Neutral citation No [2019] EWHC 2715 (Admlty)
Claim No AD 2019 000022

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES (QB)
ADMIRALTY COURT
BEFORE: Mr Registrar Kay QC Admiralty Registrar

BETWEEN

TURKS SHIPYARD LIMITED

Claimant

-and-

(1) THE OWNERS OF THE VESSEL "NOVEMBER"
(2) CLEAN MARINE LIMITED
(3) AGAMEMNON OTERO

Defendants

Appearances

For the Claimant – Neil Henderson instructed by BDM Law

For the Third Defendant –Stephen Du instructed by Browne Jacobson

Hearing dates: 25th , 26th, 27th and 28th June 2019

APPROVED JUDGMENT

(Handed down on the 16th October 2019)

Introduction

1. This claim arises out of work performed by the Claimant to the vessel "NOVEMBER" at its yard in Chatham. The Claimant is a family owned business which operates at the Historic Dockyard at Chatham ("the yard"). Its managing director is Mr Richard Turk.

2. The "NOVEMBER" ("the vessel") is a swim end barge built during the 1940s which was, as is not disputed, initially acquired and owned by Mr Fitzsimons. Mr Otero acquired a half share from Mr Fitzsimons in 2017. The evidence before the court is that those two gentlemen were and still are the owners of the barge. However Mr Otero, who has entered an acknowledgment of service as owner and has been added as the Third Defendant in these proceedings, has questioned whether that is the true situation and it will need to be considered further below.

3. The Second Defendant is a company named Clean Marine Limited ("CML"). At the material times, Mr Otero and Mr Fitzsimons were directors and shareholders of that company although it became apparent that Mr Otero is no longer a director as there was a change of the control of the company in 2019. The evidence as to whether Mr Fitzsimons is still a shareholder or officer of the company is not clear. A third director of CML was apparently Purpose Venture Capital Ltd, a company registered in Jersey. As will appear below other persons, including a Mr Page and a Mr Tempest appear to have taken over control of either CML or the "November Project".

Background

4. Mr Otero and Mr Fitzsimons are supporters of projects which support environmental awareness and sustainability. In particular they proposed or created the "November Project" through which they planned to moor a vessel on the River Thames near to Westminster together with a hydroelectric wheel. This was intended to be used as an educational conference centre to promote environmental awareness amongst those at Westminster. It was intended that CML would be the vehicle through which funds from investors in the November Project would be channelled and it appears that Mr Otero and Mr Fitzsimons intended that CML would manage the project. They decided that the barge "NOVEMBER" would be converted and utilised as the relevant vessel to be moored in the Thames. As such she would become a 'Floating Establishment' and would need to comply with the terms of the Port of London Authority which apparently indicated that the vessel would need to comply with the certification rules for a Floating Establishment laid down by the Classification Society, Bureau Veritas ("BV").

5. For this purpose Messrs Houlder Limited ("Houlder") were instructed to carry out a survey and prepare a conversion specification. This was completed in September 2017 whereupon it became clear that a considerable amount of work needed to be done in order to satisfy the certificating society, BV, that the barge was safe for the purpose intended. Mr Mark Beck, of Houlder, provided a specification for the work and has stated that the owners of the barge, Mr Fitzsimons and Mr Otero instructed Turks Shipyard to undertake the works detailed in the conversion specification that Houlder had prepared. On the 1st February 2018 Houlder were instructed by Mr Otero to oversee the work being performed by Turks Shipyard and to liaise with BV.

6. In December 2017 an agreement was made between the Claimant and CML by which the Claimant undertook to drydock the barge and thereafter complete work to the barge at specified and agreed rates. What was agreed in writing was a weekly rate for drydocking of £1,500, welding rates at £32 per hour and shot blasting at £25 per square meter. The documents included a booking form, the Claimant's terms and conditions together with a list of the Claimant's charges. There was an exchange of emails which, with the booking form, formed the basis of the contract for the Claimant to do the proposed work. However no fixed price was agreed for work to be performed because, at the initial stage, it was uncertain as to the totality of the work required until the barge was dry-docked and further inspected. In these circumstances the vessel was drydocked so that preparation

and subsequently repair work could be performed to the instructions of the owners or those acting on behalf of the owners.

7. The vessel was delivered to the yard in February 2018. After the delivery preparation work was authorised and carried out in February 2018. This work was set out in invoice number 604 which was paid in full. However further work was carried out by the Claimant after the 12th March 2018 which is at the heart of this dispute. The claim for that work and incidental costs amounts to £106,220.60 plus interest.

8. On the 1st March 2018 there was a "kick-off meeting" at the yard attended, inter alia, by Mr Richard Turk, Mr Fitzsimons, Mr Otero, a representative of BV and Mr. Beck of Houlder. It is the Claimant's case that at the meeting it was instructed to perform the following work to the vessel: (i) welding up rivets; (ii) cutting out and replacing new sections which had been inserted at Isleworth shipyard (as it was apparent that such work had not been adequately performed at Isleworth); (iii) cutting out and replacing the bow swim end of the vessel; (iv) cutting out and replacing the stern swim end of the vessel; (v) cutting out and replacing the heavily pitted port side section of the vessel; (vi) cropping out and replacing bottom transverse sections which were cracked; (vii) removing doublers fitted.

9. It is to be noted that this work, which is identified in the minutes of the meeting disclosed, is consistent with the conversion specification provided by Houlder. According to the evidence of Mr Beck: "*The vessel NOVEMBER was inspected and the extent of the hull renewals (particularly the renewal of the swim ends, side shell inserts and welding of the rivet heads) was agreed by all the parties at the 'Kick off' meeting on 1 March 2018, namely Houlder Limited, Agamemnon Otero, Jay Fitzsimons, Turks Shipyard and Bureau Veritas*". Further he has stated that that work was carried out by the Claimant to a professional standard and to the satisfaction of BV. According to Mr Beck an issue arose with respect to the vessel's superstructure and main deck which needed to be replaced. That is recorded in the Minutes of the meeting. Apparently Houlder were instructed by Mr Otero to prepare drawings for this work and Turks provided a cost estimate. Mr Turk has stated that he sent to Mr Otero and Mr Fitzsimons a quotation for the complete works including superstructure, decks and interior welding on the 22nd March 2018. Mr Beck has stated that, due to lack of funding, the yard was not instructed to perform the further work.
10. According to Mr Otero also on the 22nd March 2018, following a conversation with Mr Turk, a further reduced estimate was provided, 'The option B costings', which essentially dealt with completing the work already started and doing other associated work. It is to be noted that these costs were provided for "*getting the boat to float out in order to sell in the most economical way*". The steel work was quoted as being £59,400, the paintwork of £10,225 in epoxy or £3,948 in bitumen. The work was estimated to take 6 weeks with dock fees of £1,500 per week (ie.£9,000). Mr Turk's email finishes with the sentence "*Look forward to hearing from you on whether to continue as planned or whether its minimum repair and remove from the yard quick*". The work referred to at the Kick off meeting commenced on the 12th March 2018. Mr Turk has stated that the work continued

through March 2018. On the 29th March 2018 Mr Turk sent a more detailed breakdown of the cost including the work to be performed on the deck and superstructure which was sent to all interested parties.

