Neutral citation no. EWHC [2019] 3557 (Admlty)

Claim No. AD-2019-000035

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

ADMIRALTY COURT (QBD)

Before Admiralty Registrar Master Jervis Kay QC

Admiralty claim in rem against the vessel "KUZMA MININ", her bunkers, stores and freight at risk (if any).

B E T W E E N:

(1) KEYNVOR MORLIFT LTD

(2) SEAWIDE SERVICES LTD

(3) THE FALMOUTH DOCKS AND ENGINEERING COMPANY

(FORMED UNDER THE FALMOUTH DOCKS ACT 1959)

Claimants

- and -

THE VESSEL "KUZMA MININ", HER BUNKERS STORES AND FREIGHT AT RISK (IF ANY)

Defendants

-and-

PJSC SBERBANK OF RUSSIA

Interveners

Hearing date: 22nd May 2019

Appearances: For the Claimant Mr Nevil Phillips instructed by HFW

The Defendants did not attend and were not represented

For the Interveners: - Mr James M. Turner QC instructed by Linklaters by written submissions dated the 29th October 2019.

JUDGMENT

(Handed down on the 19th December 2019)

Introduction

1. In this matter three Claimants, hereafter "KML", "SSL" and "FDEC" respectively, seek remuneration for salvage services performed to the Defendant's vessel "KUZMA MININ" ("the Vessel") on 18th December 2018. This present hearing arises from the Claimant's application for judgment in default of acknowledgment of service, pursuant to CPR 61.9. The claimants submit that they are entitled to an award of salvage remuneration at common law in accordance with the Salvage Convention 1989, as enacted by the Merchant Shipping Act 1995. Alternatively the Claimants contend that they are entitled to remuneration by way of restitution assessed on a *quantum meruit* basis. Unusually, Mr Kemp, of HFW, has gone so far as to propose that the appropriate level for the quantification of an award is £550,000.

The procedural background

2. There are a number of claims pending in respect of the casualty. By an Order dated the 12th February 2019, in claim No AD 2019 000001 brought by Glander International Bunkering DMCC, the court gave judgment and ordered that the Vessel should be appraised and sold by the Admiralty Marshal. The Vessel has since been duly appraised and sold by the Admiralty Marshal. The appraisal is confidential to the Admiralty Marshal but the sale price is known as the proceeds of sale have been paid into Court. That sum is $1,003,000. In addition to Glander International Bunkering DMCC there are two other cautioners, namely the MCA, represented by Stephenson Harwood, and Redwater NV, represented by Hill Dickinson.

3. The claim by the present Claimants was commenced by an *in rem* claim form issued on the 19th March 2019. The Claim Form, together with detailed Particulars of Claim (likewise dated 19th March 2019) and the corresponding Response Pack, was duly served by the Admiralty Marshal on 20th March 2019 by affixing the same to the bridge window of the Vessel. This can be seen from the witness statement of Mr Kemp. Accordingly, the time for acknowledging service was, pursuant to CPR

61.3(4), "*...14 days after service of the claim form*" and that period therefore expired no later than 3rd April 2019.

4. The present application was issued by a notice which was filed and issued on 9th April 2019. The Service took place as appears from the Certificate of Service filed. The evidence in support of the application and Claim is contained in the witness statements filed.

5. On the 12th April 2019, Teare J made an order directing that, for the purpose of obtaining judgment in default pursuant to CPR Part 61, the issues of both liability and quantum should be considered before the Admiralty Registrar. Teare J also directed that, pursuant to CPR 61.9(4), an application for Judgment in Default in an *in rem* claim must be served on all persons who have entered cautions against release on the Register and should generally be heard in open court with respect to both liability and quantum.

6. The hearing date and time was notified by the Court on 9th May 2019 and the two known cautioners were served by the Claimants on the 10th May 2019 with the application notice and all evidence in support, together with notice of the hearing date thus complying with the requirements of CPR Part 61.9(4). Having heard Mr Phillips, for the Claimant, at the hearing on the 22nd May 2019 judgment was reserved.

7. On the 10th July 2019 Mr Justice Teare made an Order in Claim no. AD-2019-000033 giving judgment to PJSC Sberbank of Russia ("PJSC"), the mortgagees of the Vessel, in the sum of US$1,608,570 together with costs summarily assessed as £75,000 and ordering that the PJSC Sberbank could enforce its judgment against the proceeds of the sale of the Vessel paid into Court.

8. On the 23rd July 2019, very shortly before I had intended to provide a draft judgment with a view to handing down judgment in the present proceedings on the 29th July 2019, an application was received by the Court from Linklaters, acting for PJSC, seeking permission to intervene in the proceedings. The Application Notice was

supported by a witness statement of Mr Duncan Hedar dated 22nd July 2019 which also sought a stay of the Claimant's application for default judgment. I informed Mr Phillips of this development on the 23rd July 2019 by email and indicated that the application should be heard before judgment was given and added "*if some agreement can be reached as to an exchange of documents and possibly written submissions and as to a time for that it may be possible to avoid a hearing and for me to reconsider my present draft in the light of any new submissions. If that occurs I would like to be kept informed by email.*"

9. After that Messrs HFW and Linklaters entered into correspondence in the course of which it was agreed that there would be disclosure of the evidence already put before the Court, that PJSC would put written submissions before the Court and that the Claimant would put responsive submissions before the Court. A time table was agreed. In effect this amounted to an agreement that PJSC might intervene in this claim for the purposes of making submissions with respect to the level of any salvage award to be made.

10. This judgment has been prepared in the light of the original evidence and submissions and the further submissions and documentary evidence provided.

11. I have been referred to a number of documents, including the Claim Form, the Particulars of Claim which includes a statement of truth signed by Mr Kemp, the Certificate of Service, the Application Notice, the Witness Statement of Mr Kemp and the Witness Statement of Mr Rogers. That was the primary evidence available prior to the intervention of PJSC and I have used it to set out the information relevant to the parties and the factual background put forward by the Claimants. These have enabled me to come to conclusions as to whether the claim is a proper one for salvage or whether it would be proper to give judgment based upon *quantum meruit* principles. Insofar as issues have been raised by PJSC, these address the quantification of an award; the issues raised will be referred to below in the section headed *Consideration*.

12. The Claimants are a consortium of three companies which co-operated and together provided salvage services to the Defendants on 18th December 2018 in the circumstances described below. They seek a single award for the services provided by them.

13. The Defendants are the owners of the bulk carrier "KUZMA MININ", her bunkers, stores and freight at risk. The "KUZMA MININ" ("the Vessel") is a 1980 build bulk carrier with container capacity, length overall of 180.5m, 22.9m in beam, 13.5m moulded depth, 16,257 gross registered tons, 7,306 tons net, and which has a deadweight capacity of 23,169 MT and a draught of 9.88m. At the material time the casualty was manned by a crew of 18 hands all told. She was unladen at the material time.

14. On the night of Monday 17th December 2018 the Vessel was lying to her port anchor off the coast of Falmouth. At about 0300 on Tuesday 18th December, when the wind was Southerly a fresh to severe gale with heavy seas, the casualty began to drag her port anchor towards the lee shoreline. At all material times up to and during the course of the grounding the Vessel's starboard anchor remained housed and unused up to and during the course of the grounding. At about 0530 on the 18th December 2018 the Vessel grounded beam on to the waves on a reef and sand in the vicinity of Gyllyngvase beach (East and South, off Swanpool Point) Falmouth Bay. The Vessel remained aground but with generator power and the use of her main engine but it is apparent that she was unable to free herself from the reef.

15. Mr Diccon Rogers is the Managing Director of the First Claimant. He has provided two witness statements. From the first witness statement the following appears:
    a. The first Claimant, "KML", was incorporated in 2008 by its co-founders, Mr. Anthony Glover and Mr Diccon Rogers, in South West England. According to the first witness statement of Mr Rogers: KML operates as a marine contracting firm specialising in shoreline, coastal and offshore marine operations, including salvage, around the United Kingdom and North Europe. KML has expanded since its incorporation in 2008 and the available fleet has increased from 2 to 8 vessels. KML operates 2 floating crane barges of 150 ton lift capacity, 1 DP ROV/mini construction vessel, 3 ROVs, 1 multi-

category (‘multicat’) tug, 1 landing craft, various cargo barges up to 5350 MT DWCC, crew boats, etc. plus an array of salvage and heavy mooring equipment, marine construction equipment, several shoreside wharves and facilities across the United Kingdom. The staff, including vessel and project crews, numbers between 60 and 80. KML is said to carry out extensive marine operations across the United Kingdom, in addition to some work overseas. It is said to regularly engage in salvage work, and has carried out several successful salvage/wreck recovery projects for government organisations including the Marine Accident Investigation Branch ("MAIB") and the Scottish Government. KML is put forward as a well-resourced professional salvor, with particular strength in the United Kingdom South-Western sea areas region which maintains equipment and resources on constant emergency readiness. KML has its headquarters at its own wharves on the Penryn River in Falmouth, which is also home port for its vessels. It is said that KML maintains an extensive stock of engineering, heavy mooring, and salvage equipment at this wharf, and at its nearby facility at Par, in South Cornwall. KML operates 24 hours per day, 7 days per week.

