports were missing, whether because nothing happened in those periods as a result of bad weather or because they had been lost – notably the monthly maintenance reports for May 2018, September 2018 and October 2018 which were lost, whilst the weekly maintenance report for 1–9 July 2018 was said not to exist because bad weather prevented any access to the SPM. There was a record of the collisions in the Vessel's Daily Progress reports, but

not in these records kept by the Maintenance Crew. No point was taken by the defendant as to the adequacy of maintenance of the SPM itself prior to the collisions but criticisms were made in relation to the repairs carried out afterwards, as appears below.

52 The fundamental issue however, in relation to cl 8 of the Warranties, relates to the alleged absence of suitable precautions and preservation measures put in place to prevent collision between the Vessel and the SPM and whether a failure to take such suitable precautions and measures can be said to be in the "handling" or "operating" of the SPM. The Insured Equipment to which the Policy refers is defined as that set out in the non-existent Appendix 1 to the Policy Schedule, but as the Interest Insured, as stated in the Policy Schedule, is the SPM itself, the reference can only be to the SPM rather than the Vessel. In relation to the cl 1 of the Warranties, the crucial question appears to me to be whether those responsible for monitoring the position of the Vessel *vis-à-vis* the SPM and station keeping (being, as agreed between Mr Manning and Mr White, the Officers and crew of the Vessel) were suitably trained and authorised personnel and whether such monitoring and station keeping was part of the operation of the SPM.

53 What is plain and indisputable on the evidence is that the SPM was to function in conjunction with the Vessel. That was an essential part of the role of the SPM. There was no intention for individual offloading tankers to moor at the SPM and the whole purpose of the presence of the *Bratasena* was to accumulate condensate from the pipeline/riser through the SPM in its tanks and for offloading tankers to moor alongside it and receive the condensate from it rather than the SPM. The SPM and the vessel were intended to operate together to achieve the purpose of storage and off-taking by the tankers scheduled to receive the condensate from the Vessel. The SPM, on its own and

without any FSO, could not perform its intended function and it would be senseless to consider the handling or operating of the SPM without reference to the FSO.

54 Although the SPM was unmanned, it was connected to and operated together with the Vessel as part of the condensate storage and offloading facility in the Yetagun Gas Field. Its use and operation did require human intervention not only for maintenance of the SPM itself but for the operation of the manually operated valves and the monitoring of the area around the swivel, valves, pipe flange connections and floating hose flange joints to ensure that the transfer of condensate to the Vessel was conducted in a safe manner.

55 More critically, however, the defendant contends that cll 1 and 8 of the Warranties required proper station keeping between the Vessel and the SPM to avoid the risk of collision resulting in damage to the SPM, with monitoring from the bow of the Vessel or by closed-circuit television ("CCTV") to watch for that at all times. Mr Manning agreed that such station keeping includes monitoring from the bow of the Vessel or by CCTV. The plaintiff contends that this was a matter for the Vessel and its Master, Officers and crew, for whom it was not responsible, and not a matter for the Maintenance Crew.

56 In addition, however the presence of a static tow was required to hold the Vessel to keep it from surging into the SPM in mill pond/swimming pool conditions, on changes of tide and at all times when the weather conditions were not such as to cause the Vessel to weathervane around the SPM and keep it from colliding with it. This would mean attendance of a static tow at all times for use when the conditions required it. Again it was said by the plaintiff that this was not a matter of operation of the SPM as such.

57 In my judgement the issue does not necessarily turn on the individuals who are responsible for taking the necessary precautions but upon the question whether the absence of the measures of which complaint is made by the defendant are measures which should have been adopted in the handling and operation of the SPM.

The damage to the SPM

58 The uncontroverted evidence showed that the Vessel collided on several occasions with the SPM, at about 5.25pm on 1 July 2018, at around 11.27pm on 11 July 2018, and at around 11.48am on 13 July 2018 and that the port hawser was seen to be stuck at the SPM housing bollard at around 9.00am on 14 July 2018. On about 8 July, the SPM showed signs of tilting. The WhatsApp messages between members of the Maintenance Crew and Mr Kee showed that by 10 July 2018, the draft of the SPM at Compartment No 5 was 4.5m instead of the normal 2.8m and that it was listing heavily to one side. On 11 July 2018, the draft at Compartments Nos 4, 5 and 6 were observed to be in excess of the norm, at 3.8m and 4.2m respectively. At that stage the listing of the buoy impaired the ability of the turntable to rotate. Ingress of water into those compartments was suspected although there could theoretically be other causes. Preparations were made with pumps on 10 July 2018 but, because of the weather, it was not possible to board the SPM until 17 July. Water was found in the Compartments and the skirting in the area of Compartment Nos 1 and 2 and 5 and 6 was seen to have been torn away, leaving jagged edges. Mr Hanny's evidence was that he opened one of the compartments himself and saw the water in it.

59 Bad weather is said to have prevented boarding and immediate temporary repairs of the SPM but on 21 August, with the SPM seen to be

listing approximately 34 degrees (though Mr Clarke and Mr Burthem pointed out that it is unclear how such list was measured and both agree that a purely visual observation would be insufficient for an accurate determination), it is said that sounding of the compartments on the SPM confirmed the presence of water which could, in any event, be seen when the manhole covers were lifted. The tanks were pumped out and breaches were discovered in two of the tanks (that is, the Compartments). By the end of August those breaches had been the subject of temporary repairs which were carried out with cloth, wood and Belzona, to prevent the ingress of water and with a view to rendering those compartments watertight. This did not prove to be entirely effective, at least in one of the compartments and further temporary repairs of a fuller nature took place from September 24 onwards, with a "sandwich" steel plate fixed internally and externally with Belzona applied. The AEICs of Mr Law and Mr Hanny referred to repairs in August, September and November/December 2018, without descending into any detail, and did not refer to repairs effected in 2019. Mr Pramana, in cross-examination denied that there had been any repairs in May 2019.

60 An undated report, titled the "SPM Benner Hex 06 Damage Report", issued by the plaintiff which could only be issued in or after October 2018 (because it refers to the crew's assessment of the extent of damage in October 2018 and performance of temporary repairs in October, although it is known that they took place earlier) referred to the need for the condensate to flow continually into the FSO or storage since, if it did not, "the gas production from the well has to stop which will necessitate a shutdown of the entire Yetagun [Gas] [F]ield", which would have significant implications because the gas fed directly to the power plants in Thailand to generate electricity. The report stated that during the south-west monsoon, access to the SPM was

difficult and despite the flooded Compartments and listing, the plaintiff had to continue operating the SPM for a further two months to comply with the instruction of the operator (that is, PCML) not to disconnect absent a substitute mooring system/storage system because it would disrupt critical operations and/or cause a shutdown to the entire field production. Notwithstanding that, PCML had directed that a permanent remedy had to be found expeditiously. The report referred to two repair options, the first of which involved disconnecting the damaged SPM and transporting it to a repair yard for repair. This would involve 14 days' lost time and production in exchanging the SPM for a substitute and vice versa at the beginning and end of the transportation to and from the yard, while repairs of about six months were being made to the SPM at a yard. The second option was to repair at sea although a number of difficulties with underwater repairs in situ, particularly in relation to any repair of the skirt, were also mentioned in the report. A letter from PCML of 24 August 2018 referred to listing of the SPM and the serious concerns raised by this with a need to take immediate action to provide a solution or safe operation that was acceptable to PCML and ABS. The report referred to the pressure placed upon the plaintiff to find a permanent solution which was safe and posed little or no risk of production shutdown.

61 Mr Kee, who was in WhatsApp contact with the Maintenance Crew throughout but was not called as a witness, wrote a report, which appears to have been compiled in its present form after December 2019. It referred to the SPM serving "as a mooring equipment for the FSO", to three collisions on 1, 11 and 13 July and to the observation of missing skirting on 13 July and 16 August, the latter occasion being an occasion of "routine maintenance works to the buoy". An inspection was carried out and the Compartments were found to have puncture holes and were filled with seawater. Immediate

temporary repairs were carried out by the Maintenance Crew by pumping out the seawater and using steel putty (Belzona) to repair the puncture holes. Reference was then made to the damage survey conducted by personnel representing the *Bratasena* and Mr Norhakim on 11 October and to an underwater survey which took place between 31 October 2018 and 16 November 2018 in the presence of an ABS surveyor. There was a general visual inspection of the side shell, skirt, hawser support structures, chain stoppers and riser bend stiffener. Close visual inspection was made of the chain hawser including the weldments and the chain angles were measured. A Topside Survey was also effected.

62 The report went on to list the damage found, with photographs, and the temporary repairs effected. In a section of the report headed "Permanent Repair by Welding Box Plates inside the SPM Side Shell", it was said that:

> The philosophy for the permanent repair is to fabricate box plates from 12 mm thk. [P]lates and contained the damaged section by covering and welding the box plate on the damaged side shell. …
>
> The procedure for welding the box plates must be approved by Class and an MWS Surveyor must be present to witness the permanent repair[.]
>
> Since this work requires hot work activities, the task is scheduled during the PCML planned December 2018 shutdown, wherein PT AEM mobilise the Multi-Purpose Vessel SK Deep Sea for the shutdown activities and SPM remedial works[.]

63 Amongst the attachments to that report was the underwater inspection report from ABS dated 16 November 2018, acting in its third-party advisory capacity and a Permanent Repair Completion Certificate signed by the ABS surveyor dated 24 November 2019 (nearly one year after the planned December 2018 repairs) showing Class approval in respect of the repairs to the Compartments with large steel plating boxes. The details of the box plate

design were set out in another attachment in drawings which had been issued for review on 1 October 2018. An ESPM/PCML "SPM Remedial Works Presentation" constituted a further attachment to the report and set out the scope of work as including hull modifications works in the Compartments and SPM diving works involving the removal of the existing skirt and the grinding of the skirt sharp edges.

64 The MatDan report of the surveys of the Vessel and the SPM on 10 and 11 October was carried out by Mr Norhakim, who had obtained a diploma in Nautical Studies from the Singapore Maritime Academy in September 2010 and had joined his employers in March 2014 as a marine surveyor. He set out the damage in the SPM report and it was based on this report that the repair quotations were obtained by the plaintiff. In his report dated 16 October 2018, he included an estimate for uninstalling the SPM buoy from its location and delivering it to a repair yard and the cost of repair work, amounting in total to S$450,000. Mr Norhakim obtained that estimate from his direct superior in MatDan at that time. He subsequently prepared further reports in April 2019 and a different superior in MatDan dictated a paragraph which included an amended estimate of repair in the sum of US$6,500,000.

65 The damage to the SPM has been set out earlier in this judgment. It was also common ground that it was the fractures in the side shell plating in the Compartments which created the most serious risk for the SPM with the possibility that it might sink. The SPM was designed to retain buoyancy with one compartment flooded and in fact retained a measure of buoyancy with two compartments partly flooded.

66 The experts, Mr Manning and Mr Burthem agreed that, due to the side shell fractures, the Compartments were flooded and, in this flooded condition,

the SPM was at risk of sinking. Furthermore, the loss of buoyancy and the entrained water inside the Compartments affected the SPM's stability, albeit, in the latter's view, not to a great extent because the SPM retained sufficient righting moment and range of stability to prevent capsize.

The repairs effected

The issues

67 The major issue between the parties in relation to the cost of repairs required turned on the issue of whether the skirts had to be repaired or renewed, it being common ground after Mr Law's evidence that no such repair or renewal was actually done. All that was done in that respect was to grind down the remnants of the skirts to remove sharp edges and to clean up the area of welding. Any such repair or renewal of the whole skirting would require either repair in a yard or repair at sea using a heavy lift crane and other equipment which would be very expensive. The other damage was all to the topside of the SPM and could be readily repaired without huge expense, although there is no evidence that all of this work was actually effected.

68 In closing submissions, the plaintiff raised two issues arising from pleading points in relation to the issue of damage, the repairs required and that which was actually carried out. The plaintiff complained that the defendant had never pleaded that permanent repairs had been carried out nor pleaded that it was unnecessary to replace the skirting.

The matters pleaded

69 I do not consider the plaintiff's complaints in respect of pleadings to be well-founded. The plaintiff brought a claim for CTL and pleaded, at para 7 of

the Statement of Claim (Amendment No 1) ("the SOC") that emergency repairs were effected on or about 29 August 2018, 24 September 2018 and 29 December 2018. At para 8, it was pleaded that despite those repairs, the watertight integrity of the SPM remained compromised and the SPM required permanent repairs, including repair and replacement of missing skirt plates, at a cost which meant that the SPM was a CTL. The temporary and emergency repairs carried out were said to be only a stop-gap measure until permanent repairs could be carried out. After setting out the damage to the SPM, para 8 went on to say that ABS had repeatedly advised that repairs and remedial work were necessary where there was a breach of watertight integrity and that quotations for repairs were obtained, where the quoted costs were set out, all of which exceeded the Insured Value. It was alleged in para 10 that the SPM was at risk of sinking if permanent repairs were not carried out.

70 In its Defence (Amendment No 1) ("the Defence"), the defendant admitted that there had been multiple collisions between the SPM and the Vessel but put the plaintiff to proof of all other matters alleged in para 7 of the SOC. At para 12 of the Defence, para 8 of the SOC was denied, with specific denials that the watertight integrity of the SPM had been compromised or that the SPM was at risk of sinking at any material time or that it required permanent repairs above and beyond those allegedly carried out in August, September and December 2018. The defendant pleaded that the plaintiff itself did not consider any permanent repairs to be necessary as the SPM had continued in operation at all material times without such repairs being made. It was further denied that the emergency and temporary repairs carried out were a stop-gap measure until permanent repairs were carried out or that the repair quotations relied on accurately set out the estimated cost of permanent repair.

71 It is clear that the plaintiff was thus on notice from 5 June 2020, based on an earlier version of the Defence, that it needed to prove what repairs were required as permanent repairs, it being the defendant's case that whatever had been done already by the plaintiff were sufficient to restore the watertight integrity of the SPM for its continued operation as it had actually continued in use. The defendant could not know what repairs had actually been done as such matters were only in the knowledge of the plaintiff who had not informed the defendant of what was done in May/June and October/November 2019, including the grinding of the remnants of the skirting without replacement, with the SPM continuing in operation before and after. The defendant's expert, Mr Burthem was able to piece together some of what had been done from documents disclosed but it was not until Mr Law was cross-examined that the overall picture emerged. The complaint that the defendant had not pleaded that additional repairs had been made and that replacement of the skirting was not required does not lie in the mouth of the party who knew what repairs had been done, where it knew that the defendant denied that anything beyond what was done was necessary by way of permanent repair, yet, omitted to mention any details about such repairs.

72 The issues were raised fairly and squarely in the experts' reports and were discussed between them, leading to the experts' joint memoranda, which I elaborate more fully below. The plaintiff was fully alive to the issues and its experts were able to opine thereon as they did. Both issues were the subject of considerable evidence and debate. No conceivable prejudice has been suffered by the plaintiff who should have appreciated from the pleadings that the issue of what repairs were done and whether they were sufficient or whether more was needed, had been raised in the context of the prudent uninsured test, where the burden was on it to establish a CTL.

73 For the following reasons, I find that the repairs/replacement of everything other than the skirting could be done offshore, in situ and without lifting the SPM out of the water. There was no need for the SPM to be taken to a yard for these repairs, as agreed by the experts. The replacement of the skirting required the SPM either to be taken to a yard or lifted out of the water which would be more expensive in situ than transportation to a yard. Whilst the cost of replacing the skirting in itself was more significant than the cost of the welding in the compartments, it was not a very substantial item of cost, if carried out at a yard. The major element of the cost of any replacement of the skirts lay in the requirement to disconnect the SPM and take it to a yard for repair before returning it or, if in situ, lifting it out of the water with a spread involving offshore vessels, barges and a large heavy lift crane.

74 The single fracture in Compartment No 4 of 150mm length and 10mm wide was located at "the bottom stringer, frame no 5 counting from forward", which is understood to mean, by reference to the photographs, the fifth vertical stiffener counted across from the shell frame, with "the bottom stringer" meaning the radial deep frame web there. The single fracture in Compartment No 5 of 200mm length and width of 40mm was located "at bottom stringer, frame no 6 counting from forward" which is understood to be in line with or close to the sixth vertical stiffener. These were localised fractures situated immediately adjacent to the internal stiffened structure at the point of maximum restraint. Underwater inspection in November 2018 showed that there was no deformation of the shell plating and the structural capacity of the SPM was unaffected, although, of course, there was a loss of watertight integrity.

75 It is agreed that temporary emergency repairs to the Compartments were carried out at the end of August using Belzona and wooden

spikes/wedges/dunnage and cloth, and in late September with additional steel patch plates inside and outside, and G-clamps, with the application of Belzona. During the underwater inspection in October/November 2018 photographs were taken which show the sandwich plate affixed to the outside of the hull in way of Compartment No 5. Mr Law gave evidence of these repairs.

76 On the evidence of Mr Law, by the end of September the water had been drained from both Compartments which had previously leaked, the temporary repairs were complete and the SPM was no longer listing. Permanent repairs were being planned in October/November 2018 with a discussion as to whether doubler plates should be welded on the outside of the SPM in addition to welding box plates internally. A decision was taken that box plates should be installed in the Compartments in December 2018, without such doubler plates, and that these repairs should be approved by ABS. Such repairs took place and were observed by a surveyor from ABS, but not for classification purposes since he had been engaged as a third-party surveyor. A Non-Destructive Testing ("NDT") operator attended who was approved by PCML but not Class approved. It was also noted in that report that the Magnetic Particle Inspection ("MPI") equipment was provided by PCML *without* calibration certificate. These repairs were complete by 2 January 2019.

The Repairs effected in December 2018

77 The scope of the repairs effected in December 2018 is not in dispute. In addition to the repairs of the side shell plating in the Compartments, they involved the replacement of a mooring hawser, import hose and hose chutes.