11. There is some confusion as to precisely what occurred thereafter. According to Mr Otero, on the 29th March 2018, he telephoned Mr Turk and requested him to stop all work on the vessel to which, according to Mr Otero, Mr Turk agreed. Mr Turk's witness statement refers to receiving an email from Mr Otero on the 30th March 2018. That email is in evidence and requests "*please postpone all <u>new</u> works until we have agreed formally*"(emphasis added). In his witness statement Mr Turk says that he telephoned Mr Otero on the 31st March 2018 and they discussed the situation. Mr Turk told Mr Otero that various works had been commenced and they had to be completed in order to make the vessel watertight so as to be floated out. According to Mr Turk it was explained that this was necessary to allow his business to continue. Mr Turk states that Mr Otero accepted that and agreed that works had to be completed and that Mr Otero would cover the cost of this and that, during the conversation, Mr Otero stated that he would try to get his investors to support the project once again.

12. This situation apparently arose because the participants in the November Project were concerned about the increasing costs of the work, and Mr Otero needed to have written confirmation as to the works to be carried out so as to obtain further finance. That is apparent from the emails between, inter alia, Mr Otero and Mr Fitzsimons sent on the 29th and 30th March which indicate that there had been an investors meeting on the 29th March 2018 and that the decision was taken at that time to put the project 'on ice'. Mr Otero's email on the 30th March 2018 indicates that he spoke with Mr Turk after that meeting. There was then a meeting on the 5th April attended by, inter alia, Mr Turk, Mr Beck and Mr Otero which is referred to in Mr Otero's email of the 6th April 2018 and Mr Turk's email of the 8th April 2018. As a result, Mr Turk put forward a "*heavily reduced cost*" on the steelwork of £205,000 if the project proceeds. Mr Turk's email further states: "*In the event we do not come to an agreement or your investors decide not to proceed then all works so far on the vessel will be charged at our shipyard standard rates which have been emailed previously as per our signed terms and conditions.*"

13. From Mr Turk's evidence and the emails in evidence it is clear that the Claimant and Mr Otero and other investors continued to communicate and, on occasions, meet until July 2018. During that period Mr Otero expressed his satisfaction with the work which had been carried out to the vessel and informed Mr Turk that he was continuing his efforts to obtain investment in the project. On the 1st May 2018 BV informed Mr Turk and Houlder that the society would not approve Mr Turk's more economic version of the works. Mr Turk informed Mr Otero. Also on the 1st May 2018 a Mr Richard Page, who was an investor in the project, emailed Mr Turk congratulating him on the work performed. On the 4th June 2018 Mr Otero emailed Mr Turk requesting the latest invoice and stating that there was an intention to continue the work later in that month. On the 12th June 2018 Mr Otero sent an email to Mr Turk acknowledging the receipt of the invoices. It is noteworthy in these communications there is no suggestion that the work performed by the Claimant was not authorised, was exaggerated or should not be paid. On the contrary,

an email from Mr Richard Page dated the 19th July 2018 which was mistakenly forwarded to Mr Turk by Mr Fitzsimons, clearly indicates Mr Page's view that the Claimant should be paid for the work performed plus a sum for painting the vessel to allow the vessel to be re-floated. Mr Fitzsimons' email dated the 20th July 2018 also indicates his clear agreement with Mr Page's views. Further there is an email from Mr Otero dated the 20th July 2018 in which he informs Mr Turk of their intention that he should be paid.

14. The work claimed for is itemised in invoice number 736 (amounting to £91,230.60) which despite the assurances of payment remains unpaid. In addition the Claimant painted the vessel before it was finally re-floated. That work is claimed for in the sum of £11,670 which is set out in Invoice number 778 rendered on the 12th September 2018. In addition the Claimant claims for storage/mooring fees for the vessel on a monthly basis from August 2018 to January 2019.

The issues

15. The primary areas of dispute are: (a) who was the contracting party or parties in respect of the docking and work performed to the vessel, (b) whether the work performed was authorised, and (c) the reasonableness of the costs put forward by the Claimant. Issue (a) is central to the contention made by Mr Du, acting for Mr Otero, that the court has no jurisdiction to consider this claim by reason of the provisions of section 21(4) of the Senior Courts Act 1981.

The case put forward by the Third Defendant

16. Mr Stephen Du, counsel for the Third Defendant, made the following submissions inviting the claim against Mr Otero to be dismissed:
    a. The contracting party was CML not Mr Otero;
    b. There is no rule that contracts for repairs must be with the shipowners, for example it may be with a charterer;
    c. The claim is a quasi *in rem* claim not a true claim *in rem* and the court only has jurisdiction to the extent that there is an *in personam* claim against Mr Otero;
    d. As to whether Mr Otero became a party to the contract, that needs to be specified in the contractual documents. This is an exercise in contractual interpretation of the written documents and the legal test is what a reasonable person would have understood the parties to have agreed, having regard to the communications which passed to and from the yard, citing *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 AC 919. A reasonable person would have concluded that the contract was intended to be concluded with CML because:
        i. CML were named in the booking form;
        ii. The emails of the 15th and 20th December 2017, 31st January 12th, 13th, 15th February and 9th March 2018 were from Mr Fitzsimons as "*Director/November Project*";
        iii. Mr Otero was described in a number of emails as financial director of CML

iv. The minutes of 1st March 2018 referred to the attendees as "*Clean Marine (CM); Jay Fitzsimons, Agamemnon Otero ..*"
v. The invoices no.604 (5th March 2018), no.736 (25th May 2018) and no.778 (12th September 2018) were addressed to CML;
vi. The letters of demand on the 5th June 2018 and 10th July 2018 from the Claimant were addressed to "*The Directors of Clean Marine Ltd*";
vii. The factual matrix supports that view because:
    1. Mr Turk agreed that he was unaware that Mr Otero was an owner of the vessel until May or June 2018;
    2. Mr Turk stated that he considered that he was dealing with CML and his agreement was with CML;
    3. Mr Turk agreed that both individuals were acting as representatives of their company, Clean Marine.
    4. Mr Turk was not sure about and was not particularly concerned with who the owners of the vessel were;
    5. Mr Otero's evidence was that he never personally entered into a contract with the yard and therefore does not consider that he is personally liable for the sums claimed by the yard.
    6. CML was supposed to become the owner of the vessel and therefore it was sensible for CML to contract for the repairs to the vessel.
    7. In this respect it is to be noted that on the 25th October 2017 Mr Otero emailed his fellow investors stating: "*The good news is that November is now owned by Clean Marine and able to be classed . . . I have purchased half the boat from Jay for £15,000 and Jay and I will now sell November to Clean Marine for £1.00. At the moment of this transaction the November will be owned by us all*". It is submitted that although the agreement was never executed the intention was very clear.
    8. The River Works Licence effectively required CML to own the vessel, see clause 4.5 of the licence.
viii. The pleadings support this view, see paras. 27, 28 and 46 of the Particulars of Claim and para. 15 of CML's Defence.
ix. The Claimant's own solicitors represented that Mr Fitzsimons and Mr Otero were acting for Clean Marine throughout the relevant dealings.