b. The second Claimant, Seawide Services Ltd ("SSL"), is also based at Falmouth Wharves and is a marine tenant of KML’s wharves. SSL is a family business founded in Falmouth in the late 1960s as a diving and salvage company. Over the years it has expanded to provide commercial diving services, salvage and emergency response, mooring services, workboat services, and crew and stores transfer to deep-sea ships in Falmouth Bay. SSL maintain a fleet of workboats and fast crew transfer vessels, as well as extensive diving and underwater equipment, salvage equipment, including large portable pumps, underwater lift bags, compressors, underwater cutting gear, and engineering equipment at Falmouth Wharves. SSL is now owned and operated by Captain Brendan Rowe, the son of the founder. SSL regularly carries out salvage, diving, and lifting services for smaller craft, and recently responded to salvage a high-value abandoned ocean racing yacht 250 nautical miles South-West of Southern Ireland. SSL operates 24 hours per day, 7 days per week, with a staff of up to 14 personnel. KML work closely with SSL and they have frequently co-operated in salvage and emergency response operations. In April 2014 SSL acted as KML’s principal diving sub-contractor

for KML's during the successful salvage of the 99 metre, 2750MT DWCC "mini bulker" "SEA BREEZE", abandoned and sinking off the Lizard, Cornwall.

c. The third Claimant, Falmouth Docks and Engineering Company ("FDEC"), is a group company of A&P Group Ltd. A&P Group Ltd is a subsidiary of Peel Holdings Ltd and is a large UK company engaged primarily in shiprepair services nationally and internationally, including an extensive portfolio of work for the UK Ministry of Defence. A further company, A&P Shiprepair Falmouth Ltd, is a fellow group company of A&P Group Ltd, also based in Falmouth. A&P Shiprepair Falmouth Ltd employs approximately 300 people in Falmouth and is a key commercial shiprepair business in the region, operating 24 hours per day, 7 days per week. FDEC owns and operates three tugs of between 17-21 tons bollard pull of Voith-Schneider propulsion type, the "PERCUIL", "ANKORVA" and "ST PIRAN". These tugs are all based at Falmouth and are mainly engaged in harbour towage, with some coastal work. FDEC regularly subcontract Fowey Harbour Commissioners tugs to provide additional towage at Falmouth Docks. FDEC also has smaller workboats and fast crew transfer vessels to service deep-sea ships in Falmouth Bay. FDEC maintains readiness for maritime emergency response and emergency local towage and vessel assistance, and rotas its tug crews so that they can be called out rapidly in the event of maritime emergency. FDEC has played a key role in response to many local salvage and marine emergency situations.

d. KML regularly work with the FDEC and A&P Falmouth, in relation to vessel moves, ship repair, emergency response and as project partners in the development of new maritime technologies. KML, SSL and FDEC have successfully responded together to a number of ship emergency and urgent call outs, including to a Maersk vessel with a collapsed crane, a timber-carrying vessel with shifted cargo, and a tanker with generator failure. These ships were specifically brought into Falmouth for the combined resources of the three companies to provide successful assistance.

16. The relevant salving instruments used in the operations under consideration were:

a. The "SARAH GREY"is operated by the First Claimant, KML. She is a multi-category tug built in 1999, of 25m length over all, 9.6m in beam with a draught of 1.8m. She is equipped for towing, for heavy nearshore anchor handling and has heavy-duty bow and stern rollers, a 60 ton line pull work/ towing winch, and two large hydraulic 'knuckleboom' cranes, the forward unit of 100 t/m. She is fitted with two Cummins KTA 19 marine diesel engines powering two fixed pitch propellers in nozzles giving a bollard pull of 18 tonnes.

b. The "ST PIRAN" is operated by the Third Claimant, "FDEC". She is a 1979-built tractor tug built in 1979, 26.55m length overall, 8.5m in beam and with a draught of 4.6m. She is fitted with two Ruston diesel engines driving through twin Voith cycloidal propulsion units, with a bollard pull of 24 tons. "ST PIRAN" is operated by the Third Claimant, FDEC.

c. The "ANKORVA" is operated by the Third Claimant, FDEC. She is a tractor tug built in 1967, of 26.35 m in length over all, 8m in beam and a draught of 4.2m. She is fitted with two Deutz SBV6M536 diesel engines powering two Voith cycloidal propulsion units and has a bollard pull of 20 tons.

d. The "PERCUIL" is operated by the Third Claimant, FDEC. She is a tractor tug, a sister to the "ANKORVA", built in 1967, of 26.35 m in length overall, 8m in beam and a draught of 4.2m. She is fitted with two Deutz SBV6M536 diesel engines powering two Voith cycloidal propulsion units, and has a bollard pull of 20 tons.

e. The "CANNIS" is owned by Fowey Harbour Commissions. She was chartered in by the Third Claimant, FDEC. She is a tractor tug built in 1982, of 30m length over all, 9m in beam with a draught of 4.6m. She is fitted with two Ruston diesel engines powering two Voith Schneider propellers and has a bollard pull of 32 tons.

f. A RIB was also mobilised and used by the Claimants to enable the Vessel to be boarded and to assist in making towage connections. The RIB is 9.9 metres long and is powered by twin 200 hp outboards. She is said to carry tools, lines and rigging and is equipped with a chartplotter and sonar. The ownership of the RIB is unclear but Mr Rogers states that KML maintains access to this Vessel which is available at short notice and that he is personally responsible for the RIB and one of her designated coxswains.

g. The NEW ROSS is a workboat/tug, apparently owned by KML, which was mobilised and apparently assisted the SARAH GREY to load anchors from the KML crane barges in Falmouth.

The Claimants' case relating to the casualty and the services performed

17. According to Mr Rogers the salient features of the services were:

a. Shortly after 0530 on the morning of 18th December Captain Brendan Rowe, Managing Director of the Third Claimant, became aware of the grounded casualty whilst monitoring, as was his wont, AIS information at his base in Falmouth. Captain Rowe immediately alerted Falmouth Coastguard and UK Emergency Services both of whom were previously unaware of the situation. At about 0536 Captain Rowe also informed Mr Rogers. At around 0600 Captain Rowe and Mr Rogers arrived at Gyllyngvase beach. At 0640 Captain Rowe and Mr Rogers spoke with the Harbour Master by telephone. The Harbour Master confirmed that he was requesting KML to mobilise their assets. Apparently this was because the KML assets, which included ground tackle, were thought to provide the best available means to free the Vessel. The Harbour Master also confirmed that he was in communication with the Third Claimant, FDEC, regarding the availability of their harbour tugs. At that time Mr Rogers states that the casualty was lying almost beam on to the surf line on a heading of about 212 degrees True. The casualty was showing signs of movement and the waves were striking her hard and heavy spray was driving over her forecastle and decks. Mr Rogers and Captain Rowe considered that the casualty's bow was close to or in contact with the rock reef extending East and South from Swanpool Point.

b. Low tide was 0730 that morning with a height of 1.8m over chart datum. The next highwater was predicted for 1315 with a height of 4.4m over datum. The following low water was predicted for 2004 with a height over datum of 1.5m. At the time the tides were making towards springs. During the summer Gyllyngvase is a tourist beach and year round popular amenity. The Fal and Helford Estuaries are environmentally sensitive and areas of particular beauty.

At about 0643 the Falmouth lifeboat and Falmouth pilot launch attempted to reach the Vessel but could not do so due to the heavy surf. Mr Rogers and Captain Rowe were conscious of the urgency of the situation and the need for swift action so as not to lose the tide. For this reason, and following discussions with the local authorities, they deployed their personnel and equipment to begin the salvage operation whilst the Coastguard arranged for a helicopter to deliver a Falmouth Harbour pilot to the Vessel.

c. At 0645 the Falmouth lifeboat and the pilot boat arrived in the vicinity. They attempted to approach the casualty but were prevented by the surf and conditions. At about 0654 the “ST PIRAN” departed her berth in Falmouth Dock. At 0711 the “SARAH GREY”, apparently assisted by the “NEW ROSS”, was loading heavy anchors in Falmouth and the KML base at Par was preparing Bruce anchors, chains and buoys for delivery to Falmouth.

d. At about 0725 Mr Rogers and Captain Rowe set off from Falmouth in a RIB (9.9 metres long and powered by twin 200hp outboard engines) with two additional SSL crew members, Ben Rowe and Nick Johns. At 0745 they arrived on the scene and approached the lee of the casualty with a view to boarding via the pilot ladder. The weather was a fresh gale with gusts of 50 knots and with wave heights of 3-4 metres or greater. There was heavy and dangerous surf all round the casualty. By rounding the casualty they risked capsize if the RIB was hit by breaking sea whilst on final approach. By 0830 they had reached the lee, starboard, side of the casualty safely and Captain Rowe boarded via the pilot ladder on the lee side, and met the casualty’s master on the bridge. He was informed that the casualty was in ballast and carrying no cargo. Her drafts were said to be 6.8m aft and about 6m amidships. The casualty was moving with some impacts but not pounding heavily.

e. At around 0730 the first FDEC tug, "ST PIRAN", arrived in the area and stood by. "ANKORVA" and "PERCUIL" had been mobilised and dispatched at 0654 and 0704. After loading extensive heavy anchors and ground tackle and salvage equipment, KML's tug "SARAH GREY" was despatched from Falmouth Harbour at about 1130. KML's "NEW ROSS" and other vessels including amphibious landing craft and crane barges were placed on standby, should further assistance be required. FDEC also worked to procure the

charter of "CANNIS" from Fowey Harbour Commissioners on an emergency basis, for additional towage. Due to the heavy weather and surf, it was not possible for the tugs to get close enough to the Vessel to attach a line. "ST PIRAN" grounded briefly during the operation but the Master was able to free her without damage to the tug and thereafter she continued to participate in the salvage operation. The tugs attempted to use rocket lines to fire messengers but the strong winds, shallow waters and rough seas prevented the tugs from getting close enough to take accurate aim.