78 A Job Card No 37 was issued for review on 16 October 2018 and approved for construction on one December 2018 setting out the "procedure for the permanent repair of [the Compartments]". Mr Pramana agreed in cross-examination that the plaintiff intended the repairs to be effected in December to be permanent and approved by Class. The "Work Pack" document of 17 December 2018 for the "SPM Repair Works" also refers to the planned repair of those compartments as "permanent repairs". After initially accepting that they were intended to be permanent repairs, he retracted this evidence, seeking to draw a distinction between permanent repairs which had the effect of preventing future leakage and truly permanent repairs which did not require any further repair to be carried out. This was casuistry on his part. He sought to justify this on the basis that water was seeping through the crack at the time of the welding, which was one of the grounds upon which ABS refused to approve these repairs as permanent repairs, but it is clear from the contemporary documents, including the WhatsApp messages exchanged on 1 October, 2 November and 8–9 November 2018 that the repairs were intended to be permanent, as confirmed by Mr Law who also said that the intention was to have the repairs approved by Class.

79 Attempts to obtain Class approval for these repairs which, on the evidence, were intended to be permanent, foundered. An e-mail of 18 March 2019 from ABS to Mr Pramana and Mr Kee set out the reasons:

> … we will be unable to consider the existing temporary repairs for the purpose of classing the SPM, regardless of any engineering reviews. The damages to the buoy and skirt will need to be repaired to the satisfaction of attending Surveyor.
>
> … ABS will not be able to consider the existing temporary repairs for the purpose of classing the SPM. The reason that we have to convey this message ahead of the engineering review are as follow,

> 1. The repair work carried out with water being present at on the other surface of the welded plate. Please note that ABS requires that a suitably qualified welding procedure and also welder for welding with water backing are required. It is understood that neither procedure more welder for this particular welding were available. Acceptance by the attending class surveyor was because it was informed that the repair was done as a temporary measure.
>
> 2. It was stated that the MPI equipment provided [for the NDT] was not calibrated. Information received was that the MPI equipment was provided by PCML. It was also later confirmed that … PCML could not provide the calibration certificate.
>
> Accordingly, NDE carried out at that time cannot be considered as an acceptable result.
>
> 3. It was noted that welding was continued even with the presence of water from the water seepage from the hole that was closed using [B]elzona. This is unfortunately not acceptable as it will severely affect the material properties of the shell in that location. In this case, these repairs may not be accepted in any case.
>
> Based on the above reasons we would seek your assistance in providing a repair plan for submission to our Engineering colleagues that take consideration of rectification of the above as the existing repair cannot be accepted. …

80 In my judgment, the problem with the repairs conducted in December 2018 was not so much the nature of the repairs carried out but the way in which they were done. ABS' reasons for refusing to approve them as permanent repairs turned on: first, the absence of a suitably qualified welder and a suitable welding procedure for welding steel boxes into the external plating underwater; secondly the absence of calibrated equipment for the NDT; and thirdly the fact that the welding took place at a time when water was still seeping through the cracks, since such a weld was more likely to fail. ABS was therefore looking for a repair plan for its engineers to assess and in

the same e-mail asked also for the plan relating to the bridle assembly and the skirt.

81 The evidence shows that the plaintiff planned and carried out further repairs in May/June 2019 before selling the SPM to SPMT, obtaining Class approval of the planned work and that further repairs were effected by SPMT in October/November 2019 under Mr Law's supervision in order to obtain Class approval for the executed works on the SPM. These repairs consisted of the welding of additional larger steel boxes inside the Compartments and modifying the SPM to operate without skirts by cropping the remnants of what was there to remove the sharp edges. Mr Law confirmed in cross-examination that these repairs were planned with a view to obtaining ABS approval and that the steel boxes were fabricated in May 2019. The sequence of events, as appears from Mr Law's evidence in cross-examination and the contemporaneous WhatsApp messages, was as follows:

(a) On 18 March 2019, ABS informed the plaintiff that the December 2018 repairs could not be accepted as permanent for the reasons given in the e-mail referred to above.

(b) On 20 March 2019, the plaintiff's personnel discussed the need to "redo the permanent repair". Mr Law explained that preparation for further repairs was being done simultaneously with seeking the approval of ABS and the completion of any other outstanding repairs.

(c) By mid-May 2019, the drawings for the installation of the larger steel boxes in the Compartments were under review by ABS and by 17 May, they may have been approved. Even if such approval had not yet been received by 17 May, Mr Law went ahead with the preparations and fabricated the boxes.

(d) By 21 May 2019, the larger steel boxes had been fabricated and tack welded in place on the SPM.

(e) By 28 May 2019, the drawings of the modified SPM without skirts had been approved by ABS.

(f) By 7 June 2019, the larger box or Compartment No 4 had been fully welded into place.

(g) In or around October 2019, it was discovered that the remaining sections of the skirt had fallen off so that there was no need for their removal. The grinding of the sharp skirt remnants/edges was completed and accepted by Class in October 2019.

(h) In November 2019, the larger box for Compartment No 5 was completed and on November 24, the repairs for both Compartments were accepted by ABS.

82 Despite Mr Pramana's protestations to the contrary, it became clear in the later cross-examination of Mr Law that the bigger boxes encompassing the welded regions in the Compartments were not only fabricated for the purpose of repairing the shell plating but that one such box in Compartment No 4 had been fully welded in place and that, as set out above, the other, in Compartment No 5, had been installed by tack welding before the sale of the SPM. A meeting had taken place on 15 April 2019 in which a repair plan dated 14 April 2019 which involved installing such boxes was discussed with ABS. According to the minutes of that meeting, the repair plan was to be considered a permanent repair and expedited approval was sought so that welding could start at the end of April 2019. It was also recorded, in the meeting minute, that "[u]pon approval of this repair plan, the intact

stability/watertight integrity are to be submitted to ABS Engineering for review". It was said there that there was no plan to repair the skirt, providing that no damage had propagated to the hull structure and that the plaintiff's consultants would submit photographs of the damage for review with any proposals necessary. A hawser of 120m in length was to be provided in place of 70m hawser and a new bridle was under fabrication under the supervision of an ABS surveyor in accordance with an approved drawing. The plan also encompassed the SPM swivel and chain tensioning and angle which were to be approved by Class.

83 Whilst Mr Pramana continue to maintain, and Mr Law initially only accepted, that preparation was made from March 2019 onwards for repairs to be done with the bigger boxes in the Compartments, the documents put to the latter in cross-examination drew from him the admissions that drawings for the installation of the larger box plating in the Compartments were issued for approval on 4 April 2019 and that although he said that Class approval had not been obtained by 17 May 2019, a WhatsApp exchange with Mr Kee suggested that it had:

Mr Law:	Kee, how about the hull repair abs approved status?
	…
Mr Kee:	Already approved . I saw email , I check
Mr Law:	Okay thank. I ll check my email

84 Mr Law did not accept that this meant that Class approval had been obtained at that point and said that he had taken the initiative to tack weld both boxes in place on 21 May 2019. The full installation of the box plate in Compartment No 4 had been completed by 7 June 2019, whilst the box plate in Compartment No 5 was installed following the monsoon in November 2019

and the repairs were approved by ABS on 24 November 2019, with NDT testing also approved.

85 Mr Law also accepted that in October 2019 whatever remained of the skirt, which was not much, if anything, was removed and the sharp edges ground in underwater repairs which were also accepted by ABS.

86 Thus, prior to the sale of the SPM by the plaintiff to SPMT, repairs to the Compartments and the cleaning up/grinding of the skirting had been planned with parts done prior to the sale and part effected afterwards, all under the control of Mr Kee and Mr Law who took up employment with SPMT in July 2019. There is an ambiguous reference in the WhatsApp messages to the Class approval for the planned work being obtained by 17 May 2019 where Mr Kee says that he has seen an e-mail in which approval was given but says he will check, as set out above. The absence of disclosure by the plaintiff of Class records, suggests that adverse inferences should be drawn against the plaintiff in relation to such matters and I am therefore entitled to find, and do find, in accordance with decided authority and s 116 of the EA that there was approval for the work to be done as at that date, although the work itself was carried out later with the actual completed repairs being accepted by ABS on 24 November 2019.

87 Notwithstanding the contradictory evidence of Mr Pramana, I also find, on the basis of all the evidence before the Court, that the December 2018 repairs were intended to be permanent and approved by ABS, as exemplified by the presence of the ABS surveyor, albeit as a third party adviser and not as a Class surveyor, in the light of Mr Law's evidence and the e-mail of 18 March 2019 in which ABS gave reasons for their refusal to approve those repairs in response to what was obviously an enquiry by the plaintiff, who was

seeking Class approval for the SPM as a whole, which was ultimately given in March 2020.

The cause of the collisions

Background

88 PCML, the operators of the Yetagun Gas Field, carried out an investigation into the damage to the SPM which, it is undisputed, was caused by the collisions between the *Bratasena* and the SPM. The authors of the report produced to the Court as a result of that investigation did not give evidence but their conclusions are clearly stated and correspond with other evidence as to the cause of the collisions. The facts recorded in it which gave rise to their conclusions, are essentially undisputed or tally with other evidence to the Court. The result of their conclusions was the implementation by PCML/ESPM, PTCMS and the plaintiff of the recommendation that a static tow be available at all times for the *Bratasena*.

89 Four individuals were named as part of the PCML Investigation Team, one or more of whom must have authored the document which was headed "Chronology of Events, Findings and Recommended immediate Action" ("the Chronology"). From the document itself, it is clear that they were tasked with carrying out such an investigation and interviewing six individuals, including the Vessel's Master, Chief Engineer and Chief Officer, ESPM's Marine Superintendent and Mr Law, who said in evidence that he had been interviewed by the team as a witness to matters relating to the SPM. The Chronology was supplied to the surveyor from MatDan, Mr Norhakim, on his visit to the site on 10 October 2018. His evidence of what the latter was told by the Vessel's Master and Chief Officer is essentially the same as that recorded in this report.

90 The Chronology referred to a first "soft contact" between the Vessel and the SPM on 30 April 2018, observing that there was an Emergency Response Plan ("ERP") procedure to be observed in the event of a collision which had not apparently been followed. The Chronology records that based on an interview with the Master of the Vessel, there was "no emergency alarm triggered and no internal investigation" and no evidence of conducting a visual inspection, despite the ERP requiring to do so. Later in the Chronology it was stated that following "numerous heavy contacts", after 9 June which was when there was no vessel to provide a static tow, none of those collisions had been reported and logged nor the emergency alarm triggered by the Master of the Vessel in accordance with its ERP procedure. The Chronology also stated, "Refer to Incident Report (XXX)" though no such incident report is attached to the Chronology or reference number to such report mentioned. Information from the SPM Maintenance Crew referred to the collisions on 1, 11 and 13 July 2018 and the observation on 13 July that the SPM skirting at the Compartments was missing.

91 On 1 May, the Master was said to have instructed the *MV Amber* to commence a static tow of the Vessel since, from the time of installation, the Vessel had encountered several contacts with the SPM. The team found that the Vessel's engine was ineffective to keep her away from the SPM and so the *MV Amber* was called on to provide the static tow. The Chronology went on to state that on 9 June 2018, the *MV Amber* left for Singapore for recertification with a return date of 1 August 2018, but no replacement of the static tow vessel was provided, despite the request of the Vessel's Master. It was said that there was no dedicated static tow between those dates and, during the absence of the *MV Amber*, "numerous heavy contacts" occurred between the

Vessel and the SPM. It was said that named standby vessels could assist as a static tow but were unable to maintain it at the necessary times.

92 The Chronology stated that between 29 June 2018 and 14 July 2018, when there was no static tug made fast to the Vessel, "there were severe multiple contacts that led to loss of SPM skirting no 4 and 5 on 13 July. Skirt 1 and 6 was found missing on 16 August". The entry for 9 June elaborated that "during the tidal changes, [the Vessel] moves closer to the SPM and some point contacts with the skirting/body violently due to effect of abeam swells". The following statement was highlighted in red: "Static tow shall be available at all times to ensure safe operation". It was also said that an oceangoing tug with a higher pulling capacity than the *MV Amber* should be provided, a study should be made of the appropriate length of hawser to provide a safe distance between the Vessel and the SPM and that the Vessel's main engine was to be on standby prior to any tidal changes.

93 On 14 July 2018 it had been observed that one of the hawsers was stuck at the SPM housing bollard which resulted in the inability of the SPM turntable to rotate freely. The mooring hawser had parted, the cause of which was ascribed to chafing against the SPM body. The existing standby vessel was unable to perform a static tow due to its deck space being occupied and the Vessel was unable to use its main propulsion unit to keep itself away from the SPM because of the proximity of the export hose to the stern of the vessel. Once that hose had been cleared, the Vessel was able to use its main engine to maintain a position away from the buoy.

94 The Chronology referred to a Risk Assessment conducted by ESPM on 14 July which concluded, as its outcome, that there should be a "static tow in place at all times". On 3 September, it was noted that there was a need "[t]o

immediately prepare and develop safe continuous static towing operation". The report also referred to further "multiple contact" with the SPM on 30 September 2018, even with a static tow, observing that the static tow engine performance was at 75% but was unable to pull the *Bratasena* to a safe distance, the *Bratasena* itself being unable to assist with its main engine because of the proximity of the export hose to its stern. The recommendation was to change the static tow to an oceangoing tug vessel with 120-ton bollard pull.

95 At the end of the trial on 18 May 2022, I directed parties to address me on the respective hearsay objections by way of letter. On 20 May 2022, the parties raised a hearsay objection in respect of the Chronology. The parties' respective positions are as follows.

96 The plaintiff's objection is essentially that the Chronology is not admissible for several reasons. First, it is hearsay evidence insofar as Mr Norhakim, who produced the document into evidence, did not perceive the events that were described in the Chronology. Secondly, the Chronology appears to be in draft form as it refers to: (a) an "Incident Report (XXX)", as mentioned at [90] above; (b) an internal note stating, "to verify the Statement with PCML Production"; and (c) an incomplete sentence stating, "Based on … on 30 Sept 8.12am Myanmar Time".

97 The defendant's position is that the Chronology is admissible as proof of the truth of its contents, under an *exception* to the rule against hearsay evidence. It is a statement made by a person in the ordinary course of a trade, business, profession, or other occupation falling within s 32(1)(*b*)(iv) of the EA which provides:

> **Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant**
>
> **32.**—(1) Subject to subsections (2) and (3), statements of relevant facts made by a person (whether orally, in a document or otherwise), are themselves relevant facts in the following cases:
>
> …
>
> **or is made in course of trade, business, profession or other occupation;**
>
> (*b*) when the statement was made by a person in the ordinary course of a trade, business, profession or other occupation and in particular when it consists of —
>
> …
>
> (iv) a document constituting, or forming part of, the records (whether past or present) of a trade, business, profession or other occupation that are recorded, owned or kept by any person, body or organisation carrying out the trade, business, profession or other occupation,
>
> and includes a statement made in a document that is, or forms part of, a record compiled by a person acting in the ordinary course of a trade, business, profession or other occupation *based on information supplied by other persons*;
>
> …
>
> [emphasis added in italics]

Since the Chronology is a document compiled by persons from the PCML Investigation Team and/or ESPM in the ordinary course of routine business, as part of their ordinary duties in investigating the circumstances relating to the contacts, it may be presumed to have been made with a disinterested motive and be taken to be generally true.

Admissibility

98 It is common ground between the parties that the Chronology is hearsay. Even though Mr Law was part of the investigations "as a witness" for

matters relating to the SPM, he was not part of the PCML Investigation Team. The issue is whether the Chronology may nevertheless be admitted, under one of the exceptions to the rule against hearsay. The plaintiff, however, did not address that point in its submissions and instead focused on the unreliability of the statements made therein. In my judgment, this hearsay evidence is admissible as a statement or record made by the authors, in the ordinary course of a trade, business, profession or other occupation in accordance with s 32(1)(*b*)(iv) of the EA.

99 The Court of Appeal held in *Gimpex Ltd v Unity Holdings Business Ltd and others and another appeal* [2015] 2 SLR 686 ("*Gimpex*") at [94] that Parliament intended to extend the scope of this exception to the hearsay rule and did so, by adding the last qualifying phrase to s 32(1)(*b*) of the EA, "based on information supplied by other persons". The Court of Appeal endorsed Prof Jeffrey Pinsler SC's commentary on the same (in *Evidence and the Litigation Process* (LexisNexis, 4th Ed, 2013) at para 6.008):

> The term 'record' is not defined in the EA. It may consist of a single document which includes information or two or more documents which contain information. In any event, it must be compiled by a person in the ordinary course of his trade, business, profession or other occupation. *There is no express requirement that the compiler and the persons who supplied the information included in the record must have personal knowledge of that information.* Therefore, s 32(1)(b)(iv) is broader than the repealed s 272 of the current CPC (and its predecessor, s 380 of the former CPC), which required the supplier of information to have, or to be reasonably supposed to have had, personal knowledge concerning the facts. Moreover, where the supplier of information was merely an intermediary (as when he received information from another supplier of information, who might have been an intermediary himself), the intermediary or intermediaries had to have been acting under a duty. *The absence of these requirements in s 32(1)(b)(iv) means that hearsay upon hearsay (multiple hearsay) to an unlimited degree may be admitted without safeguards concerning the knowledge of the persons involved in transmitting the information.* Furthermore, the condition in the

> repealed s 272 that direct oral evidence of the facts would have been admissible (ie, the court could have accepted direct testimony of the facts if it had been available) is also absent from s 32(1)(b)(iv). Additionally, the protection in the repealed s 272, which precluded the admissibility of a statement in the record if the person who supplied the information did so after the commencement of investigations into the offence, has not been retained by s 32(1)(b)(iv). *These omissions raise the real possibility that documentary records admitted under s 32(1)(b)(iv) may be unreliable*, a particular concern where the accused has to face such evidence in criminal proceedings. …
>
> [emphasis added by the Court of Appeal]

100 Section 32(3) of the EA, however, qualifies s 32(1) as follows:

> A statement which is otherwise relevant under subsection (1) is not relevant if the court is of the view that it would not be in the interests of justice to treat it as relevant.