e. With respect to the question of whether Mr Otero was acting as an undisclosed principal the principles are set out in *Siu Yin Kwan v Eastern Insurance Co. Ltd* [1994] AC 199 at p. 207 *per* Lord Lloyd of Berwick which indicates that both the principal and the agent may be liable. Further it is stated that the test as to whether an undisclosed principal is a party to the contract is set out in *The Magellan Sprit* [2016] EWHC 454 at para.18. In respect of this Mr Du has submitted:
    i. Mr Otero's evidence is that he never personally entered into any contract with the yard and "*I do not, therefore, consider that I am liable for any of the sums claimed for by Turks Shipyard Limited. To the extent that any debt is owed to Turks Shipyard Limited this is owed by CML*".

ii. This should be believed because he thought that the vessel was owned by CML at all material times. He did not consider that he was the owner.
iii. The argument that there was an undisclosed principal and agency is illogical.
iv. Any suggestion that CML was acting on behalf of the owners in entering into the contract is both legally and factually wrong because CML was not controlled by Mr Fitzsimons and Mr Otero, there were other investors and, in any event, it is wrong to suggest that because a company is controlled by two individuals any contract made by that company is made on behalf of those individuals.
v. The argument that it would be unfair if CML was liable for the work but that Mr Otero, as owner of the vessel might take the benefit should be rejected. Mr Du submitted that this is irrelevant and it is questionable whether it gives rise to unfairness.
vi. With respect to invoice 604 monies were provided by Mr Otero to CML which then paid the yard. That demonstrates that CML entered into a contract with the yard.
vii. The suggestion that CML's position was analogous to a ship manager is not apt because, in the present case, it was intended that CML would become the owner of the vessel.

f. With respect to the scope of the works agreed Mr Du has submitted that there was no instruction for major work to be carried out after 1st March 2018:
i. CML was working under a limited budget;
ii. On the 22nd March Mr Otero asked the yard to provide a limited budget, Option B;
iii. CML considered BV approval to be essential and that approval had not been given when the works were carried out;
iv. On the 1st March BV approval could not be given until hull samples were taken and analysed;
v. Written quotations were asked for which is inconsistent with there being an agreement to carry out works and Mr Otero states that he made clear that until quotations had been agreed the works were not authorised by CML.

g. As to what was agreed:
i. Limited works were agreed in February 2018;
ii. The work was authorised by Mr Turk believing that the total works would cost less than £150,000.
iii. With respect to the 1st March meeting there was no agreement to carry out any major building or hull renewal work. No instruction was given to carry out the work listed in the minute because, according to Mr Otero, CML was "*still seeking to clarify the scope of the works required and their costs*".
iv. On the 12th March 2018 there was no agreement about the commencement of essential work to the vessel. The yard took a risk and started work despite not being asked.
v. Mr Turk did not stop work on the 30th March 2018.

vi. There was no agreement to carry out the Option B works on the 30th March 2018. The yard was instructed to stop the work and Mr Turk's evidence that he told Mr Otero that he could not stop the works is mistaken. Mr Du relies upon the emails referring to Mr Turk threatening to stop work and refusing to meet with the CML representatives. Mr Du submits that Mr Otero's recollection is correct rather than Mr Turk's.

h. The five "admissions" emails of the 18th April 2018, 4th June 2018, 12th June 2018, 19th July 2018 and 20th July 2018 do not amount to admissions at all. In the case of the 4th June email this was probably in response to a threat by Mr Turk to arrest the vessel and therefore was not a voluntary admission of liability but only a pragmatic response by Mr Otero being threatened with legal proceedings. With respect to that of the 12th June it is not a promise to pay but a statement of intent. With respect to the 19th July 2018 that is not an admission but a pragmatic proposal of a solution to the problems facing CML. With respect to the 20th July this is said to be a response by Mr Otero to seek to avoid the yard from seizing the vessel. Mr Du submits that it was not an acknowledgment of any agreement or liability.

i. With respect to paras. 51A and 51B of the Amended Particulars of Claim regarding a declaration of a possessory lien and an order for sale Mr Du has submitted that these are questions of remedy and should be addressed after judgment is given on the issues of liability and quantum.

The case put forward by the Second Defendant

17. It is to be noted that CML have not appeared at the trial. This absence was explained in a letter addressed to the Court by CML's solicitors dated the 24th June 2019 which stated that CML does not have the finances to take part in the proceedings. That letter also explains that CML has been under different directorial management since February 2019, that Mr Otero was previously a director of CML but has been removed from that office and that, although he is still a director, Mr Fitzsimons will be removed as a director. It is also apparent from the letter that Mr Otero and Mr Fitzsimons are now in dispute as to the matters arising from the November Project. In addition a witness statement made by Mr Brannan Tempest dated the 24th June 2019 has been filed with the Court. In that Mr Tempest states that he has been a director of CML since February 2019. He states that he is the current CEO of CML. He states that the true ownership of the vessel is as set out in CML's Defence and that the ownership remained with Mr Fitzsimons and Mr Otero at all material times. Mr Tempest also asserts that there has been a breakdown of relations between CML and Mr Fitzsimons and Mr Otero and the exhibits to his witness statement clearly support this conclusion. In addition Mr Tempest asserts that, insofar as the contract with or instructions given to the Claimant are concerned, Mr Fitzsimons and Mr Otero were acting in their capacities as owners of the vessel rather than as officers of CML. The thrust of Mr Tempest's case is that CML are not liable for the outstanding sums claimed.

The case put forward by the Claimant

18. For the Claimant Mr Neil Henderson has made submissions on the following aspects:
    a. Mr Fitzsimons and Mr Otero were at all material times the owners of the vessel. Only Mr Otero has acknowledged service and is contesting the claim.
    b. CML was the vehicle through which funds from investors in the November Project were to be channelled. There is no evidence of any contractual or other interest in the vessel.
    c. The claim is for the outstanding work performed to the vessel claimed as £106,220.60 plus interest.
    d. The vessel remains in the possession of the Claimant and is lying on a mooring rented by the Claimant in the Medway. The vessel was arrested on the 27th February 2019.
    e. The contract or contracts for the work was/were concluded with CML which was acting as agent for the owners who were undisclosed principals. Alternatively there was a contract or contracts with CML.
    f. Both Mr Fitzsimons and Mr Otero admitted that the sum set out in invoice no.736 was due and payable and the sums for storage from August 2018 to January 2019 are recoverable under the original agreement made in December 2017.
    g. Insofar as the sum claimed in invoice no.736 and/or the storage charges are not admitted the Claimant seeks to recover those sums by way of *quantum meruit.*
    h. If CML was the principal to the contract or contracts then the Claimant seeks a declaration that it is entitled to exercise a common law ship repairers lien and an order for sale of the vessel.

19. *Jurisdiction.* Mr Henderson has submitted:
    a. The claim was brought as a statutory claim *in rem* pursuant to s.20(2)(n) of the Senior Courts Act 1981.
    b. Mr Otero, as an owner of the barge, acknowledged service so that, pursuant to the decision in *The August 8th* [1983] 1 Lloyds Rep. 351, the claim then proceeds as a claim *in personam* against Mr Otero.
    c. CML also acknowledged service and applied to become a party at the hearing on the 29th March 2019. It served a Defence, gave disclosure and filed a witness statement on the 25th or 26th June 2019.
    d. Where parties have joined or been joined to a claim the court can give judgment against Mr Otero and/or against CML.