f. At about 0909 the Falmouth Pilot, Captain Tristan Gurd, was transferred on board the casualty via winch line from the UK Coastguard helicopter. It was agreed that the Pilot would provide pilotage and co-ordination on the casualty bridge whilst KML and SSL would take charge of connecting the tugs to the casualty (with Captain Rowe connecting lines to the casualty and Mr Rogers and crew operating the RIB). The casualty's crew appeared largely demoralised and ineffective and were provided with direction by Captain Rowe and Captain Gurd.

g. At 0910 Captain Gurd requested the tugs "PERCUIL" and "ANKORVA", which had been standing by in the vicinity of St Anthony's Lighthouse since 0730, to connect to the casualty. "ST PIRAN" approached the casualty to attempt to make fast but made contact with the bottom and had to stand off. The tugs attempted to make connections using rocket lines to pass messengers but these attempts proved ineffective in the weather conditions prevailing.

h. At about that time the casualty was beginning to pound more heavily on the rising tide. Despite the conditions, and following discussions over VHF with Captain Gurd and Captain Rowe, Mr Rogers decided to attempt to attach long floating messenger lines (which were held in the RIB in case of emergencies) between the casualty and the tugs, by passing the messenger lines in the relative shelter of the lee bow and stern of the casualty and then handling them round to the windward side for connection. Once the messenger lines were attached to the casualty, Mr Rogers manoeuvred the RIB to pass through the breaking surf at speed whilst paying out the messenger lines, then passed the messenger lines to the tugs waiting beyond the surf. The RIB made a number of these trips across the surf. It was necessary for Mr Rogers to exercise care to prevent the messenger lines being fouled in the RIB's propellers which also

involved Mr Ben Rowe and Mr Johns in tending and paying out the messenger lines so as to connect them to the tugs. The RIB was swamped on more than one occasion whilst passing the lines to the tugs. At the same time, aboard the casualty, Captain Rowe coordinated the "passing over" of the towlines by the casualty's crew.

i. In the conditions prevailing, connecting the tow lines took a number of hours and there was a continuous danger of a rope snapping and rebounding. "ST PIRAN" was the first tug to be connected to the stern of the Vessel at around 1045 followed by "ANKORVA" to the stern at around 1055 and "PERCUIL" to the port bow at around 1115. Once connected, the tugs took the strain to hold the casualty in its position and prevent her being pushed further ashore upon the rising tide. The tow lines from the "ANKORVA" and the "PERCUIL" parted on more than one occasion and had to be replaced using the RIB. These tugs were, however, not able to free the casualty which was pounding on the reef. At about this time Mr Rogers smelt heavy fuel oil and could see traces of fuel in the water. There was concern that one of the double bottom bunker oil tanks had breached on the reef. High tide was at 1315 and Captain Rowe and Mr Rogers were concerned that if the casualty could not be freed before the tide turned then she was very likely to become more heavily aground and would incur significant structural damage resulting in the salvage operation becoming more difficult. On board the casualty Captain Rowe and Captain Gurd had attempted to assist the tug's efforts by heaving on the casualty's port bow anchor but this failed because the anchor dragged and was finally hove in.

j. KML's tug "SARAH GREY" arrived on the scene at about 1149. It was considered too hazardous to deploy "SARAH GREY"'s heavy anchors and instead she was ordered to push on the casualty's starboard side which was attempted at about 1220. However, this also proved to be dangerous and she was subsequently ordered to pull ahead using her long emergency rope towline. "SARAH GREY", using the RIB to pass the line, was made fast and was pulling ahead by about 1300. With the "SARAH GREY" pulling ahead, the heading of the casualty was altered away from the reef which reduced her pounding. The "ANKORVA" was then reconnected at the port bow, again assisted by the RIB, and with both tugs pulling at full speed some forward

movement was observed. At that time the Pilot ordered the casualty's engine to be used and the heading was turned to just East of South.

k. At about 1342 the "CANNIS" arrived from Fowey. By 1352 she was made fast and assisted "ANKORVA" and "SARAH GREY" pulling the casualty. The Pilot ordered the casualty's engine to be used ahead and the casualty started to move ahead slowly on a heading of about 147 degrees True. At the same time the "PERCUIL" assisted by pulling on the starboard bow and the "ST PIRAN" assisted by controlling the stern, respectively. At about 1430 the casualty was afloat and was towed to seaward. By this time the wind had reduced to South Westerly a moderate breeze and the swell was reducing.

l. After the casualty was successfully refloated she was towed to a position 1 mile south of Castle Beach, Falmouth where she was anchored under the supervision of Captain Rowe and the Pilot. At about 1530 the casualty was redelivered to her Master. The casualty was subsequently moved at the instigation of the Maritime and Coastguard Agency but this was not part of the services.

18. Mr Roger's first witness statement does not give details of the demobilisation of the salving instruments and personnel. However, Mr Rogers provides a resume of the equipment used and damaged and the personnel deployed, as follows:

    a. Emergency mobilisation and demobilisation of RIB and Crew;

    b. Consumption/use to destruction of numerous floating messenger lines (c.400m), fenders, ropes, one drysuit, one portable VHF radio, and sundry equipment in the RIB;

    c. 180 litres of marine petrol fuels and sundry oils for RIB;

    d. Subsequent repairs to the jarred and partially flooded electrical systems of the RIB;

    e. Emergency mobilisation of extensive KML heavy mooring equipment, including at KML Falmouth and Par Facilities, to include 2 x 4t Flipper Delta anchors; 2 x 5t LWT anchors; 50m ground chain for each; 2 NRB buoys; riser wires; shackles, seizing wire, and connections; all loaded out to "SARAH GREY"; 2 large fourfold hauling sheaves; at Par, 6 x 6t twin-shank and single shank Bruce anchors; 68mm and 76mm stud link ground chain; 6 x 6t

NRB offshore through-hawse buoys c/w grease-packed mooring swivels, and 2 x 20t LWT anchors, all handled by KML cranes and machinery and readied for road transport by articulated lorry from Par to Falmouth Wharves;

f. Emergency mobilisation and deployment of the multicat tug "SARAH GREY" and the workboat tug "NEW ROSS", and their subsequent demobilisation;

g. The consumption of approximately 1,800 litres of Marine Gas Oil between these two vessels;

h. Provision of salvage coordinator Captain Brendan Rowe on board the Vessel;

i. Emergency mobilisation to readiness of diving equipment, floating oil boom, portable salvage pumps, tool packages, air compressors, sheave blocks, pumps, mooring connection equipment, cutting equipment, underwater cutting and patching equipment, concrete, wood and steel patching materials, wires, and winches from the KML and Seawide Services yards at Falmouth Wharves;

j. Emergency mobilisation and deployment of the tugs "ST PIRAN", "ANKORVA", and "PERCUIL";

k. Emergency mobilisation via subcontract charter of the tug "CANNIS";

l. The demobilisation of the tugs "ST PIRAN", "ANKORVA", "PERCUIL" and "CANNIS", to include significant clearing up and drying out below after their use in extreme conditions;

m. The consumption of approximately 10 tonnes of Marine Gas Oil between these four tugs;

n. The consumption/use to destruction of various rocket lines, sundry messengers, and five Dyneema towlines between the tugs "ST PIRAN", "ANKORVA" and "PERCUIL";

o. Damage to the towing winch of the "ST PIRAN"; and

p. The marine replenishment of towing lines and equipment direct from FDEC stores by a fast crew transfer vessel operated by FDEC to the tug "PERCUIL".

19. The costs associated with performing the services are put forward by the Claimants as being £118,500.

20. For the Claimants, Mr Nevil Phillips, provided the court with a carefully prepared and detailed skeleton argument to which he added in oral submission. Mr Phillips has also made it clear that the claim is brought by the present Claimants acting as a consortium, that the Court is not required to apportion any award of salvage between them and that the Claimants only require the Court to make a single award in respect of their services as a whole. In his email of the 23rd July 2019 Mr Phillips also stated that the pilot, Captain Gurd, is not a claimant to these proceedings and has, apparently elected not to put forward a claim for salvage.