As the Court of Appeal in *Gimpex* explained at [103]–[104], s 32(3) is a balancing counter to the potential increase in the admission of hearsay evidence, for which its applicability "must be considered especially for evidence pursuant to s 32(1)(*b*)". The Court of Appeal agreed, at [105], with Prof Pinsler's view that the issue in applying s 32(3) is whether admissible evidence should be excluded because other countervailing factors outweigh the benefit of having the evidence admitted. In that respect, where the hearsay evidence sought to be admitted is of limited probative value, such evidence should properly be excluded. The effect of this is that the party seeking the admission of the hearsay evidence must be able to show the court that there were certain safeguards or measures that applied to that evidence which would ensure a minimal degree of reliability (at [109]).

101 In my judgment, s 32(1)(*b*)(iv) of the EA is broad enough to permit the admission of the Chronology. The Chronology undoubtedly forms part of the records of the business (in operating the Vessel in conjunction with the SPM). The Chronology can be presumed to have been made with a disinterested

motive, since PCML, as the field operator, would be keen to ascertain the cause of the damage in order to prevent its recurrence. The conclusions reached are, of course, not necessarily correct, but were accepted by the plaintiff in the person of Mr Pramana as correct and tally with the expert evidence of Captain White and the course of action subsequently adopted.

102 It is common ground between the parties that the recommendation that a static tow be available at all times thereafter was implemented. In itself this is a clear indication of the general acceptance of all those involved that this was a suitable precaution to take. Whilst much of the Chronology is, at best, secondary evidence of what occurred, it might well be said that what is set out in it could constitute admissions against interest on the part of all those involved in the operation of the SPM and the Vessel. There was no evidence adduced by the plaintiff to contradict any of the facts recorded in the Chronology and no challenge was made to its accuracy by any witness, nor by Counsel in argument. To the contrary, the evidence demonstrates that the plaintiff did consider a static tow to be necessary. The essential reliability of the Chronology is thus established, even though certain *portions* of the Chronology appear to be in "draft" form. It is highly relevant and material to the issues on which the experts offered their opinions and it is in the interests of justice that it should be admitted, with due caution, having regard to its hearsay nature.

The other evidence

103 That there was a recommendation for a static tow is also supported by the evidence apart from the Chronology. On 4 September 2018, PCML wrote to ESPM to express that it had "several negative experiences" within four months of ESPM's operation at the Yetagun Gas Field: "Hawser parted, SPM

was sinking, Tanker Hull was leaking with multiple holes and dents, Towing Wire was caught into static tow vessel's propeller, etc." PCML expressed that those "miserable situations" suggest that they are "NOT merely coincident" and thus demanded "detail technical/operational analysis and root causes with solid justifications for the above incidents". In his evidence, Mr Pramana accepted, as set out in a draft letter of reply to PCML which he had himself written, that:

> The root cause of this entire problem lies to the static tow requirement for [the Vessel] to operate safely. We have address this by having Amber there, but we are a too late as the damage has been done or occurred. We believe the damage occurred during the absence of static tow that caused the damage to the SPM, Bratasena and the incident of hawser parting off. All-cause by the slacking of the hawser due to the absence of static tow and [the Vessel] hitting the SPM and vice versa.
>
> As PCML good partner and goodwill, Enra has been proactive by sending Amber to address this without discussing on the cost impact with PCML. Enra first concern is for smooth operation and safety. We had smooth operation since Amber there from 31st July … so almost 2 months smooth operation …

Notably, Mr Pramana's draft reply mentions the "smooth" operations only *after* the *MV Amber* had commenced a static tow. He did not mention the Collisions or the lack of a static tow on the dates of the collisions.

104 The undated report issued by the plaintiff which could only be made in October 2018 or thereafter (the reasons for which I have mentioned above), stated that the Vessel collided with the SPM "several times" in about "July/August 2018". It also stated that the plaintiff "can only assume the damage was caused by PTCMS' failure to properly manoeuvre the Vessel during the south-west monsoon season", but this is not in itself inconsistent with the need for a static tow.

105 At the time of Mr Norhakim's survey of the SPM on 11 October 2018, a static tow was in place, as depicted in a diagram in his report. He also observed the export and import hoses floating at the port aft and port forward areas of the Vessel respectively. He met with the Master, the Chief Officer of the Vessel and the Marine Superintendent from ESPM on board the Vessel on 10 October 2018. The Officers were not those on board at the time of the incidents said to have caused the damage. He was handed the Chronology prepared by the PCML Investigating team, as referred to above, which he discussed with them. He was told that the tug currently present was the *MV Amber* which had not been present at the time of the collisions and that they all agreed that there should have been a static tow present at the site at all times to keep the Vessel in position. They also agreed that the presence of hoses floating around the Vessel was quite dangerous and that the export hose, in particular, could prevent the Vessel from engaging its engines because of the risk of being damaged by the propeller. In his report he referred specifically to the absence of any "assist tug to Static Tow the FSO" also stating that "due to the floating hoses in close proximity to the propeller, the FSO was not able to use its main engine to avoid drifting into the SPM". On 11 October 2018, Mr Norhakim boarded the SPM with the Chief Officer of the Vessel and Captain Hasnol from ESPM, but not the supervisor of the Maintenance Crew, Mr Law.

106 Mr Kee's report, which appears to have been compiled in its present form after December 2019, as previously mentioned, stated that there been two offtake operations completed with two shuttle tankers on 28 June and 1 September 2018. However, the contacts with the SPM on 1, 11 and 13 July 2018 did not occur during offtake operations but during the time in which "there was no available assist tug for "Static Tow" the FSO and due to the

floating hoses in close proximity because of bad weather to the propellers, the FSO was not able to use its main engine to avoid drifting into the SPM".

107 The view, therefore, of all those involved at the time appears to have been the same. A static tow should be available to the Vessel at all times because the collisions had occurred in the absence of that facility and by reason of failures on the part of the Vessel itself to keep away from the SPM, with some potential contribution to the lack of manoeuvring caused by the presence of the unsecured export hose near the stern of the Vessel. The uniformity of this view formed by those who can be taken to have the relevant knowledge and experience of the operation of an SPM in the conditions in question is a weighty factor to be taken into account by any court when determining the cause of the damage to the SPM.

108 With this background in mind, I turn to the expert evidence on the subject.

The expert evidence about the collisions and procedures/precautions adopted

109 The evidence of Captain White and Mr Manning differed on one main point in relation to the operation of the Vessel when moored to the SPM, namely the very question whether it was necessary to have a static tow available at all times as a suitable precaution or preservation measure. It was Mr Manning's view that it was not reasonably necessary to have a static tow available and that a competent Master with competent Officers and crew, observing appropriate procedures should have been able to keep the Vessel from colliding with the SPM by keeping the Vessel's engine on standby and using short bursts of astern thrust when necessary. Captain White considered it prudent, reasonable and necessary to have such a static tow available,

particularly after experience showed that the Vessel was incapable of keeping itself away from the SPM as the multiple collisions showed.

110 Captain White's view was that a static tow was necessary for the safe operation of the SPM and the FSO in circumstances where weathervaning was ineffective. The SPM and the Vessel were installed in April 2018 and, whilst there is no direct evidence of this, it appears that there was a soft contact on 30 April and numerous other contacts after the 9 June departure of the *MV Amber*, as illustrated by the multiple indentations shown in the photographs of the Vessel's port side shell plating at varying heights, which suggested to Captain White that contacts were made at various loaded conditions of the *Bratasena*. Whether or not, at the time of installation, it appeared to those concerned that a static tow was unnecessary, contacts of this kind should immediately have resulted in the taking of precautions to prevent such damage. As the conclusions of PCML and ESPM made clear, after the event, a static tow was required both when conditions were transient such as the change of tide or when the weather was calm with "swimming pool" conditions. The fact that this may not have been appreciated before the collisions did not affect the conclusion made after the event that this was a necessary requirement. After the first heavy contact (on 9 June 2018 according to the Chronology), it was obvious that this was the position in any event and the Master appears to have been asking for such a static tow in the absence of the *MV Amber*. There is an e-mail dated 1 July 2018 timed at 6.33pm, which appears to be after the first collision relied on, in which the Master of the Vessel expressly asks for a static tow urgently, "due to [SPM] and Bratasena is in close range situation". Once it was known how the *Bratasena* was performing, whether as a result of failings on its part, poor seamanship or limitations in its propulsion machinery or otherwise, the need for a static tow

was apparent. In Captain White's view, whether or not the *Bratasena* was replaced by a vessel with a CPP and bow thruster, the need for an available static tow was established.

111 Mr Manning accepted that it was clear that the PCML/ESPM Investigative Team concluded that the *Bratasena* could not manage without a static tow in any event, whether because of the way in which she was being managed by her Master, Officers and crew or otherwise. He accepted that a vessel such as the *Bratasena* could not stay at slow speed for continuous long periods of time in order to keep itself away from the SPM and it was Captain White's view that this applied equally to a vessel with a CPP. Mr Manning accepted that the Vessel's daily reports showed that the Vessel could use its engine to manoeuvre and did so from time to time but continuous use was not advisable and the provision of a static tow was a suitable precaution to take and one which was certainly necessary if the *Bratasena*'s Officers and crew were not up to the mark. As soon as a collision occurred, it could be seen that there were obvious difficulties in avoiding such an incident and a static tow should be made available in such circumstances. Whilst he accepted that practice varied from one field operated to another, there was always, in his experience, a static tow available where an individual off-taking tanker was moored to an SPM, but not for an FSO.

112 Mr Manning stated that, in his experience, in 90 to 95% of FSO connections to buoys of this kind, no static tow was required save where there was an off-taking tanker as well as the FSO, where the dynamics of two sets of hawsers (between the SPM and the FSO on the one hand and between the FSO and the off-taking tanker on the other) resulted in different movements and a static tow was necessary. Mr Clarke's experience was that there is always a tug at the stern of the FSO if it was sitting permanently on a CALM buoy such

as the SPM. Mr Manning and Mr Clarke, whilst differing on that point, considered that it was likely that the provision of the *Ratu ENRA*, in place of the *Bratasena* from May 2020 onwards, with its CPP and bow thruster thereby allowing for a greater capacity to manoeuvre with a longer hawser between it and the FSO, was made because of the absence of skirting on the SPM, but regardless of that, on Mr Clarke's evidence, a static tow was an ordinary precaution to be taken, whether the FSO had a fixed propeller like the *Bratasena* or more sophisticated manoeuvring devices such as the *Ratu ENRA*. There was a suggestion by Mr Pramana that once the *Ratu ENRA* was in place, there was no longer a need for a static tow but there was no good evidence of that and Mr Burthem's evidence was that the provision of a vessel with a CPP and bow thruster made only a modest difference which was by no means equivalent to a permanent static tow.

113 In my judgment, the suggestion that a static tow was needed only because of the absence of skirting on the SPM makes no sense as the collisions occurred when the skirting was in place and the nature of the problem did not revolve around the protection of the SPM from soft collisions (referred to, as mentioned above, as "kissing the buoy") but the need to avoid the heavy contacts which had occurred when, as Mr Burthem pointed out, the skirting was inadequate to protect the watertight integrity of the SPM.

114 Both Mr Manning and Captain White agreed that it was the Master of the Vessel who was ultimately responsible for station keeping and that proper station keeping required a 24/7 watch on the forecastle of the Vessel to alert the bridge to any untoward movement towards the SPM. Whilst a CCTV was available on the Vessel there was no evidence of a light which would render that effective at night. Mr Manning took the view that the evidence of the collisions, as seen in multiple indentations on the bow of the Vessel extending

back to the second Water Ballast Tank, revealed "appalling" seamanship on the part of those responsible for the Vessel.

115 There was a dispute as to whether or not the SPM and Vessel together were to be defined as a "Terminal" for the purpose of statutory regulations and industry guidelines. On the definitions in the Terminal Regulations issued by the operator of the Yetagun Gas Field, PCML, in the International Safety Guide for Oil Tankers and Terminals and in the Oil Companies International Forum, the SPM and Vessel together would constitute a "terminal". In my judgment, the dispute surrounding whether or not the SPM and Vessel constitutes a "terminal" is something of a red herring. Regardless of whether that is so, it is self-evident and cannot be seriously disputed that there should be safety and other procedures which apply to the way in which the SPM and Vessel are to operate together, whether or not such regulations and industry guidelines are directly applicable. I heard evidence from Mr Manning and Captain White in relation to their operation.

116 Captain White stated that the International Convention for the Safety of Life at Sea ("SOLAS"), the International Safety Management Code ("ISM Code") and the International Convention on Standards of Training Certification and Watchkeeping for Seafarers ("STCW") applied to the Vessel and particularly relied on the fact that the ISM Code specifically requires a "Company" (defined as the owner, manager or bareboat charterer who assumes responsibility for the operation of a ship) to develop, implement and maintain a Safety Management System ("SMS") which requires the establishment of procedures, plans and instructions, including checklists, for key shipboard operations concerning the safety of the personnel, ship and protection of the environment. The various tasks should be defined and assigned to qualified personnel. He set out the functional requirements of an

SMS and the STCW where explicit responsibility is placed on shipping companies to ensure that the seafarers they employ meet minimum international standards of competence. Similar requirements in respect of training and competence are set out in industry guidelines for terminals. Without descending into any detail, it is clear in my judgment that there should be an established, maintained, and documented management system which required competent and trained personnel to have a clear understanding of their roles and responsibilities, with clear maintenance and operational procedures in place to maintain the integrity of the SPM and ancillary equipment, ensuring that incidents, accidents and near misses are reported, investigated and followed up.

117 No detailed Operations Manual for the SPM and FSO was produced which set out: any established procedures plans and instructions, including checklists for key shipboard operations; any instructions and procedures to ensure safe operation of the FSO; any procedures to prepare for and respond to emergency situations; any procedures to ensure that the FSO was manned by qualified and certificated seafarers; any procedures to ensure that personnel were given proper familiarisation with their duties; any procedures to ensure that all personnel involved in the companies' SMS had adequate understanding of the relevant rules, regulations, codes and guidelines; any procedures for identifying potential emergency situations and establishing procedures to respond to them; and any procedures for identifying equipment and technical systems, the sudden operational failure of which, might result in hazardous situations. Whilst there was reference to the existence of some emergency procedures, as mentioned below, no evidence was produced in relation to any SMS procedures in existence which set out in detail, procedures, plans and instructions for key shipboard operations including

appropriate precautions and preservation measures to be adopted to ensure that the FSO maintained proper station keeping and remained a safe distance away from the SPM in order to avoid collisions between them.

118 Captain White commented on the plaintiff's Operation Procedure & Maintenance booklet dated 11 July 2017, the SPM Banner Hex 06 Manual Book Rev A dated 17 January 2020, the Maintenance Plan SPM Banner Hex 06 dated 18 October December 2017, an ESPM document entitled "Static Tow Arrangement for … [*Bratasena*] During Station Keeping at Yetagun [Gas] Field", first issued on 25 September 2018 after the collisions on 1, 11 and 13 July 2018 (which was subsequently revised on 1 October 2018), and various Emergency Response Plan Documents, the last of which was dated 9 March 2018, together with an ESPM document titled "Conditions of Use, Terminal Information and Regulations", which is a document appended to ESPM's contract for the provision of condensate storing, offloading facilities and services for PCML. His uncontradicted view was that the available procedures and/or manuals were seriously deficient and failed to meet the basic statutory and regulatory requirements or recognised industry guidelines, in relation to the "Terminal", if the definition applied. There was a failure, in particular, to set out any precautions or preservation measures for: maintaining proper station keeping; ensuring that there would be a static tow in attendance at all material times; adopting relevant measures and/or protocols in the absence of a static tow on site to prevent and/or reduce the risk of collision between the SPM and the FSO; disconnection of the SPM from the SFO after collision; or ceasing operations after the SPM had sustained damage. There was no dispute that the Vessel had failed in numerous respects, as seen below, the dispute between the parties being whether or not the Warranties applied to the Vessel when operating in conjunction with the SPM.

119 Belatedly, during the course of the hearing on 10 May 2022 and without any witness evidence on the subject save for Mr Pramana mentioning it during his cross-examination, the plaintiff produced a Hazard Identification ("HAZID") Report and a Hazard and Operability Study ("HAZOP") Report for the Vessel dated 22 January 2018 which was produced by another company of which Mr Pramana was the beneficial owner and which referred to studies being carried out in December 2017. No reference was made in that to the need for a static tow to be constantly available or even to be available at all, so it carried no weight. No attention appears to have been directed in those reports to possible collisions between the Vessel and the SPM at all. The HAZID Report and HAZOP Report were mentioned in the plaintiff's 6th Supplementary List of Documents. The defendant objected to its admissibility, especially in the circumstances where specific discovery was granted on 3 September 2021 in respect of all "reports relating to the commissioning and installation of the Yetagun Gas Field" and "Documents and Correspondence relating to the measures and/or precautions taken to ensure that the Vessel remained a safe distance away from the SPM". That being so, the defendant said it would be seriously prejudiced by its admission into evidence as it would be deprived of the opportunity to cross-examine witnesses on these documents. As they failed to mention the critical areas in issue, however, they were effectively irrelevant and no help could be gained from them.

120 There were several features of the failings on the Vessel's part, if the views of Mr Manning and Captain White are taken into account. I should also mention that no evidence was produced in relation to the operation of the Vessel which was owned by PTCMS, another company owned by Mr Pramana, save for extracts from its log book and the Vessel's Daily Progress Reports. The defendant was the insurer of the Vessel but a "Chinese

Wall" existed between the defendant's different departments involved (that is, between the Non-Motor Claims department and the Marine Hull Claim department involved in boarding the *Bratasena* in July 2018) and as such could not obtain the Vessel's log books and crew's statements directly.