20. With respect to the witnesses Mr Henderson has submitted that the evidence of Mr Beck, Mr Crispin and Mr Turk is to be preferred over that of Mr Otero who was evasive and argumentative and whose evidence was inconsistent, in particular with regard to whether he saw shot-blasting being performed and as to when he instructed Mr Turk to stop work.

21. *The contracting parties.* On this aspect Mr Henderson has submitted:
    a. The Claimant's case is that CML entered into the contract for drydocking and repair works evidenced in writing by the exchange of emails on the 18th and 20th December 2017 and completion of the booking form together with the payment of the £500 booking fee on behalf of the owners whoever they were.
    b. CML did so as agents for an undisclosed principal.

c. The legal owners at all material times were Mr Fitzsimons and Mr Otero.
d. The contract of repairs was made between the Claimant and the owners of the vessel although the booking form identified CML as the contracting party.

22. *The instructions and the work undertaken.* Mr Henderson has submitted:
    a. *The preparatory work* – this was clearly authorised. It was set out in invoice no.604. It was eventually paid;
    b. *The work completed between 12th March 2018 and 29th March 2018*. That was identified and authorised at the meeting on the 1st March 2018. Although Mr Otero has argued that only preparatory work was authorised, which did not include the repairs to the swim ends and the shell plating, that cannot be accepted as: (i) the work continued after the 12th March 2018; (ii) this information was not included in his witness statement; (iii) Mr Turk provided Mr Otero with emails on the 19th March and 22nd March 2018 with updates on the work performed and there was no response stating that the work was unauthorised and should be stopped, and (iv) Mr Otero's assertions that he instructed Mr Turk to stop work on the 12th and 22nd March 2018 were inconsistent with the evidence that Mr Turk had, on the 26th March 2018, threatened to stop work if invoice no.604 was not paid
    c. *The work performed after 29th March 2018.* These were works which had already been authorised on the 1st March 2018. They were necessary to allow the vessel to be refloated from the drydock. Mr Otero's instruction on the 29th March 2018 was that no new works should be undertaken. Mr Turk's evidence was that it was agreed that the works to allow the vessel to be refloated was agreed with Mr Otero. Mr Otero's evidence as to what occurred was inconsistent and evasive. In fact his email of the 18th April 2018 was an acknowledgment that work had been carried out and "*looks great*". Further the emails of the 18th April (Mr Otero), 1st May (Mr Page), 4th June (Mr Otero), 26th June (Mr Otero), 11th July (Mr Otero) and the internal emails dated the 19th and 20th July 2018 support the proposition that Mr Otero had authorised the Claimant to continue work after the 29th March 2018. With respect to the painting work it was clearly necessary before the vessel was re-floated as was accepted by Mr Page and Mr Fitzsimons (emails of the 19th and 20th July 2018). At no time during the relevant period did Mr Otero, Mr Fitzsimons or Mr Page assert that the works were performed by the Claimant were not or had not been authorised and/or should not be paid. On the contrary the emails of Mr Otero (26th June 2018, 11th July 2018 and 20th July 2018), Mr Page (19th July 2018) and Mr Fitzsimons (20th July) indicate a clear acceptance that the sum of £91,230.60 set out in invoice no.736 should be paid.
    d. *The sums invoiced were reasonable* – Mr Henderson has submitted:
        i. that where there is an agreement for work to be done but no price has been agreed there is an obligation to pay a reasonable sum for the work, referring to *Chitty on Contract* paras 29-017 and 37-171 which cites *Benedetti v Sawaris* [2014] AC 938 at para. 9.
        ii. The principal work performed was: (a) the bow end was replaced; (b) the stern end was replaced; (c) insert repairs were carried out to the port and starboard sides; (d) about 3,000 rivets were replaced; (e) holes in the

portside forward were repaired; (f) the hull was epoxy coated and painted in gloss and anodes were attached.

iii. The evidence of Mr Crispin of Crispin Marine who surveyed the vessel on the 3rd September 2018 and again, in conjunction with a surveyor appointed by CML (Robert Bingham Yacht Surveys), on the 16th May 2019. Mr Crispin recorded that "*All works have been done to a high professional standard*". The surveyors for CML were also satisfied with the standard of the work and Mr Tempest, CEO for CML, congratulated Mr Turk on a "*professional job*".

iv. Mr Crispin stated that he had seen the estimates and invoices and expressed his opinion that these were reasonable for the work done. In cross examination Mr Otero accepted that the sums set out in the invoices No.736 and 778, amounting to £102,900.60 were reasonable.

v. The Claimant is entitled to recover the storage charges invoiced from August 2018 to January 2019. In fact the sum charged to October 2018 (£600 per month) is less than the contractual rate (£1,500 per month) and is reasonable both for the period to October 2018 and thereafter.

vi. Mr Henderson also submitted orally that it would be reasonable for the sum of £600 per month thereafter to be recovered.

23. *The possessory lien.* Mr Henderson has submitted that, as an alternative, the Claimant is entitled to a declaration that the Claimant has validly exercised a ship repairer's possessory lien and that it would be appropriate for the court to make an order for the sale of the vessel. In this respect he has contended:

    a. A common law possessory lien may be exercised by a repairer who has carried out work to a ship on the instruction of the owner or someone authorised by an owner, see *Admiralty Jurisdiction and Practice – Nigel Meeson and John Kimbell, 5th Ed.* para 6.21. Such authority may be implied, see *Tappenden v Artus* [1964] 2 QB 185 (CA).

    b. However the lien only covers the work done but, absent express agreement does not extend to other charges, ie for keeping the ship after the repairs have been completed, *The Katingaki* [1976] 2 Lloyds Rep.372.

    c. The repairer must have taken possession of the ship which commences when the ship enters the shipyard and continues so long as the repairer retains possession of the ship, see *Admiralty Jurisdiction and Practice – Nigel Meeson and John Kimbell, 5th Ed*. paras 6.22-6.25 and the cases cited therein.

    d. Moreover the arrest of the ship by the Admiralty Marshal will not cause the possessory lien to be lost, even if the arrest is at the suit of the repairer, see *Admiralty Jurisdiction and Practice – Nigel Meeson and John Kimbell, 5th Ed.* para 6.26-6.29 and the cases cited therein.

    e. The repair works were properly undertaken and at a reasonable cost and the mooring charges and storage costs for August and September 2018 were incidental to the repairs and were therefore covered by the possessory lien, *The Katingaki* [1976] 2 Lloyd's Rep 372 at 375. Further the storage/mooring costs for October 2018 to January 2019 were recoverable by reason of the contract made in December 2017.

Consideration

The evidence

24. Mr. Otero has provided a witness statement. From that it appeared that the essence of his case is that, with the exception of investigative work, the work performed by the Claimant to the vessel was not authorised, that he was a director of CML but never intended to instruct the Claimant or enter into contractual relations with the Claimant for or on behalf of the owners of the vessel so that the owners of the vessel are not liable to the Claimant for any work done. Mr Otero also gave oral evidence during the course of which I consider that he was evasive, disingenuous and argumentative. I consider that Mr Otero was a most unsatisfactory witness whose primary purpose was to deflect liability away from the owners of the vessel, particularly himself as a part owner of the vessel, and to seek to reduce the quantum of any such liability by any argument which he perceived was available to him. As such I consider that his evidence was largely self serving and, insofar as there was factual dispute, is not to be relied upon as being reliable or true.