21. Mr Phillips' submissions may be summarised as follows:
    a. With respect to making the present application for default judgment the procedural requirements set out in CPR Part 61 as supplemented by CPR Part 12 have been satisfied.
    b. The right to remuneration for salvage services at sea are governed by s.224 of the Merchant Shipping Act 1995 which incorporates the Salvage Convention of 1989 ("the Convention") set out in Schedule 11 of that Act.
    c. Further the approach to whether there have been salvage services rendered and, if so, the quantification of an award are governed by in particular Articles 1, 12, 13 and 14 of the Convention.
    d. The services provided fall within "*any act or activity undertaken to assist a vessel or any other property in danger in navigable waters*" and thus were salvage operations, as defined by Art. 1(a) of the Convention, and the services did "*have a useful result*" as required by Art.12.1 of the Convention. As such the Claimants are entitled to claim an award for salvage.
    e. Alternatively, in the event that the court does not accept that primary submission, the Claimants are entitled to claim an award based upon the equitable principles of *quantum meruit*.
    f. The assessment of the award is to be considered in accordance with the criteria set out in Art.13 of the Convention. The primary considerations are:

i. Art.13(1)(a) – *the salved value of the vessel and other property.* In the absence of any co-operation by the Defendants the value is based upon estimates obtained by the Claimants The salved value put forward is £2,413,581, made up of a sound value of £2,823,462 less deductions of £450,000 with bunkers worth £40,119 added. The value is based upon estimates obtained by the Claimants.

ii. Art.13.1(b) – *the skill and efforts of the salvors in preventing damage to the environment*. The casualty was carrying 129 tonnes of heavy fuel oil, and there was a real risk of there being a leak of fuel oil which would have had serious consequences to the environment.

iii. Art.13.1(c) – *the measure of success obtained by the salvor.* Success was comprehensive and only as a result of the Claimants' own initiative, resources and skills.

iv. Art. 13.1(d) – *the nature and degree of the danger*. The evidence, which includes some video taken from a helicopter, indicates that the casualty was in real peril. The conditions were "challenging" and there was no realistic alternative assistance available.

v. Art. 13.1(e) – *the skill and efforts of the salvors in salving the vessel, other property and life.* There are substantial and significant features of the services. It was a delicate and pressurised service, in difficult and dangerous conditions with risk to the individuals involved. Without the skill demonstrated and the risks undertaken it is likely that the casualty would have become lost and that significant pollution would have taken place.

vi. Art.13.1(f) – *the time used and expenses and losses incurred by the salvors.* Although the services only took about 9 hours they were, nonetheless of "high intensity" and "nick of time" which makes the services more deserving of recognition. The Claimants incurred expenses of £118,500, including the charter at short notice of the "CANNIS", damage to the winch of the "ST PIRAN" (£75,000), lost and damaged gear (£13,700), fuel costs (£6,300) and mobilisation and demobilisation costs (£7,900).

vii. Art. 13.1(g) – *the promptness of the services rendered.* The services were promptly rendered where every minute counted. The speed of

mobilisation was highly commendable which arose from Captain Rowe's monitoring. But for the speed of the Claimants' response it is probable that the casualty would have been harder aground before any assistance was available.

viii. Art.13.1(h) – *the availability and use of vessels or other equipment intended for salvage operations.* The Claimants maintain, between them, 4 tugs and a panoply of salvage equipment.

ix. Art.13.1(i) – *the state of readiness and efficiency of the salvors' equipment and the value thereof.* The First and Second Claimants are professional salvors who made a substantial investment in equipment to enable them to provide a high quality service where there are no obvious alternatives.

g. Taking these factors into account the Claimants deserve an encouraging award.

h. The salved fund, although not trivial, is relatively modest and in this case the Claimants contend that the award should be in the region of £550,000 which represents just under 23% of the salved value and which is supported by LOF arbitration awards put before the court, in particular the decision of Geoffrey Brice QC in *The Rea*, an arbitration regarding the salvage of that vessel, in which he awarded £48,000 against a salved fund of £237,624 (a little more than 20%) in what he described as a nick of time service to a vessel which was dragging its anchor onto a lee shore. That was an award made in 1979.

The case put forward by the Intervener, PJSC

22. Although I have not had the benefit of hearing Mr Turner QC he has provided written submissions which are, not surprisingly, well presented and helpfully set out in a way which addresses the points in issues in this case. It is unfortunate that he was not provided with a copy of the Claimants' skeleton. Therefore, not unnaturally, his submissions tend to respond to the case put forward in Mr Kemp's witness statement. In outline his submissions are that, although the Claimant is entitled to a salvage award, nonetheless the benefit to the casualty, the nature of the services, the dangers faced by the casualty, the skill and efforts demonstrated, the time taken, out of pockets and losses, the risks taken by the salvors, the promptness of the services rendered, the availability of vessels and equipment intended for salvage operations,

and the state of readiness and value of such equipment have been to a greater or lesser extent exaggerated by the Claimants. He acknowledges that the Claimants are entitled to an encouraging award but has submitted that the actual circumstances of the case are what must weigh with the tribunal. He has further submitted that it is contrary to principle and practice for a party to state a figure for an award and, in any event, the figure proposed is "*grossly in excess of the proper and encouraging award that these services, by the Claimants, merit.*"

23. With respect to Mr Turner's particular submissions on these points they may be summarised as follows:

    a. *The salved values.* The burden rests upon the Claimants to establish the value of any property salved. The Vessel's court sale price of US$1.03 million is about one-third of the value put forward by the Claimants (US$2.99 million as at 18th December 2018) and is better evidence of the Vessel's value on an arm's length sale. There is no explanation of the figure of £450,000 put forward by the Claimants as deductions from the sound value. The value put forward by the Claimants is a demolition value but there is no evidence that any account has been taken of the cost of taking the casualty to a scrapping port. The true valuation should not exceed $1.5 million.
    b. *The quantity of the HFO onboard the casualty.* Although the Claimants have advanced a figure of 129 tonnes onboard the MAIB found 105 tonnes. The Vessel had called at Falmouth to bunker but had not done so by the date of the casualty.
    c. *Risk of pollution* – The risk of pollution was exaggerated. The MAIB noted that the damaged tank had held 5 tonnes but was filled with water. Although the 5 tonnes must have escaped, no pollution had resulted. No actual steps were taken, or could have been in the prevailing weather conditions, to deal with any pollution, and the only step taken to minimise pollution was the actual salvage of the Vessel.
    d. *Dangers.*
        i. The casualty was a bulk carrier which was 40 years old but had been built in East Germany and was therefore '*over-engineered*'. Additionally, she was Ice Class 1A. She was therefore probably more

resistant to damage than a younger bulk carrier. The evidence contained in the MAIB report indicates that she had suffered relatively modest damage despite having pounded vigorously and Mr Rogers did not see any signs of serious structural damage to the shell above the waterline.

ii. Caution has to be exercised with respect to the video of the AIS positions and the submission that the Vessel was moving up the beach. Low water was at 0730 and, in fact, the video does not appear to show the Vessel moving significantly until the tugs are made fast from about 1045 when the Vessel becomes more parallel to the reef rather than moving up it. However, it is accepted that there was a risk that the Vessel would move higher up the reef over the course of the tide. The tidal height was due to increase over the next few days which would not have presented the problems which can arise where they are decreasing.

iii. The weather conditions were improving by the time the Vessel was pulled off the reef as evidenced by the MAIB report, Mr Rogers' evidence (wind SW 4 by about 1430 with decreasing swell) and the weather information provided by him. There is no evidence of the weather conditions worsening in the days following the services.

iv. In the circumstances prevailing, the risk of the Vessel suffering further damage if she remained aground is considerably lower than that put forward by Mr Kemp in his witness statement, and the view which was expressed in the MAIB report that " . . . *while [the vessel was] firmly on the beach with the weather abating, the SOSREP did not consider that [she] posed an immediate threat of pollution*" is relevant.

v. This was not a case, as averred by Mr Kemp, where the Vessel was immobilised until professionally assisted. In fact, four of the tugs which assisted were harbour tugs and were owned or chartered by a company which does not maintain a salvage posture, and the "SARAH GREY" has an MCA licence which restricts her operation to within 60 miles of a safe haven; the RIB driven by Mr Rogers was hired in; and various personnel, particularly Captain Gurd, the Pilot, have not claimed salvage. The MAIB Report dated August 2019 indicates:

1. That the Vessel's master informed the port authorities of the casualty, not Mr Rogers;
2. The Harbour Master implemented the local emergency plan and liaised with the Coastguard.
3. The pilot vessel was on the scene at 0635, nearly 1 hour before the Claimant's first vessel left harbour;
4. After boarding, the pilot discussed the matter with the Vessel's Master, there is no mention of Captain Rowe who had apparently been onboard for about 1 hour before that. It is suggested that this indicates that Captain Rowe's role was essentially one of liaising between those organising the salvage and those implementing it;
5. The Harbour Master mobilised the Third Claimant's tugs.

vi. The Claimants were not in charge of the salvage but were acting as tools of the Harbour Master and the central role was played by the local maritime authorities. This is supported by:
    1. The nearly contemporaneous press release stating that the Coastguard coordinated assistance to the Vessel;
    2. The press release issued by the Third Claimant's parent company which suggest that the operation was successful because of the collaborative efforts of "*multiple agencies*";
    3. The First Claimant's press release which indicates that the salvage manager was put onboard the casualty and took initial control before collaborating with the pilot once he had arrived by helicopter and also recognised the collaboration between the various participants and recognised the nature of the salvage effort - "*It was a great team effort*".

vii. Two out of three of the Claimants have some salvage capability but the Third Claimant appears to have no salvage posture. The Claimants are not professional salvors.

viii. The Vessel was immobilised until assisted by tugs but she was facing a low order medium term risk of structural damage with a lower risk of pollution. Save for that any danger is speculative.

e. *Skill and effort in performing the services.* It is accepted that the Claimants' personnel demonstrated fine tug and boat handling skills in testing conditions. However the Claimants were not in charge of the operation. The Vessel's main engines were used before and during the re-floating. That was self-help for which the Defendants are entitled to credit.