121 The following emerged from the expert evidence of Captain White and Mr Manning in relation to the failures of the Vessel, regardless of the absence of a static tow:

(a) Both experts agreed that the failure to observe a 24/7 watch on the bow of the Vessel in relation to its station-keeping of the SPM was crucial. There is no evidence of any satisfactory watchkeeping on the part of any personnel on the Vessel, whether members of the Maintenance Crew or the Officers or crew of the Vessel in order to maintain a safe distance between the SPM and the Vessel. The expert evidence was to the effect that someone would have to be stationed on the bow of the Vessel in order to monitor the position and that a view from the bridge would not be sufficient, since the SPM would be out of the line of sight from there, because of its limited height above the water level. Watching the CCTV footage would likely be ineffective at night. A watch was necessary in order to alert the Master or Officer on the bridge to the Vessel drifting or surging towards the SPM so that evasive action could be taken by use of the Vessel's engines. The documents disclosed by the Vessel show some monitoring of the SPM on an approximately hourly basis, when the experts agreed that a 24/7 watch was essential. Mr Manning stated that he considered it "unusual" to provide astern thrust to an FSO *because* "a diligent FSO crew, undertaking normal watchkeeping duties, would be aware of the FSO becoming poster the SPM and take action to prevent a collision".

He said that he had not seen any evidence of any system or watchkeeping on the Vessel.

(b) Both agreed on the failure to use the Vessel's engines, on being alerted to a problem by such a watch-keeper to propel the Vessel astern to manoeuvre away from the SPM. This would require the Master or Chief Officer on the bridge to give the necessary orders to the engine room for such movement.

(c) Both agreed on the failure to ensure that the export hose was not in a position where it could impede such movement. Whilst it might not be uncommon for such an export hose to be left connected to the Vessel's manifold, even for a period of as much as two months between discharges to off-taking tankers, both experts agreed that the other end of the hose, used to connect it with an off-taking tanker, should have been secured to the Vessel at the bow so it could not get in the way of the propeller and impede any movement of the Vessel that might be required. Whilst there was no direct evidence that the Vessel had been so impeded, that had been offered as an excuse for failure to make the necessary manoeuvres to keep the Vessel away from the SPM.

122 Both Captain White and Mr Manning agreed that there should have been a field-wide Terminal Handbook/Operations Manual setting out procedures, plans and instructions for the operation of the Vessel and SPM. It seems inevitable that such a document must exist and be in the hands of PTCMS, even if not in the possession custody and power of the plaintiff. There are references in the Chronology to the ERP not being followed and, in the absence of production of documents of this kind authored by PCML or

ESPM, I find on a balance of probabilities that whatever procedures were set out therein were not followed.

123 Captain White's uncontradicted view was that:

(a) There was no evidence of any systems or procedures which would comply with the statutory regulations which were undoubtedly applicable to the FSO. No SMS procedures were disclosed. No reports were disclosed from the Vessel in relation to the events in question and no steps taken to remedy the position after collisions first occurred.

(b) There was no evidence of the certification, qualification or training of the Master or any of the Vessel's officers or crew.

(c) When the damage to the SPM and to the Vessel itself was seen in the light of the obvious failures to maintain proper station keeping or to take suitable precautions or put in place measures to ensure that the FSO remained at a safe distance from the SPM, the "appalling" seamanship (as described by Mr Manning) spoke for itself in relation to the competence of those on board the vessel and/or the absence of proper procedures in existence on it.

The defendant's defence based on the Warranties

Clauses 1 and 8 of the Warranties

124 In my judgment, if the Warranties are applicable, cl 8 of the Warranties had been breached. Based on the evidence set out above, regardless of any prior assessment as to whether a static tow was required to be available at all times for the Vessel, it was the uniform position of PCML, ESPM and the plaintiff, after the Collisions, that this was not just a sensible precaution but a

requirement for the *Bratasena*. After the first collision which forms the factual backdrop of the present claim (that is, 1 July 2018), if not before, this should have been obvious but, regardless of whether it was appreciated at the time, it was a suitable precaution which should have been in place on an objective view. It is clear to me that the requirement to have a static tow available at all times was a suitable precaution and preservation measure which should have been adopted in relation to the SPM and Vessel.

125 Furthermore, the absence of 24/7 watchkeeping on the part of the Vessel's crew which would have enabled the Master or Chief Officer on the bridge to call on the services of the static tow tug, when required, is another failure in the provision of suitable precautions and preservation measures. So also is the failure to secure the disconnected end of the export hose so as not to impede the use of the Vessel's main engines and propeller, an excuse which could not possibly advance the plaintiff's case. Based on the Chronology, the failure of the Master of the Vessel to notify ESPM of every contact with the SPM as required by the ERP with the result that no corrective actions were taken in itself would constitute a further breach.

126 In my judgment, all of these matters contributed to the collisions and the damage caused thereby. A static tow was needed, but the failures of the Vessel, its Officers and crew and the absence of proper procedures on the Vessel to ensure proper station keeping, were contributory causes. All of these failures would amount to a breach of cl 8 of the Warranties if it is applicable to the way in which the SPM is operated.

127 In respect of cl 1 of the Warranties, the experts took different views on whether the Maintenance Crew were suitably trained and authorised personnel. Whilst Captain White's view was that the incomplete records in

respect of the Maintenance Crew's qualifications, training and personnel records were such that the evidence provided did not establish that the Maintenance Crew were suitably trained and authorised personnel, Mr Manning took the view that they were sufficiently qualified at a technician level, trained to carry out the maintenance functions on the SPM and had conducted the temporary repairs with some skill. Mr Burthem was not inclined to criticise the temporary repairs effected in August and September 2018, though he was critical of the repairs effected in December 2018 which were, on the evidence of fact, intended to be permanent and approved by Class. I do not conclude that there was a breach of cl 1 of the Warranties by reason of the provision of unsuitable personnel in the Maintenance Crew, because they would be expected to have basic technical skills only.

128 If cl 1 of the Warranties is applicable to the Vessel's Officers and crew, there is an absence of evidence in relation to their certification and training which would show compliance with its provisions. It was Captain White's view that the collisions themselves, reinforced by photographs of damage to the Vessel's port side shell plate which showed "at least 20 indentations", demonstrated their lack of training for the task required of them. In the light of this and Mr Manning's strong criticisms of the seamanship of those on board the Vessel (resulting in "extensive damage" to the SPM and the Vessel of the sort which he had "never seen" before), there is a case to answer in relation to this issue. The legal burden is on the defendant to establish a breach of at least one of the Warranties, but in circumstances where evidence as to the appropriate qualifications and training of the Vessel's Offices and crew and evidence of the establishment of appropriate procedures for watchkeeping and station keeping, could, it seems to me, have been readily provided by the plaintiff, because of the inter-relationship between

Mr Pramana and Mr Kee and, the plaintiff and PTCMS, I conclude that the evidential burden of showing suitable training and authorisation shifted to the plaintiff. The plaintiff failed to do so. If the Warranties apply to the Vessel's Officers and crew, there would be a breach of cl 1 of the Warranties because the SPM was not operated, in conjunction with the Vessel, by and under the supervision of personnel on board the Vessel who were suitably trained for the functions that they had to carry out as an FSO connected to the SPM.

129 If there were such breaches of either cl 1 or cl 8 of the Warranties, for the reasons given below, they would have the effect of excusing the defendants from any liability under the Policy, whether in respect of a claim for CTL or S & L expenses.

Application of the MIA (UK)

130 In para 5 of the SOC, the plaintiff pleads that, while the Policy is governed by and is to be construed according to the laws of Singapore, all of the terms conditions warranties and other matters contained within the UK Marine Insurance Act 1906 (c 41) (UK) (as amended by the Insurance Act 2015 (c 4) (UK) ("IA (UK)") which, collectively, I refer to as "MIA (UK)") are incorporated into the Policy. The allegation was denied at para 6 of the Defence. In support of their respective positions, the plaintiff essentially relies on the Marine Insurance Act Clause while the defendant relies on the clause on Law and Jurisdiction, the wordings for which I have reproduced above.

131 It is common ground between the parties that the Policy is governed by and construed according to Singapore law. The defendant, however, stops short of considering the effect of the Marine Insurance Act Clause. In my judgment, the Marine Insurance Act Clause cannot be ignored particularly in

circumstances where it reflects that the parties expressly agree and declare that all of the matters contained in the MIA (UK) "shall *still* be applicable" to the Policy [emphasis added]. The Marine Insurance Act Clause ought to instead be interpreted in accordance with the proper law governing the Policy (that is, Singapore contract law). There is no doubt that the reference in the Marine Insurance Act Clause to the "Marine Insurance Act 1906 (as amended by the Insurance Act 2015)" refers to the English legislations bearing such names and *not the Singapore* legislation bearing a similar title, "Marine Insurance Act". The phrase "shall *still* be applicable" [emphasis added] suggests that parties specifically considered, intended and agreed to incorporate "all of the terms, conditions, warranties and other matters" contained in the MIA (UK) *even though* the proper law is Singapore law. As such, on an objective interpretation of the Marine Insurance Act Clause, I find that the clause unambiguously encapsulates the parties' common intention for the MIA (UK) to apply. Neither party referred me to any material to show why the parties' common intention in that regard should not be given effect.

132 I cannot see any reason why the terms of a particular foreign statute should not be expressly incorporated in an insurance policy that is otherwise governed by domestic law and there is English authority to that effect. I therefore proceed on the basis that s 10 of the IA (UK) applies in relation to the effect of breaches of warranty.

Applicability of Clauses 1 and 8 of the Warranties

133 Clauses 1 and 8 of the Warranties include wording which provides for "suitably trained and authorised personnel" and "suitable precautions and preservation/maintenance measures". In the context of warranties applicable to "Operational Activities" in a policy covering total loss, "suitable" must mean

"apt" or "appropriate" for the proper operation of the SPM, with a view to minimising the risk of such total loss, whether by collision or otherwise. "Suitably trained personnel" must therefore import a requirement that those whose function is to supervise or operate the SPM are competent to do so with appropriate training to minimise the risk of such a collision which could lead to total loss of the SPM. "Suitable precautions and preservation measures" must, likewise, import a requirement for prudent, apt or appropriate precautions and measures for reducing the risk of collision which could lead to such total loss. As submitted by the defendant, there is a difference between the word "suitable" and the word "necessary" in the sense of something which is mandated or acquired under a statute, code or industry guidelines. A "suitable" precaution or measure is one which is prudent and sensible in the circumstances with the object of minimising the risk of collision, damage and loss. Even though in some sense, statutes, codes and industry guidelines may inform the standard of care expected of personnel and precautions and preservation/maintenance measures to be adopted, they are by no means *determinative* of the issue concerning the *suitability* of the training of such personnel and measures. While they are concerned with general practices, suitability is, as I have elaborated, very much determined in relation to the totality of the circumstances surrounding the present case and the collisions.

134 The plaintiff submitted that, as the word "personnel" was not defined, it can only be read in cl 1 of the Warranties as referring to the personnel responsible for maintaining the SPM, namely the Maintenance Crew, and that the SPM is not in any relevant sense operated, because it is an unmanned buoy so that cll 1 and 8 of the Warranties can have no application.

135 Mr Manning and Captain White agreed that the person ultimately responsible for the control and supervision of matters such as station keeping

and avoidance of collision with the SPM was the Master of the Vessel. It was Mr Manning's view that, once attached and functioning as a mooring point for the Vessel, the SPM was "fully autonomous". He took the view that the SPM was a "stand-alone" unit and that only Class requirements applied to it. Captain White took the view that statutory requirements and industry guidelines were applicable to the operation of the SPM. They disagreed on what was meant by the use of the words "operated" and "operating" in the Warranties, which is a matter of construction for the Court, taking into account the functions of the SPM and Vessel and their expert opinions on that aspect. The essential question posed was whether the Warranties were of application to what was or was not done by the Vessel, its Officers and crew. They differed as to whether the qualifications, training and personnel records for the SPM Maintenance Crew were acceptable as showing that they had been suitably trained and authorised (which I have found above that they were), whether the qualification, training and personnel records for the Vessel's Officers and crew were relevant in the same context (which I have found above that they were not and that the plaintiff has failed to discharge its evidential burden on the issue), and whether suitable precautions and preservation/maintenance measures were adopted when handling and operating the SPM, since the responsibility for avoiding collisions fell on the Vessel's Officers and crew (where I have found above that they were not).

136 Since the meaning of cll 1 and 8 of the Warranties raises questions of construction, albeit questions which are to be considered against the background knowledge of the parties to the insurance, the expert evidence can only assist in relation to how the SPM is "handled" or "operated" in practice, what qualifications or training are necessary for the persons who carry out those functions, once the functions have been identified and what suitable

precautions and preservation/maintenance measures should be adopted in relation to those functions.

137 There is no difference between the experts in reality as to how the SPM operates. It does not operate on its own but in conjunction with the FSO. It is therefore an essential and necessary part of its operation that the condensate should be transferred from the SPM to the Vessel for onward discharge to offloading tankers when they arrive. The SPM Manual Book describes the SPM as follows:

> The primary purpose of the CALM buoy for this project is to hold the storage tanker and enable transfer of fluids or gas from the platform to the storage tanker. Flow from the Platform is directed through pipeline, PLEM and riser to SPM and from SPM and from SPM fluids or gas go to storage tanker via floating hose.

It is therefore critical to the operation of the SPM that the SPM and the Vessel should be kept apart so as not to collide one with the other. Mr Pramana himself referred to the provision of the SPM and the Vessel as a "package" or "terminal".

138 The existence of the bareboat charterer is not in issue, nor the terms of cl 10 in it which provides that the bareboat charterers, PTCMS, bear the responsibility for the control of the SPM and its maintenance and repair. As owners of the Vessel, PTCMS also takes responsibility for the actions of the Master, Officers and Crew. As set out above however, the Maintenance Crew were employees of the plaintiff and PTCMS paid an additional sum of US$4,500 per day for that service.

Breaches of cll 1 and 8 of the Warranties

139 It is trite law that a warranty is a promise by the Assured that a particular thing shall or shall not be done in the future (a continuing or future warranty) or that a particular state of facts exists or does not exist (an existing fact warranty). All such warranties must be exactly complied with and it is immaterial that the breach occurs without the fault of the Assured. Under s 10 of the IA (UK), a breach of a warranty in a contract of insurance no longer results in the discharge of the insurer's liability, but the insurer has no liability in respect of any loss occurring after, or attributable to something happening, after a warranty in the contract has been breached but before it is remedied.

140 Here, although it is accepted that it is the Master of the FSO who is primarily responsible for ensuring the Vessel's station keeping and the plaintiff has submitted that it was the duty of the Vessel to maintain station keeping and to avoid collisions with the SPM, that does not meet the point that the cll 1 and 8 of the Warranties are promises by the plaintiff that the SPM will be operated by suitably trained and authorised personnel and that suitable precautions and preservation measures will be adopted when handling or operating it. It does not matter that, as between the assured and a third party, it is that third party who is responsible for these matters. It avails the plaintiff nothing to say that PTCMS was the owner of the Vessel and a separate legal entity, over whose employees it had no control. That does not appear to me to be a relevant averment. As between the plaintiff, as the Assured, and the defendant, as insurer, the plaintiff has warranted a state of affairs in the future and breaches that warranty if that state of affairs does not eventuate, whether or not another entity is responsible to it for those matters or it has delegated the specific obligations to some other person.

141 On the facts, PTCMS, a related company, was the owner of the Vessel and the bareboat charterer of the SPM although, despite its obligation to maintain and repair, it did not provide the Maintenance Crew, which was provided by the plaintiff. PTCMS is also a co-assured under the Policy against whom rights of subrogation are waived and PTCMS gave the same warranties as the plaintiff in what must be seen as a composite insurance, which, if relevant, reinforces the application of the general principle set out above. Furthermore, where a warranty consists of promises that certain things will be done in the future, as is the case with cll 1 and 8 of the Warranties in the Policy, it is neither here nor there if it is PTCMS which is responsible for the breach of warranty in question, as between itself and the plaintiff. The assured is not only under a duty not to breach a warranty by its own actions but has promised that it will not be breached, whether by itself or anyone else. It would not matter if the breach of warranty occurred by reason of the fault of a third party; nor would it assist the plaintiff as assured if it had delegated its duties, whether by contract or otherwise, whether to PTCMS or another. If the terms of the warranty in question are breached, the insurer has no liability in respect of any loss occurring or attributable to something happening after that breach and prior to it being remedied (see s 10 of the IA (UK).

142 Thus, the key question both in relation to cll 1 and 8 of the Warranties is whether the SPM was operated by and under the supervision of suitably trained and authorised personnel and whether suitable precautions and preservation/maintenance measures were adopted when handling and operating it, whichever company or entity was responsible for those operations. Put shortly, the question is whether, by the terms of the insurance, the operation of the SPM required the Vessel to be prevented from colliding

with it by suitable precautions and preservation measures taken by suitably trained and authorised personnel on the Vessel.

143 In my judgment, the SPM was operated in conjunction with the Vessel. Mr Pramana accepted that the SPM and the Vessel were provided as a package to PCML. He referred to the two together as both a "package" and a "terminal", as mentioned at [137] above. The plaintiff bareboat chartered the SPM to PTCMS who provided it, with the Vessel, to PCML through the joint venture company ESPM. Although the SPM and the Vessel could be disconnected, the evidence suggested that this was not a straightforward operation when the defendant enquired whether that had been done following the collision damage, as had been recommended by ABS. As mentioned earlier, the plaintiff's assessment was that the effect of such disconnection would be to bring the operation of the Yetagun gas field to a grinding halt. It is accepted that the SPM was installed for the very purpose of continual discharge to the Vessel for storage and subsequent occasional discharge to visiting tankers. In the plaintiff's report written some time after December 2019, and probably signed off by Mr Kee, the following appears:

> The SPM buoy is essentially a Catenary Anchor Leg Mooring (CALM). … Condensate cargo is passed via a subsea pipeline from the processing plant platform through the riser of the SPM buoy. A floating export hose is then used to transfer the condensate cargo to a Floating Storage and Offtake (FSO) vessel.
>
> Installed at location last April 2018 …, The purpose of the SPM buoy also serves as a morning equipment for the FSO, namely MT Bratasena, which was later replaced by the MT RATU ENRA last December 2019.