25. By contrast I found Mr Turk came to court as a truthful witness whose evidence could generally be relied upon.

26. Mr Beck was originally instructed by Mr Fitzsimons and Mr Otero but his evidence was supportive of the Claimant's case. He gave clear and impartial evidence and was clearly a witness of truth whose evidence could be relied upon.

27. Mr Peter Crispin also gave evidence as to matters which he personally observed and which were within his own knowledge. I accept that he was a witness of truth whose evidence can be relied upon. It is to be noted that his second inspection of the vessel was made in May 2019 in conjunction with Robert Bingham Yacht Surveys, appointed by CML. It is apparent that both Robert Bingham and Mr Tempest expressed satisfaction with the standard of the work performed by the Claimant.

Whether the works claimed by the Claimant were authorised.

28. *The matrix underlying the instructions given to the yard.* The intention of those involved in the November Project was to obtain PLA permission to use the vessel as a conference and demonstration centre moored in the River Thames. The PLA required that the vessel was brought to a standard which would comply with the standards set by a classification society, in this case BV. For that purpose the agreement was entered into with the Claimant for the vessel to be drydocked and preliminary work carried out. From the email sent by Mr Fitzsimons to Houlder on the 12th February 2018 it can be seen that those in charge of the vessel were keen "*to get things moving*".

29. Mr Turk's evidence was that: "*The 'kick-off' meeting was held on the 1st March 2018. In attendance were Mr Fitzsimons and Mr Otero, me, the representatives from Houlder Limited and representatives from Bureau Veritas. At this comprehensive meeting, the*

entire project was discussed in detail including the scope and specifics of the necessary works."

30. Mr Beck, of Houlder has stated that Houlder was appointed to survey the vessel, provide a specification, liaise with BV and to oversee the Turks Shipyard works being undertaken in accordance with the conversion specification. He has also stated: "*The owners of the barge, Jay Fitzsimons and Mr Otero, instructed Turks Shipyard to undertake the works detailed in the conversion specification that Houlder Limited had prepared*" and "*The vessel 'NOVEMBER' was inspected and the extent of the of the hull renewals (particularly the renewal of the swim ends, side shell inserts and welding of the of the rivet heads) was agreed by all the parties at the 'Kick off' meeting on 1 March 2018, namely Houlder Limited, Agamemnon Otero, Jay Fitzsimons, Turks Shipyard and Bureau Veritas.*"

31. In his witness statement Mr Crispin has listed the items he identified, in his survey of the 3rd September 2018, as having been completed by the Claimant. The work to the bow end, the stern end, insert repairs to port and starboard plating and work to reweld the rivets was clearly carried out. These are the works which are identified in the minutes of the 1st March meeting as items 1.4, 1.5, 3.1, 3.5 and in the photos 6.1, 6.2, 6.3, 6.4 to be replaced by the Claimant.

32. Whilst the minutes refer to items which were left over for further consideration it is clear that there was, at the 1st March 2018 meeting, agreement that the works referred to and performed by the Claimant were authorised for completion. Mr Otero's contention that the work carried out by the Claimant had not been authorised by himself and/or Mr Fitzsimons cannot be accepted as true.

33. That view is materially supported by the contemporaneous behaviour of Mr Otero and other persons interested in the November project. The significant feature is that at no time between the 1st March 2018 and the survey performed for CML in May 2019 is there any suggestion that the work performed by the Claimant and contained in invoice No.736 was not authorised. On the contrary the contemporaneous emails indicate that the work should be paid for.

34. Further I do not accept Mr Du's submission that Mr Otero's failure to complain immediately after Mr Turk's emails of the 19th March and 22nd March reported on the work being done "*means very little*".
    a. He has suggested that it was the parties' expectation that an overall fixed price would eventually be agreed. In my view that submission is misplaced because Mr Turk had set out the Claimant's rates for steel works, blasting, marine engineering and painting in his email of the 18th December 2017 and requesting a deposit. On the 20th December 2017 Mr Fitzsimons had responded stating that the deposit had been paid and providing a completed booking form. No questions were raised as to the rates and the Claimant's rates were clearly agreed at that time. In fact no issue as to the propriety of those rates has ever been raised. In these circumstances all that needed to be done was to identify the steel works to be completed which

were to be carried out at the relevant rate. That was what was done at the meeting on the 1st March 2018 and it concluded the agreement for that work to be done without any need for further consideration of prices to be agreed. The Yard did not take a risk, it simply started work in accordance with its instructions at the prices already agreed.

b. As to the requests made to the Claimant for breakdowns of the prices I do not accept the assertion that, at the 1st March 2018 meeting, it was made clear to Mr Turk that he needed to produce quotations for approval before there would be an agreement to carry out work. Whilst the minutes of the meeting do provide that there would need to be further consideration of certain items such as the replacement of the deck structure there is nothing to support Mr Du's contention that there was any further need for approval of the costings of the agreed work. The subsequent request for a breakdown made by Mr Otero cannot avoid the fact that there was already an agreement for the Claimant to do the work specified at the rates referred to in December 2017.

c. As to Mr Du's submission that Mr Otero did put a stop to the work on 30th March 2018 that needs analysis of what actually occurred and for reasons which I will consider is in my judgment incorrect at least insofar as Mr Du seems to suggest that it amounted to a protest that the work had been commenced.

The circumstances surrounding the 29th and 30th March 2018, whether Mr Otero instructed the Claimant to cease all work or whether there was a novation which permitted the Claimant to continue the work necessary to re-float the vessel. .

35. There is a dispute as to what occurred over this period.

a. It is Mr Otero's evidence that there was a meeting on the 29th March 2018 of the directors and shareholders of CML to discuss the November Project and how it was to be financed. The best evidence of what occurred is to be found in Mr Fitzsimons' email dated the 29th March 2018. The meeting took place in the morning. A significant proportion of the discussion relates to the fact that the outstanding invoice for the preparatory work was still unpaid and that the Claimant was threatening to stop work until it was. The decision was made to pay that invoice. With respect to *moving forward* Mr Fitzsimons has said "*Work in dock on ice until estimates are agreed and in writing. I strongly suggest that when Aga speaks to Richard Turk this is made clear to avoid additional issues*" (emphasis added). That merely indicates a proposal by Mr Fitzsimons but does not evidence an agreement made with Mr Turk.

b. Mr Otero's witness statement suggests that he telephoned Mr Turk on the 29th requesting him to stop all works and that was before the meeting on the 29th. However the wording of Mr Fitzsimons' email and Mr Otero's response, with comments contained in his email to Mr Fitzsimons on the 30th March, indicate that Mr Otero spoke to Mr Turk after the meeting not before it. With respect to that Mr Otero states: "*I spoke with Richard Turk. He is organising a meeting with Houlder will try to come within the original budget and proceed when everything is within contract*". In his witness statement (para. 55) Mr Otero appears to suggest that this referred to the agreement to stop work made on the 29th March but, put in

context, it is a response to Mr Fitzsimons reference to Mr Turk's threat to stop work because the first invoice, for the preparatory work, had not been paid. It is not therefore certain whether that passage is intended to refer to Mr Otero's discussion with Mr Turk.