f. *Out of pocket expenses and losses.* PJSC has provided a schedule setting out the OOPs claimed with comments:

   i. Mr Turner has submitted that of the total claimed amounting to £118,500 the sum of £75,000 in respect of the winch and RIB electronics is not properly an out of pocket expense. Of the remaining £41,900 only £11,138 has been vouched which has been overstated and only £10,750 has been proved.

   ii. With respect to the damage sustained by the RIB this has not been vouched and no explanation has been provided as to why there is a liability to make good that damage. Although the cost of replacing the defective winch onboard "ST PIRAN" has been proved the tug was 30 years old and there should not be an overcompensation for what amounts to a considerable betterment.

   iii. Mr Turner has submitted that a fair course would be to allow half the sum claimed in respect of the winch and nothing in respect of the alleged damage to the RIB.

g. *Risks*

   i. *The weather*. Mr Rogers' submissions as to the conditions should be treated with circumspection. Although the conditions were challenging they have been exaggerated and had reduced by the time that the Claimants reached the scene.

   ii. Mr Turner accepts that the RIB and the "SARAH GREY" ran the risks of damage, grounding and (in the case of the RIB) flooding and perhaps capsize during the early stages of the service.

   iii. The "PERCUIL" and the "ANKORVA" sheltered from the worst of the conditions for 2 hours before coming out to the casualty and cannot be said to have been placed at risk.

h. *Promptness.*

i. The Claimants' response was timely but not particularly swift. Although the Second Claimant was aware of the casualty at a very early stage the first of the Claimant's vessels did not leave her berth for over 75 minutes. The next three, including the RIB, left about half an hour later, and that was 2 hours after the casualty had grounded. "SARAH GREY" spent 2 hours loading ground tackle although Mr Rogers considered it would be risky to deploy ground tackle in the conditions occurring. As a result that vessel did not arrive until 6½ hours after the casualty had grounded. The "CANNIS", which was the most powerful tug deployed, was not chartered by the Third Claimant until over 4 hours after the grounding. She left Fowey 1¾ hours later and reached the casualty at 1340, 25 minutes after high water.

ii. The suggestion that the Claimants are to be compared with MULTRASHIP or that the present case compares with the claim considered in *The Skopelos* should be rejected as being risible.

iii. The points above are not intended as criticisms of the Claimants but their response must be considered in the light of the limitations imposed upon them. The services were in time but no more than that.

iv. *Nick of time.* Although this was a nick of time case in the sense that the salvors were able to take advantage of the tide it was not in the sense arising in the case of *The Rea* in which a well-equipped salvage tug maintaining salvage station made fast when *The Rea* was about 100 metres from a breakwater onto which she was drifting. Nor was it a nick of time case in the sense of the casualty being exposed to further damage or loss if not salved.

i. *Availability and use of vessels intended for salvage services.* None of the vessels or equipment used are intended for salvage operations. Four of the tugs are harbour tugs and the fifth is a marine contractor's "workhorse".

j. *Status.*

i. The present claimants are not to be compared with Multraship which is a well-known salvage and wreck removal operative with 36 tugs, a sheerlegs and a salvage store.

ii. The tugs used in *The Skopelos* case do not compare with those used in the present services.

iii. Although the Claimants have put forward three cases where they have assisted, only one, the SEA BREEZE performed by KML, involved salvage services which may not have been performed on salvage terms.

iv. The evidence demonstrates that KML is a marine contractor with an incidental salvage capability. It does not claim to keep salvage station and should not be considered a 'professional salvor' in the accepted sense.

v. Likewise SSL is also a general marine contractor with an incidental salvage capability. It is not a 'professional salvor'.

vi. There is no evidence to suggest that FDEC is a professional salvor. It is not a 'professional salvor' although it provided the most pulling power.

k. *The approach to the award.*

i. It was inappropriate and contrary to practice to put forward a particular figure. The Court should pay it no regard. It is, in any event much too high.

ii. The correct approach is to award an encouraging sum which reflects the combined status of the Claimants and their investment in salvage which are both modest. It is accepted that the Claimants' contribution was timely, skilful and occasionally courageous. It was part of a co-operative effort that was co-ordinated by the authorities who have not made a claim for salvage.

The Claimants' response to the Intervener's submissions.

24. In response to the case put forward by PJSC the Claimants have introduced further witness statements. The first is a second witness statement made by Mr Rogers and the second has been made by Captain Gurd, the Chairman of Falmouth Pilots LLP and the pilot who attended the casualty during the services. The main points have been highlighted by Mr Nevil Phillips in his submissions dated 12th November 2019. His first general submissions are to the effect that it is apparent that the intervention is to minimise the quantum of any award to reserve the Interveners' own prospects of recovery under the mortgage on the vessel, the submissions made by the Interveners in seeking to minimise the efforts of the salvors are unjustified and that the further

evidence has been provided to meet the charges of exaggeration raised. He has then dealt with 10 matters raised by PJSC which are summarised as follows:

a. *Values.* Mr Phillips has re-emphasized the Claimant's case on the salved value of the casualty. He has drawn attention to the approach taken by Brandon J, as he then was, in *The Lyrma (No.1)* []1978] 2 Lloyd's Rep. 27. He has also pointed out that PJSC has not provided evidence, or even contended for a particular salved value, and that the deductions put forward are derived by FDEC for the relevant repair work following an inspection after the salvage operations and reflect an estimate grounded in commercial reality. Although Mr Phillips has referred to the submission made by PJSC, relating to the submission that the valuation put forward is based on a demolition value, it is unclear whether Mr Phillips has accepted that is a correct assertion. It was not suggested that this was the case in his earlier submissions.

b. *HFO onboard.* In this respect the Claimant challenges PJSC's reliance on the MAIB report which has been introduced by PJSC. The Claimant submits that it is inadmissible citing *Rogers v Hoyle, Sec. of State for Transport intervening* [2014] EWHC Civ 257 and, further, if admitted it is brief and superficial and should be treated with the utmost caution. The reports of the HFO onboard the Vessel differ from the other evidence. The MAIB report refers to there being 105 tonnes but there was a bunker survey on the 21st February 2019 made for the Admiralty Marshal which indicates that there was 129.581 tonnes of HFO and 29.514 tonnes of MDO onboard and the Master of the Vessel informed Captain Rowe that there was about 129 tonnes of HFO onboard.

c. *Risk of oil pollution.* Mr Phillips has submitted that although the MAIB report, upon which PJSC relies, reports a single breached fuel oil tank it does not identify the tank. However the bunker survey report states that HFO tank 6 was holed to the sea or to an adjacent ballast tank, HFO tank 7 was holed to the sea, HFO tank 9 was holed to an adjacent ballast tank and MGO tank 13 was holed to an adjacent ballast tank. That is consistent with a vessel in very poor condition. The diving survey and survey undertaken for the Admiralty Marshal has indicated about 7 fractures in way of tanks 5, 7 and 9a, that there is considerable damage to fuel tanks to sea and to ballast tanks and no. 6 tank was showing a level close to that of No.7 which was known to be holed. The Vessel was therefore in poor condition, was unable to ballast down and

pounding on the reef. Captain Gurd's concerns, expressed in his witness statement, as to the future of the Vessel if she remained aground were justified. Gyllyngvase Beach is an important local asset. There was a real risk of catastrophic pollution. Further the MAIB report recognises that the response to the casualty was timely and prevented a more prolonged operation and pollution. Although PJSC contends that no anti-pollution equipment was deployed the evidence of Mr Rogers and Captain Gurd contradicts this, KML mobilised its floating oil boom and the Harbour Master deployed counter pollution and control contractors.

d. *Dangers*

   i. *The vessel.* With respect to the submission by PJSC that the Vessel was over engineered and it should not be assumed that she was more prone to damage than a younger vessel, Mr Phillips has submitted that there is no evidence for the former assertion and the second is fanciful in face of the actual evidence. The MAIB report refers to "*Damage below the waterline included plate deformation and breached tanks*". Further a dive survey on the 22nd December 2018 identified a 20 metre section of the forward shell plating as being badly holed, cracked and deformed with the starboard bilge keel partially detached. If she had remained aground there was a danger of hogging and deformation.

   ii. *Risk of further grounding.* Mr Phillips has submitted that the AIS replay indicates that but for the services provided the Vessel would probably have been driven further up the reef. The ballasting capacity was insufficient to stop the Vessel moving further up the beach and it was not possible to rig ground tackle in the prevailing weather conditions. The risk was recognised by all involved at the time including the MAIB report.

   iii. *The weather.* Although the conditions had begun to abate by the time that the Vessel was refloated it was very bad indeed before that and during the period when the services were commenced and lines were being made fast. Captain Gurd's evidence is that the wind was force 8-9 gusting force 10 with 4.5 metre seas at the time when the Pilot Boat proceeded to the Vessel.

iv. *Risk of further damage.* In the absence of assistance further damage was, or was almost, inevitable. She could not ballast, the crew were unmotivated, there was a lack of an operable bow thruster or stern anchor and she was moving up the reef. The SOSREP's apparent decision not to intervene should be treated with caution.

v. *Whether the services performed were professional.* Contrary to PJSC'S submissions the services provided were professional in nature, the Claimants are the only providers of salvage services in the region and they have provided services in the past. The salvage operation was the product of a combination of efforts and co-operation between the Claimants and the local authorities. The services were organised and conducted by the Claimants, in concert with Captain Gurd, That is acknowledged by Captain Gurd. There was no central role played by the authorities ashore as submitted by PJSC, on the contrary there was confusion and frustration ashore.