Mr Pramana testified that the reference to December 2019 ought to have been May 2020.

144 The operation of the SPM necessarily involved appropriate station keeping by the FSO, the *Bratasena*, and if appropriate precautions and preservation measures were not adopted to achieve that end by suitably trained and authorised personnel, both cll 1 and 8 of the Warranties would be breached.

145 The three key areas of criticism advanced by the defendant here are:

(a) the absence of a static tow to maintain the Vessel's position by use of tug power;

(b) the failure properly to keep watch to observe the Vessel surging towards the SPM and to take evasive action by use of the Vessel's own power; and

(c) the absence of suitable training and authorisation of those responsible for station keeping and keeping watch.

146 On the evidence, it is clear that, as was recognised after the event, a static tow was a necessary precaution and preservation measure to be adopted in order to avoid collision between the Vessel and the SPM. It appears from the Chronology and e-mail dated 1 July 2018 mentioned earlier that the Master requested it but was not given it when the *MV Amber* departed for Singapore, scheduled not to return until 1 August. At the time of the collisions on 1, 11 and 13 July 2018, the *MV Amber* which had previously provided a static tow had departed and was not present. Had she been present, it is more than probable that the collisions would not have occurred and there is no possibility of the Assured showing that non-compliance with the Warranties did not increase the risk of the loss which actually occurred in the circumstances in which it did occur.

147 There is no evidence of any satisfactory watchkeeping on the part of any personnel on the Vessel, whether by members of the Maintenance Crew or the Officers or crew of the Vessel in order to maintain a distance between the SPM and the Vessel. In the light of the expert evidence, there cannot have been compliance with the necessary precaution of 24/7 watchkeeping as required by cl 8 of the Warranties.

148 Watchkeeping is not a duty which requires a great deal of training or skill but station keeping requires action on the part of trained and competent officers on the bridge, alerted to the danger, in giving instructions to the engine room to take the requisite action to avoid such collision. Although it is said that the Vessel would not have been able, under its own power, to avert the collisions because of the presence of export hoses lying astern of the Vessel and impeding the use of the Vessel's propeller, that in itself would constitute a further breach of cl 8 of the Warranties since the Vessel's Officers and crew or the Maintenance Crew should have ensured that such hoses were out of the way so that the Vessel's engines could have been so used.

149 It is not possible, once again for the Assured to show that non-compliance with cl 8 of the Warranties in any of the above respects, could not have increased the risk of the loss which actually occurred in the circumstances in which it did occur.

150 The defendant says there is no evidence at all as to the training and authorisation of watchkeepers or those on the bridge of the Vessel at the times of the collision, whether it be the Master, First, Second or Third Officer, or anyone else involved in monitoring the distance between the SPM and the Vessel. I cannot simply assume, in the absence of evidence to that effect, that they were all properly certificated, trained and authorised to do the tasks with

which they were entrusted. Although some evidence was presented of the qualifications/training of the Maintenance Crew in the form of their *curricula vitae*/résumés, this does not meet the point, as it was the Vessel's Officers and crew that bore the responsibility for the avoidance of collisions.

151 Whilst it might be thought likely that the Master Officers and crew would be properly certificated, given the use of the Vessel in a gas field operated by an oil major, there is no evidence of that and, perhaps more importantly, there is no evidence of proper systems and procedures on board the Vessel in relation to the functions of watchkeeping and station keeping, as Captain White's evidence made clear. He took the view that the fact that multiple contacts with the SPM occurred in July 2018, when the Officers and crew were already aware of the risks associated with such contacts as early as April 2018 indicated that the crew were not suitably trained and equipped with the necessary skill sets and competencies properly to evaluate and manage the risk of contacts between the FSO and the SPM. Mr Manning's evidence was that "it is appalling that someone can allow that to happen and continue to have without doing an investigation".

152 With the evidential burden shifting to the plaintiff in the light of the expert evidence in relation to suitable training and authorisation of those personnel responsible for the operation of the SPM and supervision of its operation, the absence of evidence to satisfy me that the Master, Officers and crew were suitably trained and authorised, means that there is a breach of cl 1 of the Warranties also. Regardless of certification, there is no evidence of proper procedures and systems which would establish that there had been proper training of officers and crew for the tasks needed when the Vessel was acting as a FSO with the SPM. Once again, the Assured cannot show that non-compliance with the cl 8 of the Warranties in relation to proper

watchkeeping/station keeping as a precaution, (regardless of qualifications and training) could not have increased the risk of the loss which actually occurred in the circumstances in which it happened.

153 I do not, in the circumstances, need to decide whether or not statutory requirements such as SOLAS, the ISM Code, STCW are of direct application to the operation of the SPM or whether the combination of the SPM and the FPO constitutes a "terminal" in the technical sense, since it was recognised by all concerned, after the event, that a static tow had to be available at all times for utilisation when required, whether in "swimming pool conditions", transient conditions and at any time other than adverse weather conditions which ensure that the Vessel weathervanes around the SPM. The experts agreed that the Vessel would weathervane better in what are would normally be regarded as "bad weather" or adverse weather conditions because they would have the effect of keeping the Vessel away from the SPM. It was in relatively calm conditions or transient tidal conditions that the Vessel was likely to surge towards the SPM. This is made clear by the ESPM document of 25 September 2018 headed titled "Static Tow Arrangement for … [*Bratasena*] during station keeping at Yetagun [Gas] Field" which, as mentioned earlier, was referred to by Captain White. This document makes it plain that the static tow is to be provided during "weathervane conditions" when the *Bratasena* is riding with the current in calm sea conditions where there is no real effect of wind speed and swell and when the weather is calm and there are changes in the heading of the Bratasena due to tidal effects. It sets out detailed instructions for the manner in which the static tow is to be conducted. Mr Pramana said it was easy to "know the solution" after the event and there were issues as to who should bear responsibility for the cost of a constantly available static tow.

154 I cannot accept Mr Manning's view that a static tow was not required to be in attendance at all times with the package consisting of the SPM and the *Bratasena*. It was universally recognised by all concerned, after the event, that this was the case even if the HAZOP study beforehand had not suggested that it was needed. With a different vessel from the *Bratasena* with a CPP, the situation might have been different, as he suggested and it may be that this is the solution which has been adopted more recently, although Mr Burthem did not accept that this could prove an acceptable solution. Whether it was the responsibility of PTCMS, ESPM or PCML, as a matter of contract between them, to ensure safe operation by providing a static tow or a different FSO is not the point. It was clear to all concerned at the time, following the earlier collisions in early July 2018, that the *Bratasena* could not safely operate with the SPM without such a static tow.

155 In the absence of a static tow, it is self-evident that proper watchkeeping must be maintained and that the Vessel itself must be able to use its main engines to manoeuvre away from the SPM should it be found to be drifting too close in order to maintain its station and avoid collision. That applies also, even if there is a static tow available. If floating hoses are left in an unsecured position which prevents the vessel using its main engine and propeller for such manoeuvres, that is plainly a failure to take a necessary suitable precaution or measure when operating with the SPM. Both Captain White and Mr Manning agreed that was necessary.

156 I conclude therefore that there was a breach of both cll 1 and 8 of the Warranties and that, in consequence, the defendant is not liable under the Policy for any loss resulting from the collisions. The claim for a CTL and for S & L expenses fails on this basis alone.

The defendant's defence based on the Claims Notification Clause

157 I find that the defendant is likewise not liable under the Policy for any loss resulting from the collisions as a result of the plaintiff's breach of the Claims Notification Clause which, under the Policy, is a Condition Precedent to the defendant's liability.

Background

158 The Claims Notification Clause, reproduced above, provides that it is a "strict Condition Precedent to Underwriters' liability" that in the event of the Assured "becoming aware of any incident giving rise to a claim which may be covered under this Policy that Underwriters be given written notification of such circumstances within thirty days". As the Policy covers total loss only, including CTL, the awareness of the Assured must be of an incident giving rise to a claim which might result in a total loss or CTL. An incident which could only give rise to a partial loss would not fall to be notified because it could not give rise to a CTL.

159 There is no scope for any argument that this clause was not validly incorporated into the Policy as the Policy wording was the subject of negotiation between Mr Ng, the plaintiff's broker and Mr Athappan. It appears in the standard wording which Mr Ng produced to Mr Athappan as the policy wording when first seeking a quotation. Virtually all policies contain notification clauses of some kind and the fact that Mr Pramana said that he was unaware of it is immaterial.

160 It was on 5 September 2018 that the plaintiff notified the defendant of a potential claim under the Policy. The question is therefore whether the

Assured was, as at or before 6 August 2018, aware of an incident giving rise to a claim which might be an actual total loss or a CTL.

161 As at 6 August 2018, the plaintiff was aware of the following matters:

(a) there had been several collisions between the Vessel and the SPM;

(b) the SPM had taken on a list, tilting at an angle which gave rise to a risk of sinking;

(c) there had been water ingress in the Compartments which had been pumped out;

(d) there were breaches in the shell plating of the Compartments which were the subject of temporary repairs, with further repairs to be effected;

(e) part of the skirting of the SPM had been torn off; and

(f) there was other visible damage of a more minor nature which could not have put the SPM at risk of total loss.

162 Two questions arise. Could the plaintiff, as at 6 August 2018 or before, be taken to be aware that the collisions and damage caused thereby could lead to an actual total loss? Could the plaintiff, at that date, be taken to be aware that the costs of repair might exceed the Insured Value of the Vessel? In my judgment the answer to each is affirmative.

The plaintiff's awareness as of 6 August 2018

163 It is the plaintiff's pleaded case that on 8 July 2018 the SPM showed signs of tilting and that on or about 17 July 2018 its representatives conducted

a preliminary check when the SPM was found to have taken in seawater in its watertight tanks which compromise the SPM's buoyancy and rotating ability, causing the SPM to tilt and sink further. It is said that the plaintiff's representatives could not ascertain whether the sea water ingress was caused by physical damage to the SPM. The plaintiff pleads that it was on 16 August that it was observed that the SPM was still sinking and that the skirting plates had been dislodged from the body of the SPM and were missing in part. It was on 21 August 2018, as pleaded, that the plaintiff's representatives boarded the SPM and assessed that the plating of the compartments had been breached. On 25 August, upon boarding the SPM again, the representatives discovered that the structural integrity of two tanks was likely to have been breached by punctures caused by the collisions. The breaches caused the ingress of seawater into the SPM's tanks, which were causing the SPM to sink further. As pleaded, repairs were effected on or about 29 August 2018, on or about 24 September 2018 and on or about 29 December, in each case to restore watertight integrity and allow the SPM to regain buoyancy despite structural damage. The pleading goes on to say, in para 8, that despite the plaintiff's efforts, the watertight integrity of the SPM remained compromised and it required permanent repair, the estimated costs of which exceeded the Insured Value.

164 Mr Clarke and Mr Burthem in their joint expert memorandum agreed that the side shell fractures and flooding of the Compartments gave rise to a risk that the SPM would sink. The loss of buoyancy and entrained water inside had adversely affected the stability of the SPM and although the angle of list could not be determined from the photographs, it had been referred to as 34 degrees. It is common ground between these two experts that the temporary repairs carried out at the end of August and in late September resulted in

effective mitigation of the risk of sinking. Even if a small degree of seepage did occur, the SPM was not at risk of sinking thereafter provided that the compartments were periodically checked and pumped dry. This position did not apply until sometime towards the end of September however and at and before 6 August 2018 this was still an unknown because all the temporary repairs had not been done and their effect evaluated. There is no evidence from which I can conclude that, at that time, the ability to pump out the Compartments and to effect temporary repairs were sufficiently known for the plaintiff to take the view that an actual total loss was unlikely.

165 There is no direct evidence as to what the plaintiff thought, other than the evidence of Mr Pramana who was unaware of the 30-day notification provision in the Policy. At para 23.3 of his AEIC, he stated that "on or about 17 July 2018, the plaintiff's representatives conducted a preliminary check on the SPM's tanks" during which "the SPM was found to have taken in seawater in its watertight tanks, which compromised the SPM's buoyancy and rotating ability, causing the SPM to tilt and sink further". He accepted in cross-examination that by that date he was aware that the Vessel had collided with the SPM on three separate occasions, that the SPM was seriously damaged, had taken in seawater and was listing. He suspected that the tanks might have been breached. He was aware of the tilting and the potential of sinking but until the damage was ascertained, he would not know the probability of that happening. It was not known where the water had entered, which could have been through a manhole. He said that he was in "panic mode" and was aware that it could sink because it was tilting with water inside. He knew it was tilting and it was "bad". Mr Law's evidence was that he remained concerned at all times about the possibility of further ingress of water bringing about a

catastrophe and it was for that reason that he initiated the May/June 2019 repairs of his own initiative.

166 What remained wholly unknown on 6 August was the likely cost of any repairs to the SPM. The plaintiff submits that it was not until 21 August 2018, at the very earliest, when the crew assessed the extent of damage to, and breach of, the SPM's watertight compartments that it would be possible to come to any view at all as to the cost of repair. The assessment of MatDan following the October 10–11 survey came up with a figure of S$450,000 for repairs and although the plaintiff, in the person of Mr Kee, told Mr Pramana that this was a ridiculous estimate and insisted on obtaining three quotations in November/December, all of which came in at over US$5m, I consider that it would have been impossible, before 5 August 2018, to have come to a considered view about that. It would only be if the plaintiff could reasonably consider that it would prove necessary to disconnect the SPM and transport it onshore for repair or that heavy lift equipment would be needed for a repair in situ that a CTL could have been envisaged at that point. I do not find that to be the case.

167 The Claims Notification Clause provides for a condition precedent to the defendant's liability under the policy and a "Condition Precedent" is defined in the Policy as:

> … a clause where compliance is strictly required in all respects. If you fail to comply with a Condition Precedent, this may prevent you from making a claim under the Policy or may discharge Underwriters' liability under the Policy.

The ignorance of the plaintiff of this term does not assist it but the effect of the clause is harsh and, in the ordinary way, a court would be inclined to give the plaintiff the benefit of the doubt where there was room for a view that the

claim would give rise only to a partial loss, particularly as the burden of proof in this respect lies upon the defendant. In the context of a CTL, I am persuaded that the plaintiff could reasonably, at any time before receiving quotations in December 2018, have come to the view that the repairs were unlikely to exceed the Insured Value.

168 Despite the unsatisfactory nature of the evidence from the plaintiff, it seems to me that the reality was that the incidents were probably not seen by Mr Pramana as likely to give rise to an actual total loss. Had that been in the mind of Mr Pramana, I would have expected him to notify the defendant straightaway regardless of his ignorance of the 30-day notification period. That is, however, not the relevant criterion under the terms of the provision. The question is whether he was aware of an incident giving rise to a claim which ***might*** be covered under the Policy. He was undoubtedly aware of the collision incidents and of damage to the SPM and the possibility of it sinking. There is no direct evidence as to whether he considered that it might give rise to a claim under the Policy, but it is impossible to say that he did not become aware of an incident giving rise to a claim which could be covered under the policy as a total loss. If he was in "panic mode", as he said he was, and appreciated the risk of sinking as a result of the collisions, which would inevitably mean an actual total loss, he must have been aware of an incident that gave rise to a potential claim under the Policy.

169 In these circumstances, I conclude that the defendant has shown that there was a breach of the Condition Precedent in failing to give notice to the defendant within 30 days of becoming aware of "any incident giving rise to a claim which may be covered under this Policy", because of his state of knowledge at 17 July. It is enough that, at that date, he was aware of an incident which might give rise to a claim for actual total loss. As this is a

condition precedent to liability on the part of the defendant, the failure to comply with this provision results in the defendant escaping liability under the Policy.

The plaintiff's claim for CTL based on the costs of repairs

The repairs

170 Having held that the defendant is not liable under the Policy in respect of the CTL based on the breaches of cll 1 and 8 of the Warranties or otherwise because of the plaintiff's failure to satisfy the Claims Notification Clause, there is no need to determine whether or not the SPM was a CTL. I nonetheless do so, noting that the issue to be determined is whether the reasonable costs of repair that would be incurred by a prudent uninsured exceeds the Insured Value so as to give rise to a CTL of the SPM.

The expert evidence as to the repairs required

171 In their reports, Mr Manning and Mr Burthem disagreed as to:

(a) whether the December 2018 repairs with the welded box plates could have constituted a permanent repair;

(b) whether it was necessary to reinstate the SPM's skirting to its condition prior to the collisions in order to restore the SPM to a safe operational state;

(c) whether the replacement of the SPM skirts could have been deferred until the SPM's next scheduled Class drydocking in 2025;

(d) what the reasonable costs of repair would be for the damage which occurred, which largely turn on the necessity for carrying out replacement of the skirting; and

(e) what the reasonable costs of emergency repairs constituting S & L charges would be, if recoverable under the Policy. This issue is the subject of a separate section of the judgment dealing with the issue of S & L as a discrete matter below.

The December 2018 repairs

172 On the basis of the factual evidence from Mr Law, the intention was that the December 2018 repairs were to be permanent and approved by ABS. The reasons given by ABS for not approving such repairs are set out in the e-mail of 18 March 2019, the material parts of which I have reproduced at [79] above. There is no suggestion in that e-mail, if those repairs had been carried out without the deficiencies mentioned in it, that the repairs to the Compartments would not have been acceptable to Class. Although that is not a completer answer to the issue because full records have not been made available, Mr Burthem's expert opinion (having worked for ABS between 2002 and 2010 and worked extremely closely with ABS field surveyors) was that had the plaintiff organised and carried out those repairs properly, a permanent repair could have been effected which would have been accepted by ABS. I accept that evidence. Mr Manning's and Mr Clarke' s view that the use of welded box plates internal to the hull of the SPM cannot be considered an effective means of achieving a permanent repair for preventing water ingress are gainsaid by the acceptance of ABS of the repairs which were done as permanent repairs and approved on 24 November 2019 leading to classification of the SPM in March 2020. Although Mr Manning sought to say, when questioned, that the December 2018 repair was rejected because the

boxes welded inside the Compartments did not have stiffeners or tripping brackets instead, his view appeared to be based upon a misunderstanding of the differences between the smaller box repairs and the larger box plate repairs.