c. It is to be noted that neither of the emails from Mr Fitzsimons nor Mr Otero suggest that the work done prior to that date was not authorised. On the contrary Mr Fitzsimons' statement, "*It is also essential for Richard Turk to inform us what work has been finished/unfinished to date and any consequences of pausing work in dock so we are all clear on costs now and in the future*", indicates that he was aware that work had been performed since 12th March 2018. That was also made clear by Mr Turk's email dated 19th March 2018 which provided costings for the hull works to the vessel. The fact that Mr. Turk had provided the costings demonstrates that he was seeking to co-operate with Mr Otero and Mr Fitzsimons. It is also to be noted that that email specifically mentioned work being done at that time.
d. That statement also suggests that Mr Fitzsimons was asked not only to clarify the work already done by that time but also to explain the effect of the proposal to postpone the work.
e. Mr Otero's case was that when he spoke to Mr Turk on the 29th March the latter agreed to stop all work being done at that time. Mr Turk agrees that there was a discussion but he says he made it clear that he would need to complete the existing works in order to make the vessel safe to float out of the dock. He says that Mr Otero accepted that and agreed that such works were to be completed.
f. For the reasons already given I prefer the evidence of Mr Turk to that of Mr Otero. Not only was Mr Otero evasive about his knowledge of the work already agreed and, in my view, disingenuous about the work which had been authorised but it is significant that Mr Otero's email of the 30th March 2018 did not include an instruction to stop <u>all</u> work but only a request to "*postpone all <u>new</u> works until we have agreed formally*" (emphasis added). That is consistent with Mr Turk's version of events but not with Mr Otero's.
g. The Claimant was therefore entitled to complete the work as described by Mr Turk and was also entitled to charge for it.
h. That conclusion also accords with the realistic assessment of the legal relationship existing as at the 30th March 2018. As I have already found the Claimant had been authorised to carry out those works and was, contractually entitled to perform its side of the existing bargain. What Mr Otero does not seem able to understand is that if, as he asserts, he had given instructions to cease that work the instruction would have been a breach of the contractual terms at that time in existence. Mr Turk was not contractually obliged to obey an instruction to cease work on the 29th March and could not be bound to do so unless he agreed. He was perfectly entitled to refuse such agreement except on terms. In practical terms that is what occurred. Mr Otero requested that work cease and Mr Turk explained that he needed to complete the works already being undertaken but would agree not to undertake further work. Mr Otero agreed to that as is demonstrated by the wording of his email of the 30th March 2018. In legal terminology there was a novation of what had been agreed in December 2017 and on the 1st March.

Were the sums invoiced reasonable.

36. For the above reasons I conclude that the Claimant was authorised to undertake the work commenced after the 1st March 2018 and completed after the 30th March 2018. That was the work set out in invoice no.736. Mr Otero sought to argue that the sums put forward were not reasonable and that there was no requirement to replace so many rivets. However Mr Beck has expressed the view that the work was necessary and the costs reasonable. Further the evidence given by Mr Crispin was that the work was properly performed and the price was reasonable and, although the vessel was surveyed on behalf of CML in May 2019 no evidence to the contrary was put before the court. It is also to be noted that others interested in the November Project, namely Mr Page and Mr Fitzsimons, exchanged emails on the 19th and 20th July in which they expressed the view that the Claimant should be paid. In my view Mr Otero's argument was another disingenuous attempt to reduce the claim based upon a non-existent foundation.

Painting the vessel.

37. This is invoiced in the sum of £11,670 inclusive of VAT in the invoice no 778. It was envisaged as long ago as 20th December 2017 that the vessel would need to be painted and that the price would depend upon the paint specification used. This was also referred to at the 1st March meeting and appears in the minutes. A quotation was provided by the Claimant in the email dated the 22nd March 2018 amounting to £10,225 for epoxy or £3,948 for bitumen. I understand that these are excluding VAT. It is interesting to note that the email was written in the context of an enquiry as to whether it would be possible to reduce the scope of the work and re-float the vessel in the most economic way. This it was always intended that the vessel would be painted once the Claimant's work had been completed and before the vessel would be re-floated. In late August 2018 Mr Crispin recognised that painting was necessary and on the 2nd May 2019 he saw that the hull had been applied with epoxy before it was re-floated. He has stated: "*This was necessary as, if the hull had not been coated before refloating it would not have been protected and corrosion would develop.*" On the 19th July 2018 Mr Page stated what needed to be done which included paying the Claimant outstanding sums "*plus money to paint . . . so she can be refloated*". Mr Fitzsimons agreed in his email dated the 20th July 2018. The evidence is therefore that the majority of persons involved recognised what is, in any event, quite obvious that it was essential to paint the vessel before she was returned to the water. Failure to do so would have resulted in corrosion and the undoing of the work already performed. In my view it was not only reasonable but essential that the painting was performed and further that the cost invoiced is reasonable.

The jurisdiction to claim in rem and the contractual parties

38. Mr Du has submitted that "*Although this is an in rem claim the dispute is fundamentally about a breach of contract. This is because the claim is a quasi in rem claim (and not a true in rem claim), and the Admiralty Court has in rem jurisdiction in this case only to the extent that there is an in personam claim against Mr Otero.*".

39. The relevant provisions of the of the Senior Courts Act 1981 are:

> ***Admiralty jurisdiction***
>
> *20(1) The Admiralty jurisdiction of the High Court shall be as follows, that is to say:-*
>
> > *(a) jurisdiction to hear and determine any of the questions and claims mentioned in subsection (2)*
>
> *(2) The questions and claims referred in subsection (1)(a) are –*
>
> > *(n) any claim in respect of the construction, repair or equipment of a ship or equipment of a ship or dock charges or dues.*
>
> ***Mode of exercise of Admiralty jurisdiction***
>
> *21(1) Subject to s.22, an action in personam may be brought in the High Court in all cases within the Admiralty jurisdiction of that court.*
>
> *(2) In the case of any such claim as is mentioned in section 20(2)(a), (c) or (s) any such question as is mentioned in section 20(2)(b), an action in rem may be brought in the High Court against the ship or property in connection with which the claim or question arises.*
>
> *(3) In any case in which there is a maritime lien or other charge on any ship . . . or other property for the amount claimed, an action in rem may be brought in the High Court against that ship . . .*
>
> *(4) In the case of any such claim as is mentioned in section 20(2)(e) to (r), where – (a) the claim arises in connection with a ship; and (b) the person who would be liable on the claim in an action in personam ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or control of, the ship*.

40. Thus Mr Du argues that what he refers to as a *quasi in rem claim* will only lie where there is a cause of action *in personam* against the owners of the vessel in contrast to what he described as a 'true' *in rem* claim.' His argument is that since the persons who entered into the agreement for the repairs with the claimant were Mr Otero and Mr Fitzsimons acting on behalf of CML it was CML which is the entity which is liable *in personam* and not the owners of the vessel who were Mr Otero and Mr Fitzsimons. Therefore he argues the owners cannot be held liable for the claim or, I think more accurately, he argues that the statutory procedure in rem by which judgment may be given in rem may not be exercised to permit judgment to be ordered in respect of the vessel nor to allow the vessel to be appraised and sold by the court.