e. *Skill and efforts (Services).* The PJSC's submissions are based upon the MAIB report which should be treated with caution. With respect to the submissions made with reference to self-help the reality was that the part played by the Vessel's crew was trivial and without Captain Rowe's contribution connection to the tugs would have been almost impossible. The ship's engine was not used until a few minutes before the refloating and this was directed by Captains Rowe and Gurd.

f. *OOPs and losses.* Mr Phillips refers to the schedule included in the documents provided. Further it is not appropriate to make a reduction for betterment with respect to the winch on the "ST PIRAN" as this is not a claim for a contractual measure of loss but is a claim for a salvage award by reference to property which has been sacrificed and the Claimant should be indemnified for the cost or replacing equipment which has been damaged.

g. *Risks*

i. *The weather.* The conditions at the Vessel would not be the same as the hindcast obtained from a weather station. The evidence of Mr Rogers as to the severity of the weather conditions has been corroborated by Captain Gurd.

ii. *"PERCUIL" and "ANKORVA"*. These tugs were called to the casualty by the salvage team as soon as it was possible to make a towage connection. PJSC has made no reference to "ST PIRAN" but that tug took extraordinary risks in performing the services.

h. *Promptness.*

i. Although PJSC has sought to denigrate the promptness and expedition of the services that is unjust and unrealistic. The skill, perseverance and swiftness of the response in the face of the challenges posed by the conditions, and the problems in boarding the Vessel should be regarded as enhancing qualities. The important feature is that the services were time critical and were effective

ii. PJSC's comments are classic "hindsight" and Mr Rogers' decision to continue loading the ground tackle was sensible. Similarly the hiring of the "CANNIS" was simply part of the developing situation.

iii. *Nick of time.* Without the attendance of the Claimants the situation of the Vessel would not have resolved itself but would have become worse within a short period of time.

i. *Status.*

i. The Claimant does not seek to compare itself with organisations such as Multraship and the reference to *The Skopelos* was not intended to do so.

ii. However the Claimants are the closest that can be found to a conventional professional salvor in the South West of England, the nature and scope of their work is considerable and their investment in equipment is substantial.

iii. The Claimants have performed previous salvage services.

iv. KML is a subsidiary of Marine Asset Management Group and uses the group assets, including 2 floating crane barges, 1 DP ROV construction vessel, 3 ROVs , 1 multicat tug, 1 landing craft and various barges and crew boats are available.

v. SSL has performed a significant yacht salvage.

vi. FDEC has assets which were procured by KML/SSL.

j. *The award.* The Claimants do not seek a specific award however it is submitted that the services were exceptional, decisive, successful and deserve encouragement.

k. *Costs.* Mr Phillips has submitted that PJSC should pay the Claimants' costs of the intervention to be summarily assessed. With respect to interveners Mr Phillips has referred to CPR Part 19.2 and 19.4 and the White Book at 19.2.8. Alternatively PJSC should bear its own costs of the intervention and the Claimants' costs should form part of their recoverable costs against the *res.*

Consideration

25. As I have already indicated my original judgment was largely complete when it became apparent that PJSC were intending to apply to intervene. I have sought to summarise the additional submissions and information provided by the parties and I have revised my original findings where I consider it appropriate to do so.

26. This claim was brought *in rem* and, on the evidence before me, it is clear that it was properly served. The Owners of the casualty have not acknowledged service of the claim and that has led to the Claimants making this application for default judgment. The provisions of CPR Part 61 contain different rules from those applying in other courts and in Admiralty matters it has long been established that to obtain a default judgment it is necessary to satisfy the Court that there is a proper claim and that the sums sought are appropriate.

27. PJSC are the mortgagees of the Vessel and, given the fact that the owners have chosen not to take part in the proceedings, it is understandable that they would wish to make submissions with the intention of preserving as much of the fund as possible as they have a substantial interest in whatever remains after any salvage award has been paid. In my view that course is understandable although it was unfortunate that the intervention took place at a late stage in the proceedings.

28. PJSC has introduced the MAIB report in evidence. In his submissions Mr Phillips has contended that the MAIB report should not be admitted relying on the decision of the Court of Appeal in *Rogers v Hoyle*. In that case objection was taken to the admission of the Department of Transport's Air Accident Investigation Branch ("AAIB") report

in civil proceedings following the death of a passenger in a vintage bi-plane crash. The Judge at first instance, Leggatt J, after careful consideration concluded that, notwithstanding the decision in *Hollington v Hewthorn* [1943] KB 587 (CA), it was permissible to admit such a report both with respect to the factual matters recorded and with respect to the expressions of opinion made by the authors of the report although the weight to be placed upon such information was a matter for the judge. In the Court of Appeal Christopher Clarke LJ, with whom both Arden and Treacey LJJ agreed, gave a judgment which affirmed Leggatt J's decision and distinguished the decision in *Hollington v Hewthorn*. Both of the judgments considered the position of marine accident inquiries (or 'wreck inquiries' as the procedure used to be known) and drew attention to the cases of *Waddle v Wallsend Shipping Co Ltd* [1952] and *The European Gateway* [1987] QB 206 . The first was concerned with fatal accident claims arising from the loss of the ship and the second with a collision between ships both of which required the court to evaluate the fault of owners of the ships. In both cases there had been reports made following the relevant wreck inquiry. The report was not put in evidence in *Waddle* but was referred to before the judge, Devlin J, who expressed the view that it was inadmissible but went on to express the further view that it would be helpful if 'the relevant authorities' should consider whether it would be sensible if such reports were made available to the court. In *The European Gateway* the question which arose before Steyn J, as he then was, was whether the findings of the court of formal investigation gave rise to an issue estoppel. Steyn J held that it did not because the court of investigation was not a court of competent jurisdiction with respect to the issue of the owners' civil liability. However Steyn J repeated the recommendation made by Devlin J referred to above. As Leggatt J observed those recommendations have still not been implemented. In *Rogers v Hoyle* Christopher Clarke J also considered the question of MAIB reports and noted that until 2005 they were regarded as admissible in civil proceedings, as in the case of *Margolle v Delta Maritime Co. Ltd* [2003] 1 All ER, when regulations were introduced making the reports inadmissible. Since then the Regulations contained in the Merchant Shipping (Accident and Investigation) Regulations 2012 (SI 2012/1743) have been implemented. Regulation 14(14) provides that if any part of an MAIB report, or any analysis it contains, is based on information obtained pursuant to an inspector's powers under ss.259 and 267(8) of the Merchant Shipping Act 1995 that part of the report is "*inadmissible in any judicial proceedings whose purpose is to*

attribute or apportion liability or blame unless a Court, having regard to the factors mentioned in regulation 13(5)(b) or (c), determines otherwise" (emphasis added). As Christopher Clarke LJ observed "*This appears to contemplate that such a report is or may be prima facie admissible*". Upon that basis it appears to me that the Court has a discretion as to whether or not to admit it and applying the same process of reasoning to MAIB reports as was set out with respect to the AAIB reports in *Rogers v Hoyle* it would appear sensible to admit the MAIB report in the present case.

29. In my view that approach is strengthened because the 2012 Regulation provides that the issue of the report's admissibility is only specifically proscribed if the judicial proceedings have the purpose of attributing or apportioning liability or blame. As the present proceedings are solely dealing with issues of salvage and not the apportionment of fault or blame it appears to me that the 2012 Regulation does not prevent the MAIB report from being admitted in evidence. However as both Leggatt J and Christopher Clarke LJ have emphasised the weight to be placed on any information derived from such a report is a matter for the decision of the tribunal and I have in mind the Claimant's submissions as to the possible deficiencies in the report made in the present case.

30. *Were the operations salvage services?* Having considered the whole of the evidence now put before me together with all the submissions made I have no doubt whatsoever that the operations performed by the Claimants were "salvage operations" within the meaning of the Salvage Convention as enacted by the Merchant Shipping Act 1995. The casualty was, on any view, in danger and the operations undertaken by the Claimants were successful. It follows that this is a case in which it is proper to make an award of salvage assessed upon the principles set out in Art.13 of the Convention. It is to be noted that Mr Turner QC, counsel for PJSC, has not advanced any argument that the services performed were not salvage but expressly accepts that an award of salvage remuneration would be proper.

31. *The claim for quantum meruit.* The finding above, as Mr Phillips recognised, renders it unnecessary to consider the Claimants' alternative claim for an award based upon the equitable principles of restitution and/or quantum meruit. However, for the sake of completeness and having considered Mr Phillips' interesting submissions, I doubt that

it is correct to say that English law recognises the existence of a right to, or liability for, any award based simply upon services gratuitously given to anyone or anything including a vessel. The exception to this is where the services are recognised as being salvage either by agreement, as in the case of an LOF, or where the circumstances are such that the services are recognised as salvage by virtue of the Salvage Convention, in which case an award of salvage may be made.