Repairs to the skirting

(1) Necessity of reinstating the skirts

173 I find that, on the evidence, it was not necessary to reinstate the SPM skirting to its condition prior to the collisions in order to restore the SPM to a safe operational state. Not only did the plaintiff (and subsequently ESPM) operate the SPM following the collisions throughout (save for any periods of shutdown necessary for the repairs in December 2018 and October/November 2019 to be effected), but PCML was also content for such operation to be continued, whether with a static tow and/or a different FSO with a CPP/bow thruster. Furthermore, ABS subsequently approved the operation of the SPM without such skirting, which has never been restored and was used with the *Bratasena,* as before, for the period up to May 2020, when the latter was apparently replaced by the *Ratu ENRA*. Mr Burthem's expert opinion, which I accept, was that ABS would probably apply the Underwater Inspection In Lieu of Drydocking ("UWILD") procedure to the SPM which would mean not only that the SPM could operate without a skirt until the scheduled drydocking in 2025 (when it could be renewed at relatively small cost) but that it was effectively authorising its use for the rest of its functional life of 15 years without such skirting. The plaintiff's appointed experts agreed that ABS' major concern related to the safety of operation of the SPM and that there was no evidence of any condition imposed by ABS when accepting that nothing further need to be done to the skirting other than grinding away the sharp

edges. The proposal to remove the skirts was accepted by ABS in late May 2019 and the grinding works were accepted in October 2019, the full classification being given to the SPM in March 2020, well before the *Bratasena* was replaced by the *Ratu ENRA*.

174 In my judgment, no prudent uninsured would decide to repair or replace the skirting by disconnecting the SPM and transporting it to a yard and back because of the prohibitive cost of doing so when the function of the skirting, as agreed by the experts, was only to protect the SPM from soft collisions and was not designed to withstand larger collision forces. With the field operator's requirement changed to require a static tow to be available at all times after the collisions, as opposed to specific limited times of offtaking, the FSO would be kept away from the SPM and collisions would thus be avoided, whether of a soft or more serious nature. As stated above, the SPM could operate safely without the skirting and with a static tow, the need for any skirting was obviated. The same would apply with a FSO such as the *Ratu ENRA* with its CPP and bow thruster (a "Rolls-Royce" vessel according to Mr Clarke). The skirting could only operate to protect the SPM from soft impacts of the nature of "kissing the buoy" in any event and where the risk was of collisions of the same severity as those which had occurred in July 2018, the skirting could have no real protective effect. Other measures were needed to provide such protection which would render the skirting of limited, if any, use.

175 It is true that the SPM's original design included a skirt and the plaintiff submits that it is entitled to have the cost of repairs assessed on the basis of restoration to the SPM's design condition, by renewal of the skirting, which, as Mr Manning and Mr Burthem agreed, could not practically be done offshore, but required transportation to a shipyard. Reference to the SPM's

original design, however, is immaterial when considering a purported CTL and I therefore cannot accept the plaintiff's submission. The essential principle, however, in the assessment of a CTL is agreed to be what a prudent uninsured owner would do by way of repair. In my judgment, this is seen here by what was actually done, which was to effect such repairs as were necessary for the continued operation of the SPM with the approval of Class – all the while without reinstating the skirts. The Court must assess what repairs are required to make the SPM substantially as good as it was before the casualty or, to use the historic words approved in the decision in *The "Yero Carras"* [1935] 52 Lloyd's Rep 34 at 43, to restore it to be "of the same classification and as nearly as possible the same thing as that which was valued". The test is an objective test and the Court must determine, on the basis of the evidence, the cost of the reasonably necessary repairs to make the SPM substantially as good as it was before the casualty in order to decide whether or not it would exceed the SPM's Insured Value. Both Mr Burthem and Mr Clarke agreed in questioning by the Court that, with a static tow or CPP vessel in place, a prudent uninsured would not renew the skirts on the SPM.

(2) Deferment of repairs to the skirting

176 Even if it was desirable to renew the skirting in order to restore the SPM to its original design condition, with the protection afforded by the skirting to soft collisions, no prudent uninsured would ever repair the SPM by taking it to a yard for such a repair, given the prohibitive cost of the disconnection, transportation to and fro, followed by reconnection in situ, when renewal could take place at a scheduled drydocking in combination with other repairs and renewals. On being questioned about this, Mr Clarke agreed with Mr Burthem that as long as Class approved the operation of the SPM without skirts the obviously sensible thing to do was to defer any repair of the

skirting to the next drydocking. Whilst they disagreed about the actual cost of renewal of the skirting in a shipyard, Mr Clarke's estimate of US$322,738 was based on renewal of three skirts rather than the two which were claimed to be damaged in the collisions in question and Mr Burthem's estimate of US$115,000 would appear to be more accurate. Whatever the true cost for repairing the skirts at the yard, Mr Clarke agreed that in the context of the present case where the Insured Value is US$4.7m, such sums of moneys are relatively small, and the difference in the experts' opinion of such costs is of little consequence. To incur transportation costs for a limited repair of this kind would be so disproportionate that no prudent uninsured would contemplate it.

(3) The reasonable costs of repairs

(A) REPAIRING AT A YARD

177 As the defendant submitted, what was done in practice reflects the approach of a prudent uninsured owner, save that, in Mr Burthem's view, if the December 2018 repairs had been properly planned, organised and effected under ABS' aegis, what was done in May/June 2019 and October/November 2019 could all have been done in December 2018 in one campaign. Thus, in his view the true cost of reasonably necessary repairs was in the region of US$970,000. No evidence was adduced of the actual cost incurred in the three campaigns which took place following the temporary repairs in August and September 2018 save for the amounts claimed as S & L expenses, where limited evidence was available. In his report, Mr Burthem calculated the reasonable costs of the repairs which were actually carried out in December 2018 as US$900,000 and in May/June 2019 as US$750,000 with an estimate of the repairs remaining to be done after that date as costing US$350,000, giving rise to a total of US$2m, if three campaigns were justified. Those

figures were based on the information then available before Mr Law gave his evidence so that some small adjustments would be required, in the downward direction as the SPM no longer had a skirt by October 2019. The figures compare with Mr Clarke's estimate of the repair cost at the various shipyards of figures between US$1.535m approximately and US$1.745m, including what he saw as necessary permanent repairs to the Compartments and renewal of the skirting (with, of course, the additional cost of getting the SPM to the yard).

178 It is not necessary for me to decide on the exact figure because it is plain that, if the SPM is not disconnected and transported to a yard, the cost of repair cannot exceed the Insured Value, whichever figures are adopted. The costs of the temporary repairs in August and September 2018 are insignificant and the costs of the further repairs required outside a yard in situ cannot approach the Insured Value of US$4.7m.

179 Furthermore, it was common ground between the experts that:

(a) the repairs to the Compartments and all the topside repairs could take place in situ, rather than at a yard; and

(b) the most substantial element of the repair costs alleged by the plaintiff is to be found in the costs of disconnection of the SPM and transport to a yard for repair. The cost of transportation to and from a yard, as set out in the repair quotations for yards in Singapore or Thailand and the opinion of Mr Clarke, varied between US$5.273m and US$7.532m. Without that element, the repair costs could not exceed the Insured Value, although Mr Clarke reneged on his previous agreement with Mr Manning and made a late attempt to suggest otherwise in

producing a spreadsheet at the beginning of his joint "hot - tubbing" evidence with Mr Burthem in relation to repairs on site which did not include renewal of the skirting.

180 The plaintiff produced no satisfactory evidence of payment of the costs of any repairs that were actually effected, whether by it or by SPMT or ESPM as any form of cross check as to appropriate costs of repair. Broad brush statements by Mr Pramana which spoke of US$2m incurred by the plaintiff or as much as US$3–4m incurred by others (where it was unclear whether he was talking about repairs or the cost of a static tow or other arrangements) without any supporting evidence can be given no weight in the absence of quotations, invoices and proof of payment, none of which was produced. As mentioned earlier, it is obvious that when one puts forward a case of CTL, the actual repairs carried out and their cost is a relevant question which the plaintiff completely left unanswered.

(B) IN SITU REPAIRS

181 Mr Clarke's late evidence in the form of a spreadsheet for repairs to be done in situ tendered on 12 May 2022 which he was instructed to prepare on 8 May 2022, contains numerous fallacies and does not represent the proper and reasonable costs of such repairs. Objection was raised to its production in answer to a question from the plaintiff's counsel in the "hot tubbing". The document had been made available to Mr Burthem the previous day and he had been given no sufficient opportunity to consider its contents. Whilst I stated that I would be fully justified in refusing to admit it into evidence, I did admit it on a *de bene esse* basis, saying that I could see no good reason for its late production and its apparent contradiction to the joint memorandum agreed by Mr Clarke and Mr Burthem. To minimise the prejudice on the defendant in

the light of the plaintiff's extremely belated attempt to adduce additional evidence towards the end of the trial, I permitted Mr Burthem to submit a further short report to state his views on it following the "hot tubbing" in which he and Mr Clarke discussed it. The spreadsheet was intended to represent the estimated cost of in situ repairs if the remnants of the skirts in the way of Compartment Nos 1, 6, 4 and 5 were to be cleanly cropped and ground and the remaining skirts in the way of Compartments Nos 2 and 3 had to be removed, without having to transport the SPM to a yard. The total figure put forward by Mr Clarke was US$5,938,906.

182 I am bound to say that I found Mr Clarke's spreadsheet to be a contrived exercise. As Mr Burthem's further report pointed out, it proceeded on the basis of a need for two repair campaigns, utilising separate offshore spreads which focussed on the underwater skirting works separately from the internal welded box repairs. This immediately had the effect of a duplication of costs for two separate spreads where no prudent uninsured would ever adopt such a course of action, if planning and executing repairs properly. The effect was to add a cost of at least US$610,500.

183 It ignored the evidence of Mr Law that:

(a) whereas the December 2018 repairs were intended to be approved by ABS, they were rejected due to issues with the welding execution and NDT whilst further repairs took place with 2 larger welded boxes being fabricated and tack welded in place in May 2019 under a procedure which had, it seems, already been approved by class. As stated at [81(f)] and [81(h)] above, the repair to Compartment No 4 was complete by 7 June 2019 and the repair in Compartment No 5 by

November 2019, with ABS signing off on of those repairs on 24 November 2019; and

(b) whereas the intention in October 2019 had been to crop and remove the remaining intact skirt, it had broken away and the only work actually done was a grinding of the sharp edges and cleaning up the area where the skirting had been. No additional brackets were fitted and Class approval was obtained.

184 The spreadsheet figures ran counter to what had been agreed in the joint memorandum with Mr Burthem for the following reasons.

(a) At para 44 of the joint memorandum between Mr Clarke and Mr Burthem, Mr Clarke agreed that the quotes for in situ repairs, by which he meant the Boskalis quotation of US$5.1m, was always going to be significantly increased by virtue of needing to allow for renewal of the skirts which necessitated a heavy lift marine spread. Because renewal of the skirts was unnecessary, the spread (and cost) could be "commensurately reduced".

(b) At para 45 of their joint memorandum, Mr Clarke agreed that a considerably less expensive permanent repair all, which was just as effective as a permanent repair to the hull, could have been completed afloat rather than taking the SPM to a repair facility.

(c) Each of the quotations had involved reinstatement of the skirts. The inconsistency of Mr Clarke's spreadsheet, providing for lesser repairs to the skirting at greater cost than the Boskalis quote speaks for itself in circumstances where he had previously agreed that the expensive heavy lift spread associated with that quote was unnecessary

and that effective dive repairs could be done which would have been considerably less expensive in a single campaign.

For the foregoing reasons, I prefer the evidence of Mr Burthem and accept his criticisms against Mr Clarke's calculations in the spreadsheet as follows.

185 A large figure appeared in the spreadsheet for a second-generation Diving Support Vessel which was wholly unnecessary as could be seen from the fact that vessels such as the *MV SK Deep Sea* were actually used for the November 2018 dive campaign and December 2018 repairs, giving a saving of about US$55,000 per day according to Mr Burthem. This would result in a reduction in cost of US$1.39m, on Mr Clarke's estimate that 25.25 days were needed for the repairs. Mr Clarke also exaggerated the mobilisation and demobilisation costs, as compared with those actually incurred for the earlier repairs, to the tune of US$450,000.

186 The duration of the repairs at 25.25 days for the diving works and a further 15 days for the internal repairs is fanciful in the context of what is known to have actually taken place. The work for welded boxes which were installed in December 2018 was completed within four days at the same time as replacement of the import hose and mooring bridle, a process which could have been carried out within the period allowed for the diving works, which, as set out above, allows for work which was not done and not required. Mr Clarke's assumption is thus "clearly excessive".

187 Mr Clarke's spreadsheet also includes work which was not actually done nor required at a cost of US$313,125, together with a figure of US$460,000 in respect of 36 replacement anodes, when only nine were required. Additional unnecessary items such as Construction All Risks

Insurance and marine warranty costs should also be deducted, amounting to US$198,609. Mr Clarke also allowed for a static tow which was not required for the purpose of repairs, being included as a necessary precaution regardless of repair requirements. The cost of the US$218,750 is therefore deductible.

188 Mr Burthem's conclusion, on adjusting all the items with which he disagreed and Mr Clarke spreadsheet was that the total figure would be US$1,434,853, which is within the same ballpark figure of US$1.1m, which he had estimated in his report for the May/June 2019 repairs and what remained outstanding at that point, on the information available to him at the time.

189 Even if I was not to accept Mr Burthem's evidence in its entirety on these matters and to consider that somewhat higher figures applied (instead of US$1,434,853 as Mr Burthem had calculated), it is clear to me that Mr Clarke's evidence on the spreadsheet figures is to be rejected both because of the inconsistency with his previous evidence and because Mr Burthem is clearly right in relation to the majority of points set out above. In my judgment, the downward adjustments would inevitably bring the figure down to a cost which was significantly less than the Insured Value.

The NOA

The tender of the NOA

(1) The parties' cases

190 Following a meeting between the plaintiff and the defendant on 16 April 2019, where the defendant took the position that the Policy did not cover a CTL and, whilst preserving its rights, requested the plaintiff to

produce its figures for a claim for S & L expenses, the plaintiff tendered a NOA to the defendant on 22 May 2019. Up to this point, the plaintiff had continued to use the SPM and had been paid the bareboat charter hire of US$5,000 per day by PTCMS plus the further sum of US$4,500 per day for providing a Maintenance Crew. On 25 June 2019, the plaintiff sold the SPM to SPMT for US$400,000 which was approximately equivalent to its scrap value. The plaintiff has declared that the sales proceeds are held to the benefit of the defendant but there has been no similar tender of the sums received from PTCMS for any period at all.

191 Where there is a valid abandonment, the insurer is entitled to take over the interest of the assured in whatever may remain of the subject matter and all proprietary rights incidental thereto. In the defendant's submission, the effect of this is retrospective and operates from the time of the casualty which gave rise to the right to abandon with the consequence that the insurer is entitled to all the income earned by the abandoned property from the time of the casualty itself. In such circumstances, the defendant submits that if the SPM was a CTL and the NOA was valid, the plaintiff was and is required to account to the defendant not only for the sale proceeds but for all income earned from the SPM from the date of the collisions, the first of which had occurred on 1 July 2018.

192 Primarily however, the defendant contends that the plaintiff failed to tender a NOA of the SPM with reasonable diligence and/or within a reasonable time after receipt of reliable information of the loss, in accordance with s 62(3) of the MIA (UK). As stated above, the NOA was tendered on 22 May 2019 and the defendant rejected it on 31 May 2019.

(2) The applicable provision under the English Act

193 Section 62 of the MIA (UK) provides:

> **62 Notice of abandonment.**
>
> (1) Subject to the provisions of this section, where the assured elects to abandon the subject-matter insured to the insurer, he must give notice of abandonment. If he fails to do so the loss can only be treated as a partial loss.
>
> …
>
> (3) Notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make inquiry.
>
> …
>
> (7) Notice of abandonment is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him.
>
> (8) Notice of abandonment may be waived by the insurer.

194 In assessing what is "reasonable diligence" or a "reasonable time", account must be taken of the information available to the insured and the uncertainties involved. Where information is of a doubtful character, the insured is entitled to make enquiry and to examine the circumstances which obtain, before tendering the NOA. Where the insured receives information which is certain and definite however he must tender a NOA promptly. The reason for this is that a delay in tendering and NOA deprives the insurer of the benefit of taking over the insured property, with the result that the loss is to be treated as a partial loss and a claim cannot subsequently be made for a total loss under s 62(1) of the MIA (UK). Section 62(7) of the MIA (UK) states that a NOA is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him.

(3) The inexplicable delay in tendering the NOA

195 It is a question of fact whether or not a NOA has been tendered with reasonable diligence or within a reasonable time. Whilst, as I have stated above, the plaintiff could not have arrived at any sensible figure for repair costs until it had obtained quotations, it did receive three quotations for on shore repairs between 13–21 December 2018 from Blue Water Asia Pacific Group Ltd, Franklin Offshore International Pte Ltd and InterMoor Pte Ltd in sums ranging between US$6.994m and US$9.253m. Furthermore, at para 7.8 of its SOC, the plaintiff pleaded that on 6 November 2018, its representatives "carried out an underwater inspection of the SPM to fully assess the extent of damage to the underside of the SPM". The underwater survey in fact took place between 31 October and 16 November. In Mr Pramana's AEIC, he stated that he had a copy of the plaintiff's own report which is referred to elsewhere in the judgment, which set out the damage suffered. Although he referred to it as being produced sometime in September 2019, it appears as though it could not have been produced until October, but this is of no significance in this context. The plaintiff also had the MatDan report of 16 October 2018 which stated that the cost of repair work would amount to S$450,000. Furthermore, the plaintiff had been able by the end of December 2018 not only to prepare detailed repair plans, having conducted temporary repairs in August/September 2018, but had virtually completed the December 2018 repairs. There was therefore detailed knowledge on the part of the plaintiff of the damage upon which the quotations were based. Mr Pramana accepted in cross-examination that at the time the plaintiff obtained these quotations he was aware that the SPM was a CTL.