41. *The principles relating to statutory rights of action in rem.* In Chapter 3 of *Admiralty Jurisdiction and Practice* 5th Ed. the learned authors have engaged in a very interesting consideration of the distinctions between actions *in rem* where a maritime lien is involved, which they refer to as true *in rem* claims, and where there is a statutory right of action *in rem* which they refer to as '*quasi in rem* claims' (apparently adapting the terminology used in American Admiralty Law according to Dr Frank Wiswall). For

present purposes it is sufficient to say that the main difference is that a true in rem claim is brought against the res although the owner of the property is indirectly impleaded, see *The Parlement Belge* (1880) LR 5PD 197 (CA) *per* Brett LJ. Where owners enter an appearance (now acknowledge service) the claim becomes *in personam* (save that if the owners, such as a foreign state, wish to challenge the procedure they may 'appear under protest'). However in the case of a *quasi in rem* claim the learned authors consider it is not a claim against the ship itself, although it takes that form, but is in truth a claim against the owner of the ship at the time when it is commenced but one which requires the *in personam* defendant to be the owner of the ship when the claim form is issued. "*The defendant is sued, but he is sued through service on the ship*". As the editors observe the advantages of this procedure are that (i) it allows security for the claim to be obtained and (ii) it establishes jurisdiction. However there are other procedural peculiarities which arise: the judgment has to be obtained by proving it in court, summary judgment is not available, persons other than the defendant who may have an interest in the res may defend the claim. However these characteristics are only significant whilst the claim remains *in rem* because once the defendant has acknowledged service the claim will also proceed *in personam.* In *The Tatry* [1992] 2 Lloyds Rep 552 it was held that once an acknowledgment of service has been filed the claim does not lose its *in rem* character but proceeds as being both *in rem* and *in personam.* In *The Gemma* [1899] it was held that the owners who had entered an appearance became personally liable and that payment of the unsatisfied balance of the judgment could be recovered by a writ of *fieri facias*, also *The August 8* [1983] 2 AC 450.

42. The jurisdiction of the Admiralty Court is to entertain any claim for repairs or storage of a vessel. That is conferred by s.20(1)(a) and 20(2)(n) of the Senior Courts Act 1981. Section 21 is concerned with the "mode of exercise" of that jurisdiction. In the present case the claim form was issued, served and the vessel arrested. The Admiralty Court clearly has jurisdiction in the present claim arising under s. 20 of the 1981 Act. As is usual in a claim in rem the claim was brought against the owners and it was exercised pursuant to section 21(4) of the Act.

43. The case raised by Mr Otero challenges the jurisdiction of the court to entertain the claim. CPR Part 11 provides that a party who wishes to dispute the jurisdiction of the court or argue that the court should not exercise its discretion may apply to the court for an order declaring that it has no such jurisdiction. An application under this rule must be made within 14 days after filing the acknowledgment of service and be supported by evidence. If the defendant who files an acknowledgment of service does not within 14 days make an application with respect to jurisdiction then he is to be treated as having accepted that the court has jurisdiction to try the claim. In the present case Mr Otero acknowledged service but although the form has a tick box to indicate if he wished to dispute jurisdiction that has not been ticked and the form only states that he intends to defend the claim.

44. In many cases the claimant may not know the precise details of the owner of the vessel to be arrested and may be entitled to assume that the instructions given to him are given by a person acting for and on behalf of the actual owners of the vessel itself. It may also be regarded as an implied term of any agreement entered into between a repair yard and the

person or entity giving him instructions that that entity has authority to act, see *Tappenden v Artus* [1964] 2 QB 185 (CA). In these circumstances there is nothing improper in the Claimant seeking to invoke the procedure under s. 21(4) of the Senior Court Act and if no person acknowledges service then the claimant may apply to the Court for a judgment in default and proceed to request the court to make an order for appraisement and sale so that, if sufficient funds are available the Claimant may recover the sums claimed. The authorities referred to make it clear that if a person files an acknowledgment of service as owner of the vessel then although the claim continues *in rem* it also allows the claim to continue *in rem* against that person or entity who may therefore become subject to liability *in personam.*

45. It seems to me that the situation is analogous to a position where sovereign immunity arises such as in the case of *The Cristina* [1938] AC 485 (HL). In that case Lord Wright said: "*The writ by its express terms commands the defendants to appear or let judgment go by default. They are given a clear alternative of either submitting to the jurisdiction or losing possession. In the words of Brett LJ the independent sovereign is thus called upon to sacrifice either its property or its independence. It is, I think, clear that no such writ can be upheld against the sovereign state unless it consents. It is therefore given the right, if it desires neither to appear nor to submit to judgment, to appear under protest and apply to set aside the writ or take other appropriate procedure with the same object. It may be said that it is indirectly impleaded, but I incline to think that it is more direct to say that it is directly impleaded. The defendants cited 'all persons claiming an interest in the Cristina, a description which precisely covers on the facts of the case the Spanish Government . . . under the modern and statutory form of a writ in rem, a defendant who appears becomes subject to liability in personam. Thus the writ in rem becomes in effect also a writ in personam.*" Thus a party who seeks to contest a claimant's right to recover may invoke the procedure set out in CPR Part 11 to challenge the court's jurisdiction but if it does not then it ought not to be able to invoke arguments based upon jurisdiction to challenge the claimant's claim.

46. In my view the proper procedure was for Mr Otero to have applied for an order setting aside the warrant of arrest and having failed to do so is not now entitled to argue that the court cannot exercise jurisdiction in the present claim.

47. Neither side addressed the considerations raised above. Mr Du chose to argue the case upon the basis that he raised his arguments by way of defence to the claim made and Mr Henderson responded to that case. Out of deference to the diligence of both counsel and, in case I am wrong upon the procedural point referred to above, I consider that I should consider the parties' arguments and come to a conclusion based upon them. The argument made by Mr Du is based upon the premise that the ownership of the vessel remained throughout with Mr Fitzsimons and Mr Otero notwithstanding Mr Otero's evidence that both he and Mr Fitzsimons intended to transfer the ownership to CML and that this was evidenced by Mr Otero's email dated the 25th October 2017 which was sent to his fellow investors in CML. In fact the sale to CML was never executed and Mr Otero filed an acknowledgment of service as owner of the vessel however the Court is entitled to investigate both the legal and beneficial interests in the vessel. The declaration contained

in the email of the 25th October 2017 which was not contradicted by Mr Fitzsimons give rise to the interesting question of whether they as legal owners had effectively declared that they were holding the vessel on trust for CML.

48. It is an essential ingredient of Mr Du's argument that CML were acting wholly on their own behalf and that Mr Otero and Mr Fitzsimons were acting solely for CML when the negotiations were entered into with Mr Turk, when the agreement was reached about the yard's rates and when the meeting of the 1st March 2018 took place and, as I have found, there was agreement as to work to be performed by the Claimant. Mr Du submitted that the construction of the agreement is an exercise in contractual interpretation and that the legal test is what a reasonable person would have understood the parties to have agreed upon the basis of the written documents and the communications which passed to and from the yard. I agree but would add that the principles referred to by Lord Hoffman in *Investors Compensation Scheme Ltd. v West Bromwich Building Society* [1997] UKHL 28. [1998] 1 WLR 896, 1998] 1 All ER 98 are also applicable particularly what a reasonable person having all the background knowledge would have understood and the background which includes anything in the 'matrix of fact' that could affect the meaning of the contract.