32. However in the absence of salvage, by agreement or otherwise, a claimant may be able to recover on the basis of quantum meruit but, in my view, only where he can establish that there is in existence an express or implied contract for the provision of some services other than salvage, for example towage. Thus I do not accept that it is open to a claimant to simply assert a right to a recovery based upon quantum meruit as an alternative claim if he fails to establish that the circumstances are such as to render the case one of salvage. In my view this is made clear by the dictum of Bowen LJ in *Falcke v Scottish Imperial Insurance Co.* (1886) 34 Ch D. 234 at 248 where it was said: "*The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will. There is an exception to this proposition in the maritime law. I mention it because the word "salvage" has been used from time to time throughout the argument, and some analogy is sought to be established between salvage and the right claimed by the Respondents. With regard to salvage, general average, and contribution, the maritime law differs from the common law. That has been so from the time of the Roman law downwards. The maritime law, for the purposes of public policy and for the advantage of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea.*"

33. *The entitlement to a judgment in default.* The provisions of CPR Part 61.9 govern the procedure which applies to applications for judgment in default where a claim is brought *in rem*. These are:

> "*(1) In a claim in rem (other than a collision claim) the claimant may obtain judgment in default of – (a) an acknowledgment of service only if – (i) the defendant has not filed an acknowledgment of service; and (ii) the time for doing so set out in rule 61.3(4) has expired; …*
>
> *(3) An application for judgment in default – (a) under paragraph (1) … in an in rem claim must be made by filing – (i) an application notice as set out in Practice Direction 61; (ii) a certificate proving service of the claim form; and (iii) evidence proving the claim to the satisfaction of the court; and*
>
> *(4) An application notice seeking judgment in default and, unless the court orders otherwise, all evidence in support, must be served on all persons who have entered cautions against release on the Register. …*"

34. Mr Phillips has submitted that as the Defendants have not filed an acknowledgment of service and the Claimants have filed an Application and served it in accordance with the procedures set out together with the evidence necessary to prove the claim to the satisfaction of the court it follows that the Claimants are entitled to judgment in default for a salvage award which must be assessed. I agree with him. Mr Phillips has drawn the Court's attention to the fact that under the rules there is no requirement for service of the application notice or the supporting evidence on the defendant to the *in rem* claim. CPR Part 61 contains no such requirement and, aside from the position in relation to cautioners who must be served in accordance with CPR Part 61.9(4), CPR 61.9(3) only requires that the application notice and evidence are to be filed. Further CPR Part 12.11(2) provides in terms that "*Any evidence relied on by the claimant in support of his application need not be served on a party who has failed to file an acknowledgment of service.*". Mr Phillips has therefore submitted that it is not necessary to serve the Defendants and that this is consistent with the policy in respect of a default judgment which is only sought in circumstances where the defendant has already failed to engage in the proceedings. I consider that Mr Phillips' approach is correct and hold that all procedural requirements for the present application have been satisfied.

35. It is therefore necessary for the court to consider what is the appropriate sum for the salvage remuneration on the facts of the present case. However PJSC has intervened and submissions and further evidence have been filed. With the exception of the MAIB report no objection has been made as to the admissibility of the further evidence and in respect of that report I have already decided to admit it, as set out above. It is common ground that the assessment of the salvage award may take account of those submissions and such other evidence as has now been provided.

36. *The criteria to be considered in approaching an award of salvage.* As the services performed in the present case were not performed in compliance with a contractual agreement, such as for example an LOF, the Merchant Shipping Act 1995 requires that the assessment of the award must be made in accordance with the principles set out in the Convention. The relevant provisions are:

    a. By Article 1 of the Convention:

    "*For the purpose of this Convention—*

    (a) Salvage operation means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever.

    (b) Vessel means any ship or craft, or any structure capable of navigation.

    (c) Property means any property not permanently and intentionally attached to the shoreline and includes freight at risk.

    (d) Damage to the environment means substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents.

    (e) Payment means any reward, remuneration or compensation due under this Convention. ..."

    b. By Article 12 of the Convention:

    "*1. Salvage operations which have had a useful result give right to a reward.*

    2. Except as otherwise provided, no payment is due under this Convention if the salvage operations have had no useful result. ..."

    c. By Article 13 of the Convention:

"*1. The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below —*

(a) the salved value of the vessel and other property;

(b) the skill and efforts of the salvors in preventing or minimising damage to the environment;

(c) the measure of success obtained by the salvor;

(d) the nature and degree of the danger;

(e) the skill and efforts of the salvors in salving the vessel, other property and life;

(f) the time used and expenses and losses incurred by the salvors;

(g) the risk of liability and other risks run by the salvors or their equipment;

(h) the promptness of the services rendered;

(i) the availability and use of vessels or other equipment intended for salvage operations;

(j) the state of readiness and efficiency of the salvor's equipment and the value thereof.

2. Payment of a reward fixed according to paragraph 1 shall be made by all of the vessel and other property interests in proportion to their respective salved values. However, a State Party may in its national law provide that the payment of a reward has to be made by one of these interests, subject to a right of recourse of this interest against the other interests for their respective shares. Nothing in this article shall prevent any right of defence.

3. The rewards, exclusive of any interest and recoverable legal costs that may be payable thereon, shall not exceed the salved value of the vessel and other property."

37. As appears from the foregoing the starting point is the provisions of Art.13 but before turning to that there are two preliminary matters which I consider need to be mentioned with respect to my approach.

38. *The submission of a precise figure for the award.* In the present case Mr Kemp has, by his witness statement, stated his opinion that a reward of £550,000 would be

appropriate. He has reached that figure as a result of the "round robin" exercise carried out within his firm. Mr Turner QC has submitted that such a course is inappropriate and contrary to practice and principle. I consider that that submission is correct for the following reasons:

a. The majority of salvage awards are made by arbitrators appointed by the Committee of Lloyds to consider the awards arising from arbitrations heard arising under the Lloyds Forms of Salvage agreement, referred to for these purposes as the Lloyds Open Form ("LOF"), although more recent editions have come to be known as the Lloyds Standard Form. The Lloyds Open Form was developed from 1890 onwards and the first standard edition came into existence on January 15th 1908. According to an Article by Mr Michael Buckley of Waltons & Morse, Mr William Walton, later Sir William Walton, was appointed as the original arbitrator but subsequently senior members of the Admiralty Bar were appointed. Since 1908 there have been many editions of the LOF culminating in the most recent, promulgated in 2011. In general, it can be said that the changes have mirrored the tensions between the salvors and the insurance underwriters, the former seeking as large an award as possible and the latter seeking to ensure that payments for salvage were not excessive. The earliest LOF forms contained a space into which the amount of the award could be added. It appears that, originally that would be completed with a figure and that the purpose of the arbitration was to consider whether that was or was not a fair sum.

b. After a period the practice developed that the form would be left blank leaving the consideration of a fair award entirely to the arbitrator. Later editions of the form omitted the space referring to the sum to be awarded and it has not, for very many years, been the practice for parties to submit an actual figure for the services. In fact it has been the convention that Admiralty practitioners would refrain from mentioning a specific figure to the tribunal considering the quantum of a fair salvage remuneration and have been discouraged from doing so. However in certain specific circumstances, usually where the services have been particularly meritorious and/or the salved fund has been modest, it has been accepted practice for the advocate to urge the arbitrator towards making as generous award as possible by making submissions, such as, that it would be appropriate to award "*a moiety*", "*something greater than a moiety*" or " *a*

very substantial proportion" of the salved fund. As noted the vast majority of salvage claims were held under the umbrella of the LOF and there have been far fewer claims heard in the courts exercising Admiralty jurisdiction.

c. Nonetheless the principles to be applied in assessing an award are the same in Court and the procedure adopted has been virtually identical so that Admiralty practitioners have adopted the same practice in salvage claims coming before the courts. The precise reason for the convention referred to is obscure but I think it probably arose because the arbitrators and the Admiralty judges considered that to actually suggest a figure for the award may be considered to be usurping the tribunal's function. There is some force in this observation where, as in the present case, Mr Kemp has made it known that the figure put forward has been arrived at by reason of an "inter office round robin". This has the appearance of an overt attempt to influence the tribunal by the introduction of the views of persons who are not part of the decision making process. In my view such a process is to be discouraged. In any event the convention referred to above is of long standing and I can see no reason why it should be altered now.

d. In fairness to Mr Kemp it is possible that he mentioned a precise figure in the present case in an attempt to avoid a hearing by bringing the application for judgment in line with the procedure set out in CPR Part 12.4(1), ie. with respect to claims for a specified sum of money. On this it is to be observed that CPR Part 61.9(3)(b) does indicate that an application other than in a collision case may be made in accordance with CPR Part 12 "*with any necessary modifications*". However I consider that the attempt to have the matter decided 'on paper' and without a hearing in the present case was procedurally incorrect. That is because the procedure in CPR Part 12.4(1)(b) provides, in cases where a liquidated sum is not claimed, that the court may give judgment but make an order for the 'damages to be assessed' which means that there is bound to be a hearing at least with respect to the quantum of the claim. Further, in the Admiralty Court, it has always been the practice that the court should, when making an order for default judgment, be satisfied that the quantum claimed is proper upon a hearing in open court. This is particularly relevant where there are other potentially interested parties such as cautioners as the Admiralty Judge has already indicated.

e. For these reasons I consider that the proper approach is to seek to assess the salvage award without reference to Mr Kemp's suggestion as to the appropriate sum or how it has come about. Having said that it is, in reality, difficult to avoid the inference that Mr Kemp's figure is a sum which would, at least as advised by their solicitors, satisfy the Claimants as being an encouraging award.