196 On the face of these quotations upon which the plaintiff relied in support of its claim, it would have been obvious to the plaintiff that there was

a case to be made for CTL of the SPM by, at the very latest, mid-December 2018. There was no conflicting information with which the plaintiff had to grapple, save for the assessment made by the MatDan surveyor of S$450,000, which self-evidently could not have been right (and was never believed by the plaintiff to be correct) if the SPM was to be brought to shore for repairs on the basis of the damage recorded in that report, which was the basis on which those quotations proceeded. In those circumstances, even allowing for a period of time for the plaintiff to consider the position and discuss the matter and take legal advice, a further five months passed before the plaintiff tendered the NOA on 22 May 2019. The obtaining of a fourth quotation from Boskalis on 2 April 2019 for repair at sea provides no good reason for delay, since the evidence of Mr Pramana was that such a repair was not only difficult to do but that he knew it would inevitably turn out to be more expensive with standby charges in bad weather representing an open-ended bill of costs. Even after obtaining this quotation at over US$5.194m, which was said not to be exhaustive, a further seven weeks passed before the NOA was sent.

197 In these circumstances I do not consider that the NOA was given with reasonable diligence after the receipt of reliable information of the loss, as required by s 62(3) of the MIA (UK).

(4) The necessity of tendering the NOA

198 The question arises nonetheless as to whether, when the plaintiff received sufficient information of the loss to tender a NOA, there was any possibility of benefit to the defendant in receiving such a notice, since s 62(7) of the MIA (UK) provides that if there is no such possibility, a NOA is unnecessary. The plaintiff did not plead this point and the defendant submits that if it had, evidence might have been obtained on the topic. Since, before

selling the SPM, the plaintiff approached the defendant to see if it had any suggestions to make for a sale and was told to act as a prudent uninsured, it might be said that an earlier NOA would not have afforded the defendant any benefit at all.

199 The defendant argued that, since the SPM continued in operation throughout, it was obviously of value in situ to those involved in its operation with the Vessel, and subsequently with the *Ratu ENRA*, so that any abandonment to it at an earlier stage (if accepted) would have enabled the defendant to investigate the contractual position in relation to SPMT, ESPM and PCML and negotiate a sale at a price that was not an undervalue. Whilst this appear at first blush to be fanciful, given what actually occurred when the NOA was tendered, the hypothesis on which this has to be considered is an acceptance of the NOA with concomitant rights and the issue is whether it can be said that no benefit would have accrued to the defendant if the SPM had been left in its hands.

200 The decided authorities show that a NOA is not necessary where there is nothing that the insurer can do, so that such a notice would be a "vain and useless form", where there is no possible benefit to the insurer, and where abandonment would be an idle and useless formality (*Arnould: Law of Marine Insurance and General Average* (20th Ed, 2021) ("*Arnould*") at para 30-15). I do not consider that I can properly reach that conclusion because the SPM was of value and the defendant might have been able to secure a better price for it from SPMT, or another party such as PCML, instead of the US$400,000 obtained by the plaintiff. Repairs had been effected in December 2018 and more were "on the drawing board", with whatever possibilities that created for negotiations with others involved in the utilisation of the SPM in the Yetagun Gas Field. I therefore consider that a NOA was required and the lack of

reasonable diligence in tendering the NOA has the effect that the plaintiff is taken as treating the loss as a partial loss only.

Waiver of the right to abandon the SPM

201 The defendant submits that the plaintiff waived its rights to abandon the SPM to the defendant and elected to treat the SPM as a partial loss when it accepted revenue for its hire from PTCMS (a related company), carried out repairs in May/June 2019 without informing the defendant, planned further repairs (which were effected after the sale by SPMT) and then sold the SPM to SPMT, another related company through Mr Kee, as a common shareholder. The sale price was US$400,000, which was initially agreed by the parties' experts, Mr Clarke and Mr Carpenter in their joint memorandum, to be "unreasonably low" although Mr Clarke changed his position on the matter on the last day of the trial. Mr Clarke's view, as expressed in their joint memorandum, was that the value of the SPM at that time was US$2,839,986. Mr Carpenter's view was that, with a proper allowance for the costs of repairs, as assessed by Mr Burthem at that time, the value of the SPM was US$4,222,500. In the interim period prior to sale, the plaintiff had been in receipt of US$5,000 per day in respect of the hire of the SPM with an extra US$4,500 in respect of the Maintenance Crew provided by it in lieu of the provision by PTCMS of such personnel under its maintenance and repair obligations in the bareboat charter. For the reasons given earlier in this judgment in respect of Mr Clarke's evidence on the issue, Mr Clarke's embarrassed efforts to retract his agreement with Mr Carpenter that US$400,000 was unreasonably low, did not carry any weight with me.

202 The premise of the NOA was that the SPM required expensive repair in a yard. That was the basis upon which the plaintiff sought settlement of a

CTL under the Policy in circumstances in which it not only intended to affect substantial repairs to the SPM in situ and to obtain Class approval of such repairs but also proceeded to do so, both before and after the NOA. No information was provided of the May/June 2019 repairs, whether at the time of the NOA or the subsequent sale. Mr Pramana, who denied that any repairs were made in May/June 2019 even at the trial, must have been well aware of them as were Mr Kee and Mr Law. Mr Pramana must also have been aware of the plan to change the package supplied by PTCMS to ESPM and the latter to PCML, once the bareboat charter of the SPM to PTCMS was terminated. It seems to me inconceivable that he could have been ignorant of such matters, particularly in view of his relationship with Mr Kee. The plaintiff did not disclose to the defendant that the SPM had been repaired and was deriving income throughout the period prior to the NOA and never stated that it would hold such income for the account of the defendant in the event of acceptance of the NOA.

203 It is clear that the plaintiff informed the defendant on 11 June 2019 of its intention to sell to SPMT, as a related company, following the defendant's rejection of the NOA on 31 May 2019 and its intention to hold the sale proceeds for the account of the defendant if the SPM proved to be a CTL. The defendant did not object to the sale on the basis of a full reservation of rights and a statement that the plaintiff must act as a prudent uninsured.

204 It is necessary to examine the exchanges between the parties and their lawyers in relation to this sale. On 11 June 2019, the plaintiff's consultant naval architect e-mailed the defendant to inform it that the plaintiff had received an offer from "a buyer based in Australia" (that is, SPMT) to purchase the SPM on an "As Is Where Is" basis with an offer expiry date of 17 June 2019. The e-mail went on to state that the plaintiff considered that

selling the SPM was in the defendant's interest as the plaintiff would be looking to recover the S & L costs incurred to prevent the SPM from sinking and sought the defendant's position on the sale at US$400,000:

> The Insured considers that selling the SPM is in your interests as the Insured will be looking to you to recover the sue & labour costs they have incurred to prevent the SPM from sinking. To date, you have not made any interim payments to the Insured on account of such costs. Assuming the Insured succeeds in their claim against you, you will agree it is in your interests to dispose the SPM to avoid incurring further costs related to such prevention. Given the current state of the O & G industry, the Insured considers the offer for US $400,0000 is about the best price one can obtain for the SPM in its present condition.
>
> As you have rejected the Notice of Abandonment, the Insured assumes you do not have any objections to them accepting the offer for US $400,000. Please let us know on an **urgent** basis if you have any objections to the Insured accepting the offer.
>
> Unless you raise any objections to the Insured accepting the offer with full and adequate reasons by **10 am Monday, 17 June 2019**, the Insured will proceed to accept the offer. To be clear, if the insured accepts the offer and the sale of the SPM is realised, they confirm they will hold the proceeds thereof to your account and credit the same to you in the event that you pay out on their claim under the Policy.
>
> [emphasis in original]

205 The defendant's response on 13 June 2019 came from the defendant's lawyers asking for clarification of the basis for saying that US$400,000 was the best price for the SPM in its present state. Information was sought as to how the offer had been obtained, what other offers had been received and how they were obtained, what valuations had been conducted of the SPM and what S & L expenses had been incurred to prevent the SPM from sinking. An urgent response was sought in relation to the questions asked whilst stating that the plaintiff was under a duty to continue acting as a prudent uninsured and that the reply was without prejudice to all questions of liability under the Policy. There is no evidence of a formal reply to this.

206 On 27 June 2019, some ten days after the supposed deadline imposed by the plaintiff, and no doubt following without prejudice discussions, the plaintiff's lawyers wrote to the defendant's lawyers to record the agreement reached between the parties in relation to the proposed sale of the SPM. The letter referred to the disclosure made that Mr Kee was a shareholder of the buyer, SPMT. The letter went on as follows:

> Your clients have confirmed that they have no objections in principle to the sale of the SPM on the following conditions, which our clients have agreed to:
>
> (a) The sale of the SPM is strictly without prejudice to all their rights and defences under the policy including but not limited to their rights to challenge our clients' declaration of CTL of the SPM and the validity of the [NOA] issued by our clients, save that they will not contain that the sale of the SPM by our clients is contrary to the NOA;
>
> (b) They also fully reserve their rights to dispute the price which the SPM is proposed to be sold and/or our client's valuation of the SPM in its current condition; and
>
> (c) The proceeds of the sale of the SPM will be held by our clients to the order and account of your clients in the event that our client CTL claim is paid by your client under the policy …
>
> Our clients note in particular that your clients have agreed not to take the position that the sale of the SPM is contrary to the NOA and our clients' intention to abandon the SPM.

207 On 29 June 2019, the plaintiff's lawyers wrote to set out their client's explanation and the basis for their position that US$400,000 was a reasonable offer for the SPM in the circumstances. The letter referred to the plaintiff's concern that the SPM was exposed to the risks of sinking at any time, stating that the SPM skirt had been badly damaged, that the SPM was now unprotected and that a tug had been arranged to keep the SPM separated from the *Bratasena*. It was said that the emergency repairs performed were not a permanent solution and that the SPM would require significant repairs before

deployment for operations. A reasonable sale price had therefore to take into account the costs of repair to restore the SPM to a condition which enabled the buyer to utilise the SPM with an ABS "Statement of Compliance". The letter went on to set out a series of figures for repair costs which the buyer had to incur amounting to US$4,900,000 for in situ repairs, such estimation of repair costs being lower than market rates because "the designer of the SPM is also a shareholder of the buyer and is familiar with how to repair and restore the SPM in a cost-efficient manner" (that is, Mr Kee).

208 Mr Pramana said that there were no documents evidencing the sale of the SPM by the plaintiff to SPMT save for the Bill of Sale. This was dated with effect from 25 June 2019 and referred to the sale as being on an "As Is Where Is" basis. It included the following provision: "The Seller has neither represented nor guaranteed that any party, including its Principal, will enter into a charterparty for the SPM as from the Effective Date". On being asked to whom the words "its principal" referred, Mr Pramana testified that he was "not sure" but suggested that it might be "ENRA" (that is, presumably, ESPM). What the plaintiff was apparently not prepared to do was to give any guarantee of fitness to SPMT as to the extent to which the SPM could be used in the future, or whether it would be acceptable to PCML, but as Mr Kee knew all about the issues and took it on, in situ, he was obviously prepared to take any risk and to agree with PCML on the package which ESPM and PTCMS would provide to PCML and what PCML would provide. Since Mr Pramana was the ultimate beneficial owner of PTCMS with a close working relationship with Mr Kee, he presumably also had a clear idea about the arrangements currently in existence and the prospective arrangements for the future. Exactly what they were is not known, although Mr Pramana gave some hearsay evidence on the subject which was not such that I could place any

weight on it, admissible or otherwise. It appeared that the *Bratasena* was, in May 2020, replaced by the *Ratu ENRA* which was said by Mr Pramana to have a CPP, but it was unclear whether there was provision for a static tow in addition and who was going to pay for what in respect of the overall package. What is plain, on the totality of the evidence (including the non-disclosure of relevant evidence by the plaintiff) before me, is that there was some package deal made at one or more points in time which involved the termination of the bareboat charter of the SPM to PTCMS and arrangements relating to the static tow and replacement in due course of PTCMS' *Bratasena* by the *Ratu ENRA*.

209 In due course, the SPM was sold by SPMT to ESPML, as stated in a general announcement by ENRA Group dated 18 February 2020, with what appears to be a 12-month warranty that it was fit for operational use in every respect. There is no evidence of any work done by SPMT, save for the repairs in October/November 2019 although it was Mr Pramana's evidence that money had been spent on "design". No supporting documents and no evidence was adduced from SPMT or ESPML on such matters. The only relevant evidence given came from Mr Law as to the limited repairs in October/November 2019.

210 It is self-evident from this account, however limited the evidence about any deal and what occurred thereafter, that the sale cannot be considered an arms-length transaction at market value. The absence of any supporting documentation for the sale other than the Bill of Sale is, to say the least, unusual, if full disclosure has been made. Whilst Mr Pramana's evidence was that the SPM was a liability, of which he was keen to be rid, and was prepared to accept less than scrap value for it, so that Mr Kee took all the risk in connection with this "liability", this does not explain how the price came to be agreed, since it appeared to me that the SPM must have been worth much

more to SPMT. Mr Pramana said that "ENRA will finance", though it was not entirely clear whether Mr Pramana was referring to ESPM, ESPML or the ENRA Group, providing finance to SPMT in respect of whatever had to be done to the SPM, but the close relationship which he had with Mr Kee means that details of the negotiated deal and details of what SPMT and ESPM did with the SPM could have been adduced in evidence and the exact nature of all that was done following the sale could have been presented to the Court. There has been no transparency and the sale does not appear therefore to accrue to the benefit of the defendant if, as appears from all the evidence, it was not a sale at a market value.

211 The fact that the SPM was repaired so that its watertight integrity was restored in the Compartments, partly before and partly after the sale to SPMT, on the basis of drawings proposed and approved by ABS before the sale is significant. The fact that the grinding of the skirting and the final repairs to Compartment No 5 were carried out in November 2019 after the sale, with subsequent approval by ABS of all the work done, with Mr Law moving employment to SPMT, does not militate against the conclusion that the sale was part of some other arrangements, the details of which have not been made available to the defendant or the Court. The absence of any willingness to account for the US$9,500 per day is also significant in reinforcing the conclusion that the sale was not effected for the joint benefit of the plaintiff and defendant but was part of a course of action pursued by the plaintiff in acting in its own interest alone (or perhaps that of PTCMS, Mr Kee, SPMT and ESPM).

212 Had the plaintiff been acting in the interests of the defendant as well, it could not reasonably have agreed to a price of US$400,000 for the sale of the SPM, it being, in my judgment, clear that the value of the SPM to its

purchaser, SPMT and the onward purchaser ESPML, was considerably in excess of that figure as the SPM could continue to be used in situ, as it undoubtedly was. Whatever modifications took place, whether to the FSO, the static tow or to the SPM itself, they did not involve any transportation of the SPM to a yard for repair at the level of costs put forward in the three repair quotations obtained by the plaintiff in December 2018 or in the assessment of costs made by the plaintiff's expert, as contained in his report, because no such transportation was needed or occurred. The agreement of the experts that US$400,000 did not represent the market value of the SPM at the time of the sale recognises this reality and the continued operation of the SPM at the site reinforces the conclusion of sale at an undervalue.

213 The exchange of correspondence referred to above in relation to the proposed sale and the agreement that was reached between the parties' respective lawyers in relation thereto shows that, although the defendant agreed not to contend that the sale of the SPM was, in itself, contrary to the NOA, it reserved all its rights to dispute the price at which the SPM was sold and its rights under the policy.

214 The defendant pleaded (at para 26(f) of its Defence) that:

> … by electing to operate the SPM and to derive revenue from it after it was allegedly damaged … and/or after the alleged emergency and temporary repairs had been completed until the sale of the SPM and/or by selling the SPM to [SPMT] for US$400,000 on or about 25 June 2019, the plaintiff was precluded from abandoning the SPM and/or withdrew and/or waived any NOA and/or any right to abandon the SPM as it had treated any loss suffered (which is not admitted) as a partial loss, which is not covered by the terms of the Policy.

In support of its case, the defendant relies on *Arnould* at para 30–28 where it is said that the assured's notice of abandonment is essentially an offer to cede the

property which, like any other offer can be withdrawn if it has not been accepted.

215 The principle that an assured who has given a NOA which has been declined may lose the right to claim for a total loss by acting inconsistently with a continuing intention to abandon the insured property to the insurer has been considered in a number of English authorities. In *The Brillante Virtuoso* [2015] 1 Lloyd's Rep 651, Flaux J (as he then was) applied the analysis of the relevant law given by Rix J (as he then was) in *Royal Boskalis v Mountain* [1997] LRLR 523 at 557–558. The question to be addressed is whether or not, by acting as it did, the plaintiff acted inconsistently with a continuing intention to abandon the SPM to the defendant, thereby losing the right to claim for a CTL. Unlike the facts in the case before Flaux J, the absence of objection by the defendant to the sale here does not mean that the plaintiff was not acting inconsistently with the intention to abandon the SPM. To the contrary, because of the nature and price involved in that sale, it appears to me that the plaintiff was preferring its own interests to those of the defendant; the plaintiff was acting for its own account in effecting that sale as well as holding onto the earnings of the SPM from the date when it became aware, on its own case, that the SPM was a CTL on receipt of the repair yard quotations in December 2018. At [31] of his judgement in *The WD Fairway* [2009] 2 AER (Comm) 399, Tomlinson J (as he then was) cited Rix J with approval and said that because abandonment of the subject matter insured to the insurers is a condition of being entitled to treat a CTL as if it were an actual total loss, as opposed to a partial loss, it is now well established that preservation of the right to treat the CTL as an actual total loss is dependent upon the assured continuing to be prepared to abandon the subject matter insured to the insurer.