49. It is common ground that the written element of the agreement only mentions CML. It is further Mr Otero's evidence that, insofar as he and Mr Fitzsimons involvement is concerned, they were only ever acting as directors of CML and not as owners of the vessel. The underlying issue is whether CML was acting with the authority of the owners. Mr Du's case is that is not what occurred and therefore CML could not have entered into the agreements for the work on behalf of the owners nor could it be said that a term should be implied into the agreements to the effect that they had such authority as referred to in *Tappenden v Artus.*

50. Mr Du has submitted that there is no absolute legal rule that contracts for repairs must be with the shipowners and that there will be cases where it is appropriate for a yard to contract personally with someone other than the owners, for example a bareboat charterer. However in such cases there will be a contract between the owners and the charterers which provides that the charterers either may or should carry out repairs to a vessel although in such cases s.21(4) specifically provides that the claimant's right to bring an action *in rem* is maintained. In the present case there is no evidence that there was any agreement with the owners of the vessel which effectively provided that a third party might enter into such an agreement without the authority of the owners. The background of this case is that those involved in the November Project which included Mr Otero, Mr Fitzsimons and CML were well aware that the type of work to be performed by the yard involved rebuilding large portions of the hull and superstructure and I find it incredible that they could, if they had given the matter thought, have considered that it was proper for them to contract with the yard to perform these works without the authority of the actual owners of the vessel. In my view that conclusion is supported by Mr Otero's statement to the court in evidence that: "*CM entered into contract with yard on behalf of the barge owners whoever the barge owners were*."

51. In fact I do not believe that anyone involved did consider this issue at the appropriate time. That is why it is appropriate to consider the question upon the basis of what a reasonable person would have understood had he been asked at the relevant time or times. In my judgment the answer is obvious. Such a person would have responded to the effect that: '*Of course such works could not be performed to the vessel without the authority of its owners*'. Therefore either CML were acting as agents for an undisclosed principal or, as an alternative, it was an implied term of the agreement that the contractors had the authority of the owners to enter into such an agreement. In this respect it is interesting to note that in his witness statement Mr Beck stated: "*The owners of the barge Jay Fitzsimons and Agamemnon Otero, instructed Turks Shipyard to undertake the works detailed in the conversion specification that Houlder Limited had repaired*". He is a project director of a company which is an independent design and engineering consultancy serving the marine, offshore and defence markets. It was clearly his understanding that whatever may have been the contractual nuances nonetheless the final responsibility and liability for the works would remain with the owners. If that were not the case it would allow owners of vessels to escape the effects of s.21(4) of the Senior Courts Act which is clearly intended to give builders and repairers of vessels protection against the non payment of invoices. In my view, Mr Otero's statement to the court referred to in the preceding paragraph was a belated recognition by him of the true situation, namely that both the agreement made with the yard and the instructions given to the yard with respect to the work to be performed were made on behalf of the owners of the vessel.

52. In addition the Court is entitled to look behind the registered ownership to determine the beneficial ownership, see *The Aventicum* [1978] 1 Lloyds Rep 184. Therefore the Court may have regard to the declaration made by Mr Otero in his email dated the 25th October 2017 to the effect that CML had become owners of the vessel. As, in fact, no formal transfer of the legal title took place this can only operate as a declaration that the legal owners held the vessel in trust for CML who would therefore hold the beneficial interest in her, see *I Congresso del Partido* [1978] QB 500. Thus if, as Mr Otero argues, CML was contracting in its own name it did so as beneficial owners of the vessel and, if that was so then s.21(4) operates to allow the *in rem* claim to proceed.

The possessory lien

53. Mr Henderson has also submitted that, in the alternative, if CML are found to be the contracting party the Claimant is entitled to exercise a repairers' possessory lien and the court should make a declaration to that effect together with an order for sale of the vessel. This arises where the repairer has carried out work on the instruction of either the owner or a person authorised by the owner, see *Admiralty Jurisdiction and Practice* 5th Ed.at para. 6.1. Mr Du submitted that this was a matter of remedy which he did not address in his written submissions. The importance of the argument is that if Mr Du was correct with respect to his submissions as to the operation of s21(4) of the 1981 Act in this case the common law right to a possessory lien arises independently and the Court can make a declaration even if the requirements of s.21(4) are not satisfied. For the reasons set out above I consider that the Court does have jurisdiction under s.21(4) in the present case but

if I am incorrect on that I hold that, as the instructions were given either by the owner, if the owner was CML, or, in any event with the authority of the owners, if Mr Fitzsimons and Mr Otero are to be considered as owners, and as the vessel was in the possession of the Claimant this is clearly a case where it is entitled to a declaration that it had a possessory lien over the vessel. That possessory lien remains in place after the arrest of the vessel, see *The Arantazu Mendi* [1939] AC 256, even where the arrest is at the instigation of the repairer, see *The Acacia* (1880) 4 Asp 254 unless there has been a waiver of the possessory lien, see Kay J in *Angus v McLachlan* (1883) LR 23 ChD 330. There is nothing on the facts of the present case to suggest that has been the case. In cases of possessory lien the Court may make an order for sale, see *Larner v Fawcett* [1950] 2 All ER 727 and where a vessel is under arrest the Court may make an order for sale under CPR Part 61.10. Although the costs of storage are not generally recoverable where a possessory lien has been exercised they are if they are incidental to the repairs, see *The Katingaki* [1976] 2 Lloyds Rep 372 or where they arose under contract. Mr Henderson has submitted that these principles apply in the present case and therefore they can be recovered in the present case. I agree.

Conclusions

54. For the reasons set out above I have come to the following conclusions:
    a. CML entered into the agreement for the drydocking of the vessel and gave the relevant instructions to the Claimant to perform the works to the vessel.
    b. CML entered into that agreement and gave the relevant instructions as agent for the owners of the vessel;
    c. As such CML are liable to pay the Claimant for the work performed as agent acting for an undisclosed principal;
    d. The owners are liable to pay the Claimant for the work performed;
    e. Mr Otero has acknowledged service as an owner of the vessel and is therefore personally liable as an owner of the vessel to pay the Claimant for the work performed;
    f. In the alternative CML are the beneficial owners of the vessel and, having acknowledged service and applied to become a party to the proceedings are liable to pay the Claimant for the work performed;
    g. The Claimant is entitled to an order for judgment *in rem* against the owners of the vessel;
    h. The repair works set out in invoice no. 736 were authorised by or on behalf of the owners of the vessel and were reasonable. There will be an order for judgment for the sum of £91,230.60.
    i. The painting costs of £11,670 set out in invoice no. 778 are properly recoverable and are reasonable. There will be an order for the sum of £11,670.
    j. There is to be judgment for the Claimant for the storage costs of £720 per month on the vessel until the vessel was arrested. These are as set out in invoices 912, 913, 914, 915 (for £720 rather than £1800 subject to further consideration), 916 and 917.
    k. There will be an order for the appraisement and sale of the vessel.
    l. In the further alternative the Claimant was exercising a possessory lien over the vessel and there will be a declaratory judgment that the lien was validly exercised.

There will be an order for sale of the vessel to enforce the judgment in the figures referred to above.

Dated 16th day of October 2019