216 The plaintiff's conduct in: continuing to operate the SPM for its own account; receiving earnings from its use; only tendering a late NOA on 22 May 2019, some five months after receiving three quotations in respect of repair costs in December 2018; effecting repairs in May/June 2019 after such tender without informing the defendant; obtaining ABS approval for projected repairs to the Compartments and the skirting prior to the sale; selling the SPM as an undervalue in June 2019; releasing Mr Law to the purchaser, SPMT, to continue supervision of the SPM; failing to inform the defendant of the further repairs carried out in November/December 2019, presumably paid for by SPMT or one of the companies related to the ENRA Group; and retaining the SPM's earnings before and after the NOA up to the point of sale on 25 June 2019, all point to the same conclusion that it was dealing with the SPM for its own account throughout. Mr Pramana himself, who was copied in the correspondence with ABS, employed Mr Law and enjoyed a close working relationship with Mr Kee (who is the plaintiff's project manager and a shareholder in the plaintiff), must have known all this and played a part in the decision-making process.

217 In consequence, the plaintiff must be taken to have elected not to treat the SPM as a CTL and/or waived its right to do so and/or is precluded from doing so by its conduct in treating the SPM as its own, to do with it what it liked, regardless of the interests of the defendant to whom the SPM had ostensibly been abandoned. As a matter of analysis, any offer which it did make to cede its interest in the SPM by tendering a NOA must be taken to have been withdrawn on effecting the sale in the manner and for the price that it did, particularly in the light of previous conduct prior to the NOA. Therefore, the plaintiff's loss can only be treated as partial and it now cannot claim for CTL of the SPM.

Was the SPM a CTL?

218 Ultimately this issue, as already indicated, turns on one question. Would a prudent uninsured have effected repairs to or replaced the skirting either by transporting the SPM to a yard or by lifting the SPM from the water in situ and thereby incurring the expense thus involved at the sort of prices quoted by the repairers, with some additional expense as envisaged by the experts? If the answer to that question is yes, then the SPM would be a CTL on the figures. If not, and if the repairs/replacements were not necessary or could be postponed to the drydocking required by ABS in January 2025, when there would be no additional cost of transportation to a yard and the direct repair cost of the skirting would be, on the expert evidence, between US$115,000 and US$322,738, then, regardless of the repair cost of other damaged items, there would be no possibility of a CTL on the figures. I have discussed the expert evidence on this issue at length in an earlier part of my judgment, which I need not repeat here.

219 Captain White and Mr Clarke agreed that with a static tow in place it was not going to make any difference whether or not there was skirting round the SPM. It was agreed between Mr Manning and Mr Burthem that the effect of the absence of part or all of the skirting, once the watertight integrity of the SPM was restored, was minimal in terms of its effect on the motions of the SPM and had no practical impact on its operation. The sole purpose of the skirting was to protect the SPM in the event of soft collisions, otherwise known as "kissing the buoy". It was in the nature of a bumper or fender which would provide no protection in the event of heavy collisions of the kind which occurred which caused part of it to break off and caused PCML/ESPM/PTCMS to provide for the static tow that should have been there in the first place.

220 Both Mr Clarke and Mr Burthem agreed that no prudent uninsured would ever consider spending money on renewal of the skirting if there was a requirement for a static tow. In essence it made no difference whether or not the FSO was to be the *Bratasena* or a vessel with a CPP and bow thruster. Mr Burthem considered that the provision of such a vessel could not obviate the need for a static tow and Mr Clarke did not disagree, saying that the *Ratu ENRA* would provide greater manoeuvrability but was essentially a Rolls-Royce option.

221 Mr Clarke and Mr Burthem also agreed that if a repair to the skirt could be deferred to the next compulsory drydocking of the SPM, that would be the sensible course to adopt provided that ABS approved the use of the SPM without the skirting, which it did. As the Compartments had been the subject of a repair approved by ABS, it was the cost of the other repairs which fell to be assessed. The differences between the experts on the direct cost of repairs to the skirting and the other topside elements were of limited significance in the context of the issue whether the SPM was a CTL or not. The cost of such repairs represented only about 10% of the overall cost, if transportation to the yard was required. There is provision in the ABS rules for UWILD. In order to qualify for this process, the SPM would need certain features which the ABS record does not show for the SPM. That does not necessarily mean that the SPM could not be approved for this process and Mr Burthem's view was that it was likely that ABS would accept such underwater inspection in lieu of taking the SPM to drydock which meant that the ABS approval of the grinding work to the lost skirting was an effective approval for the full life of the buoy and not merely an approval conditional on drydocking within the usual five-year period.

222 The conclusion to be drawn from this is that the costs of repair cannot approach the level of the Insured Value. Whatever arrangements were made as between the plaintiff, PTCMS, SMPT and ESPM remain unknown despite the fact that Mr Pramana, it would be thought, could have revealed them. The continued use of the SPM for its purpose throughout, both before and after the sale of the SPM at an undervalue of $400,000 to SPMT in June 2019 (as explained above), the repairs done in May/June 2019 and October/November 2019 with no sufficient evidence as to their cost and the payer of those costs, the termination of the bareboat charter of the SPM to PTCMS, the on-sale of the SPM to ESPML, the limited hearsay evidence of some financing by one of the entities in the ENRA Group of SPMT, the SPM's continued use today, the arrangements between PTCMS and ESPM and the latter with PCML in relation to the package supplied for the operation of the SPM and the replacement of the PTCMS Vessel, the *Bratasena*, by the *Ratu ENRA* in May 2020 all suggest that there were arrangements between these entities which would show, if revealed, a higher value of the SPM and lower costs of repair than those alleged to give rise to a CTL. Consequently, *even if* the defendant was liable under the Policy (which, as I held earlier, it is not), the plaintiff's claim for CTL of the SPM fails on the facts.

Costs of S & L

223 This issue does not arise because of my earlier decisions as recorded in this judgment which mean that the plaintiff cannot succeed on any claim under the Policy at all. *However, if that were not the case*, then two questions would arise. First, whether the plaintiff would be entitled to S & L expenses under the Policy terms. Secondly whether, if there was such an entitlement, what expenses would qualify as S & L.

S & L expenses under the Policy

224 As to the first question, it seems that a provision in the Policy escaped the notice of everyone until the closing submissions. Under the heading, "General Claims Conditions applicable to all Sections", the following wording appears (as set out above, which I reproduce here for ease of reference):

> Procedure in the event of loss or damage for which Underwriters may be liable.
>
> Underwriters will, in addition to any loss recoverable under this Policy, reimburse the Assured for any charge properly and reasonably incurred in pursuance of the duties contained within these General Claims Conditions applicable to all Sections.

225 As this provision is followed, on the same page, by the clause providing for the duty of the Assured to take such measures as may be reasonable for the purpose of averting or minimising a loss, its effect is the same as a conventional "sue and labour" clause, so that there is, in my judgment, no issue about the inclusion of the right to reimbursement of S & L charges where they are properly incurred by the plaintiff. Section 78 of the MIA (UK) provides that where there is a suing and labouring clause in the Policy, this takes effect as a separate supplementary engagement by the insurer, whether or not there is a total loss under the Policy. There is no inconsistency between a policy for total loss only and a S & L clause.

226 As stated earlier in this judgment, the negotiations of the parties are inadmissible as an aid to construction where there is an agreed policy document which supersedes the Slip, so that the defendant's attempts to rely on negotiation and/or the Slip cannot assist its case on this.

Qualifying expenses

227 It is common ground between the parties that, to qualify as S & L, the expenses must be properly and reasonably incurred for the purpose of averting or minimising a loss to the insured property and that, as provided by s 78(3) of the MIA (UK), expenses incurred for the purpose of averting or minimising a loss which is not covered by the policy are not recoverable as S & L. To qualify under the Policy here, the expense must therefore be incurred with the object of averting a total loss or CTL.

228 It is also common ground that for such expenses to qualify, they must be reasonably incurred when the insured property is in the grip of the insured peril by which is meant expenditure when the insured peril is in operation or obviously imminent (see *Royal Boskalis Westminster NV v Mountain* [1997] LRLR 523 at 607, citing *ICS v British Traders* [1981] 2 Lloyd's Rep 460 at 158: the "assured should be able to recover all extraordinary expenses reasonably incurred by him where he can demonstrate that a prudent assured person, mindful of an obligation to prevent a loss, would incur expense of an unusual kind").

229 The plaintiff initially claimed a sum of US$5,539,109 for S & L but, in its amended pleading, reduced its claim to US$1,887,380.71. That was expressed to be in four distinct categories. In their joint memorandum, Mr Manning and Mr Burthem commented on the expenses claimed under each of the four categories.

(a) It was common ground between Mr Manning and Mr Burthem that the Category 1 expenses, incurred in relation to, and/or incidental to, the replacement of the mooring hawser was not expenditure

incurred to preserve the insured property from loss. It could not therefore qualify as S & L.

(b) Category 2 expenses consisted of costs incurred in relation to, and/or incidental to, the inspection and repair of the Compartments to drain the water and prevent further flooding. The amount claimed was US$109,719.16. Mr Manning and Mr Burthem agreed that this category was recoverable in principle because there was, in August and September 2018, a risk of the SPM sinking. There was a difference between them as to the quantum of the claim.

(c) Category 3 expenses consisted of costs incurred in relation to, and/or incidental to, conducting ROV surveys of the Mooring Chain and the SPM Riser and the PLEM. Mr Manning and Mr Burthem agreed that the condition of the SPM Riser and the PLEM had no influence on the averting of loss of the SPM, but differed as to whether the survey of the Mooring Chain was expenditure incurred to preserve the insured property from loss. Mr Manning's figure for these costs was US$336,837.56, as compared to the plaintiff's claimed amount of US$308,689.56.

(d) Category 4 expenses were constituted by costs incurred in relation to, and/or incidental to, conducting the permanent repairs of the SPM Compartments by the installation and welding of the fabricated box plates in December 2018 and thereafter. Mr Manning took the view that, if a repair was carried out to save the SPM from sinking, whether it was temporary or permanent repair, it was an S & L expense. Mr Burthem opined that, once the risk of sinking was no longer operative nor obviously imminent, repairs would not qualify as

> S & L and in that, he was right, as a matter of law. The claim here was for US$1,365,974.42 and the issue was therefore whether or not, when such expenditure was incurred, there was an imminent risk of total loss. As Mr Manning and Mr Clarke both agreed with Mr Burthem that, once the watertight integrity of the Compartments was restored following the emergency repairs in August and September, the risk of the SPM sinking was effectively mitigated, there is no room for any argument that the repairs carried out in December 2018, May/June 2019 and October/November 2019 to the Compartments can be characterised as S & L.

230 There was, as indicated above, a difference between Mr Manning and Mr Burthem as to the proper and reasonable costs of the temporary repairs effected in August and September 2018 in Category 2 and the characterisation of the Mooring Chain Survey in Category 3.

231 Mr Manning's view was that the reasonable cost of the temporary repairs was US$92,219.25, whereas Mr Burthem's view, on further consideration of fuel invoices, was that the proper cost was US$20,875 which he mentioned at the trial (as compared to his initial estimate of US$8,109.84 in the experts' joint memorandum). The difference between them is essentially found in their approach to two purchase orders/invoices for the hire of the *Majestic 7*. It was Mr Burthem's view that the vessel was not necessary for the effecting of the emergency repairs because a separate standby vessel was in attendance throughout the time when the temporary repairs were being effected by the Maintenance Crew. Self-evidently, the cost of the repairs themselves were minimal, consisting only of the materials and the labour of the Maintenance Crew, who were being paid anyway. The only vessel intervention that was needed was for the transfer of the Maintenance Crew.

Mr Manning opined that it was reasonable to have the *Majestic 7* or a similar vessel available to prevent further escalation of damage to the SPM and that it was used during the temporary repairs. The two purchase orders cover the period 16 July to 15 August 2018 and 16 August to 15 September 2018 and show that the *Majestic 7* was "running" on 16–17 July 2018 and 22–28 July 2018 but was otherwise on standby in the port of Yangon for all of the period covered by those purchase orders. No purchase orders were produced in relation to the latter half of September.

232 It does not appear that the *Majestic 7* ever went to the site and there were other anchor handling tug/standby vessels present, such as the *MV Amber*, which is shown by the WhatsApp messages to have been used for transferring personnel to the SPM to carry out the temporary repairs. As the Maintenance Crew regularly boarded the SPM for maintenance, there must, in the ordinary way, have been such vessels available to transfer them from the Vessel to the SPM. I cannot therefore conclude that the proper and reasonable expenditure in this category was any higher than the figure of US$20,875.

233 The difference between the experts in relation to the ROV Mooring Chain Survey effectively evaporated when Mr Manning, in answer to a question from the Court in the "hot tubbing", appeared to agree that the ROV survey in March 2019 could not be said to be an expense incurred in the context of an imminent peril. There appears to have been measurement of the chain angles by divers in October/November 2018 which would show whether or not there had been movement which could in any way endanger the SPM. Mr Burthem's view was that, in any event, the chain survey in March had been effected by divers in the course of one day and that the ROV survey was for a different purpose, so that the cost of any chain inspection at that stage, even if qualifying as S & L, could not exceed US$19,340.

234 I conclude therefore that the only expenditure which would qualify as S & L is US$20,875 under Category 2.

General difficulties

235 There were other difficulties raised in relation to S & L which would or could prevent recovery, apart from the breach of cll 1 and 8 of the Warranties and other defences discussed in this judgment.

236 Under the terms of the bareboat charter with PTCMS, it was the latter which was responsible for any maintenance and repair of the SPM, not the plaintiff. The question then arises as to how the plaintiff could properly and reasonably incur repair costs which were the responsibility of another entity under the contract between them. The plaintiff had no liability to do so under the bareboat charter, although self-evidently the SPM could not have been left without repair. Why the plaintiff, as opposed to PTCMS, should take responsibility is however unknown. However, given that, regardless of contractual liability as between the plaintiff and PTCMS for the costs of repair, the plaintiff, as Assured was obliged by the Policy to take steps to avert or minimise loss, it was entitled to payment for expenses incurred in fulfilling that duty. If it paid for genuine S & L charges, it was entitled to payment of them by the defendant.

237 Although PTCMS was a co-insured and an affiliated company of the plaintiff because of the common shareholding of Mr Pramana in both, there was no evidence of any agency relationship between them and the evidence of payments actually made and the identity of the payer was in any event wholly unsatisfactory. It was clear from the outset, it being the plaintiff's claim, that there must be evidential support of its averments made as to the expenses

incurred in respect of the S & L costs. The defendant, in its Defence put the plaintiff to proof and in its opening statement, submitted that the plaintiff had not led any evidence, in the AEICs of its witnesses, as to the fact that the expenses had indeed been paid by the plaintiff as it alleged.

238 It was a somewhat bizarre feature of the evidence that it was not possible to reconcile the figures provided in a spreadsheet by Mr Pramana to payments actually made in respect of the costs of the temporary repairs. Even on the last day of the trial, whether the respective expenses had indeed been incurred by the plaintiff remained a mystery. In the circumstances, I allowed the plaintiff to prepare a table reconciling the relevant invoices to the corresponding proofs of payment contained in the Agreed Bundle of Documents. On 20 May 2022, the plaintiff produced a table showing the amounts with corresponding proof of payment as: US$105,201.19 for Category 2 (as compared to its claim for US$109,719.16), US$297,189.56 for Category 3 (as compared to its claim for US$308,689.56), and US$1,151,566.03 for Category 4 (as compared to its claim for US$1,365,974.42). The plaintiff also, somewhat opportunistically, tendered additional evidence which it had "inadvertently missed out disclosing some of the bank transfer notifications" and, if they were to be accepted, the respective amounts with corresponding proof of payment would be increased (to US$108,627.38, US$336,837.56 and US$1,272,425.41 respectively). On 23 May 2022, the defendant wrote to express its view that the plaintiff's attempted disclosure of further documents was prejudicial and objected to such attempt.

239 The plaintiff's conduct, in drip feeding evidence throughout the trial and *after* the trial had concluded, was unsatisfactory. It bore the burden of proving its own claim and it was incumbent upon it to adduce all of the

necessary evidence to support its case. Yet, in many respects and as mentioned elsewhere in this judgment, that was not done. Regardless of whether the plaintiff's further documents are admitted into evidence, it is clear that it could not prove payment of the expenses *as claimed* in its SOC. Taking the plaintiff's tables at face value, I accept that the plaintiff is able to prove payment of the vast majority of its expenses under Categories 2–4. Nevertheless, this does not change any of my analysis on the issue set out above or my conclusion at [234] above.

Conclusion

240 The plaintiff's claim fails. The SPM was not a CTL. The plaintiff was in breach of cll 1 and 8 of the Warranties which would excuse the defendant from liability under the Policy, whether for any claimed loss or for S & L charges. The plaintiff did not comply with the condition precedent of notification of a claim within the 30-day limit under the Claims Notification Clause. The plaintiff tendered a late NOA and consequently may treat any loss as a partial loss only. The plaintiff waived his right to abandon the SPM to the defendant.

241 In these circumstances, judgment must be entered for the defendant and, absent any special circumstances, the defendant would be entitled to payment of its costs. I have heard no submissions on this, and therefore make no decision on it. If the parties cannot agree costs, I will make any necessary ruling. The Parties are to seek to agree on costs within 14 days from the date of this judgment, failing which they are to write in to update the Court on the matter. Written submissions in respect of costs are to be filed and served within 14 days thereafter, limited to a maximum of 15 pages.

Jeremy Lionel Cooke
International Judge

Bazul Ashhab bin Abdul Kader, Prakaash s/o Paniar Silvam and Nurulhuda Atiqah Binte Sawal (Oon & Bazul LLP) for the plaintiff; Bhandari Jainil, Aleksandar Anatoliev Georgiev, Kristin Ng Wei Ting and Nathaniel Loh (Rajah & Tann Singapore LLP) for the defendant.