39. *The awards in previous claims put forward by the Claimants.* It is to be noted that Mr Kemp has exhibited two awards made by arbitrators in previous cases. They are: (i) the *The Rea* made by Mr Geoffrey Brice QC in 1979 and (ii) *The Skopelos* made by Mr Lionel Persey QC in 2018. The propriety of doing so was considered by Peter Gross QC, as he then was, sitting as a Deputy Admiralty Judge in *The St John* [1999] 1 Lloyd's Rep. 883. He considered that it was helpful to be provided with recent comparators of salvage awards given but, as he recognised, each case depends upon its own facts. Insofar as Mr Kemp appears to rely upon the decisions provided it is, I think, to demonstrate that even where services are of short duration nonetheless the fact that they were performed "in the nick of time" is an important feature when considering the overall award. With respect to Mr Kemp that is not a principle for which he required the support of earlier decisions. Aside from that so far as *The Skopelos* is concerned the circumstances, service and salved values are so different from the present that I do not consider that it affords me any real assistance. With respect to *The Rea* it is by no means a recent award and it is a fact that perception of the dangers arising from pollution are taken more seriously today than was the case 40 years ago. Further it is to be noted that there are major differences in the present case because the casualty in the present case was already aground and required the use of 5 tugs and other equipment to salve her whereas in *The Rea* the casualty had not grounded and therefore whether she would or the manner in which she would ground were still matters for argument. My impression is that the dangers and services in the present case are of such a nature as to distinguish them from the facts of *The Rea.* Insofar as Mr Kemp relies upon *The Rea* to support a suggestion of a figure of about 20% of the salved fund and therefore his proposed figure of £550,000, using a percentage comparison has the drawback of depending upon what is found to be the proper salved value. In my view neither of the awards mentioned provided me with

more than minimal assistance. Bearing those matters in mind I turn to the criteria set out in Art.13.

The salved values

40. The values put forward by the Claimants are: ship sound value - £2,823,462.00 less deductions (estimated damage) - £450,000.00, giving a ship salved value of £2,373,462.00. Which together with bunkers - £40,119.00 gives a total salved fund of £2,413,581.00. In a note to his witness statement Mr Kemp has stated that the sound value set out above mirrors the value of $3,570,000 which appears in the certificate of valuation and is converted at the rate of $1/£0.7908858589.

41. The established principle with respect to valuing the property salved is that it is to be assessed as salved at the place where and the time at which the salvage is terminated, whether or not that is the port of destination. This principle is reflected in a long line of decisions starting with *The George Dean* (1875) Swab 290 and set out at p. 569 of *Kennedy & Rose: Law of Salvage [9th Ed]*. The learned editor has added the following quotation taken from the judgment in *The Gaupen* (1925) 22 Ll.L.Rep 271 at 375: "*The law is that when a vessel is brought into port and her cargo arrested, the price to be taken is the price at the time of the arrest, which is as if the Marshal had to sell the ship and the cargo at that time*". Also mentioned in *Kennedy* are the decisions of Clarke J, as he then was, in *The Yolaine* [1995] 2 Lloyd's Rep 7 and Gross J, as he then was, in *The Ocean Crown* [2009] EWHC 3040 (Admlty); [2010] 1 Lloyd's Rep 468. In the first Clarke J. reiterated the principle referred to above. As he said "*One method of arriving at that value is to ascertain the sound value of the vessel and to deduct the reasonable cost of repairs*". He then proceeded to assess the value of the vessel on the evidence available to him. For present purposes the relevance of *The Ocean Crown* is Gross J's consideration of the effect of the size of an award and the importance of the salved fund in establishing that award. These views are summarised at para 16-103 of *Kennedy.* It is to be noted that Gross J. reiterated the oft mentioned point that all cases must be decided on their own facts.

42. The evidence shows that the present services were terminated once the casualty had been re-anchored in Falmouth Roads. The vessel was subsequently moved to a more secure mooring within the harbour as part of a separate operation however I consider that for the purposes of assessing the values in this case it is proper to take Falmouth as being the place where the service was completed.

43. However as the learned author of Brice, Maritime Law of Salvage 5th Ed. observed at para 3-92 "*Although the time and place at which the value of the salved property must be assessed is now firmly established in principle it is less clear how, at least in some cases, one establishes that value*". He also observed: "*As a matter of practice the valuation of ships is habitually ascertained for salvage purposes by reference to certificates of valuation given by experienced valuers and brokers on a charter free basis: The Kia Ora (1918) 252 Fed. Rep 507*" [para 3-100]. That was an American case but the same practice is well established in England. In many cases, where at least the salvage award is contested, the parties may each put forward their own valuations and the tribunal will decide the salved values as an exercise of discretion on a balance of the evidence provided.

44. In a claim for default judgment it is probable that only the salvors will put forward a valuation, as has happened in the present case. In this case Mr Phillips has submitted that the fund is to be evaluated as at the termination and place of the services and that the valuation certificate should be taken as the only evidence of the casualty's sound value at that time. In the absence of any other information that is probably the only course available to a tribunal. However CPR Part 61.9(3)(a)(iii) requires that the evidence filed must be to the satisfaction of the court. The general importance of this is to ensure that the decision does not compromise the rights of any other claimant which is of particular importance where the vessel has been sold and the fund paid into court is known and is somewhat limited. In my view the court should endeavour to ensure its decision is based upon evidence which it considers satisfactory.

45. The ship's sound value was derived from a certificate obtained from Vessels Value dated the 8th April 2019. The valuation of a vessel is a matter of expert evidence where a qualified witness expresses an opinion based upon the information available to him. Of course it is open to an expert to utilise mechanical or electronic means to

assist in calculating or formulating his views but nonetheless it should still be his opinion which is put before the court. In the present case no expert has actually expressed an opinion and all the certificate provides is apparently an answer provided by a computer. Strictly speaking, since a computer cannot express an opinion, I doubt whether the certificate itself satisfies the rules pertaining to the provision of expert evidence.

46. Considering the Vessels Value certificate in the present case there are a number of striking features which raise doubts as the weight which the court can place on it. The certificate provided states the valuation date was 18th December 2018 which is the date of the termination of the services and the value given is $3.57 million. It sets out the particulars of the casualty. These are that she was a Handy Bulk Carrier, flagged in Russia, of 23,200 DWT, length overall 180.5m and powered by a MAN engine. She was built in Germany in 1980 and at the material time it appears that her class was suspended. The certificate does not state that the Vessel was inspected by the valuers but states "*The model is calibrated using confirmed sales prior to the date of valuation. Sales in circumstances which make them unreflective of fair market value (e.g. with charter) are excluded. Calibration is performed by computational algorithms which automatically adjust the parameters of the mathematical functions to best fit the sales data using, nonlinear, constrained and weighted regression analysis. The software is run daily to ensure valuations reflect the latest sales and earnings information*". The disclaimer also states that the "*Market Value is provided is an estimate of fair price, … and is based on the Vessels Value estimates as its opinion in good faith*". The certificate has very limited information as to how the calculation is achieved but states that the valuation of the Vessel's market value is estimated using five factors: (i) type, (ii) features recorded in the vessels database, (iii) age, (iv) cargo capacity and (v) freight earnings.

47. Further the valuation has provided 10 comparables giving their sale dates between 2nd November 2018 and 18th December 2018. It is to be noted that there are no comparables provided after the 18th December 2018 which I find surprising as a sale soon after the relevant date ought to be considered relevant. It certainly would be if the exercise was to consider charter rates for a vessel in a loss of use claim. Further it is to be noted that all the comparables have a larger carrying capacity than the

casualty and they are all of more recent build by at least 14 years. The nearest of the comparables in terms of age are (i) *Amsel*, 27,300 DWT, built 1994, sale price $2.2 million, (ii) *Hai Xing*, 29,500 DWT, built 1998, sale price $3.6 million and (iii) *Mount Travers*,28,500 DWT, built 2002, sale price $6 million. There is no apparent reason why the value of $3.57 million is almost the same as that in the case of the *Hai Xing* which was larger and younger by about 18 years. On the face of the data apparently used there is no rational explanation as to why the *Amsel* has not been highlighted as the only real comparable and even then she is larger by some 4,000 DWT and younger by some 14 years. Logically it is highly improbable that the value of the present casualty exceeded that of the *Amsel* and given the differences in carrying capacity and age it appears to me that a true sound value of the present casualty should be less than the value of the $2.2 million comparable. Therefore it seems to me that the sound valuation of $3.57 million is suspect.

48. The paucity of information was noted at the hearing and, since then, the Claimant's solicitors have provided two 'Vessels Value' documents. In the first Mr Adrian Economakis has provided an explanation as to the data which lies behind vessel valuations and "*how it is collected, validated and managed*". Part of that includes a collection of information leading to the "sales database". The second is composed by Dr Alex Adamou in which he describes "*the mathematical models and computational algorithms behind VesselsValue automated online valuations.*" In this, inter alia, he acknowledges the difficulties in co-relating the various data basis derived from information which, as I understand it, is fed into the system. From his description I understand that one of the most reliable indicators is the actual age of the vessel. For these purposes it is to be noted that the paper accepts that there is room for error which, tested against 2,069 "*backvaluations*" has indicated an accuracy range which is impressively small in a large number of cases but rises to plus or minus 30% when taken overall. As the document states: "*Although it would be hubris to claim that our valuations were entirely error free, there are many reasons why a valuation might differ from the actual sale price. For example, the vessel may have a particularly good or bad survey position.*" In general I accept that this type of system is a valid tool in seeking to value a vessel which may provide a helpful addition to the traditional valuation exercises undertaken by shipbrokers and, so it would appear, may form a basis for many future ship valuations. However, being computerised, it is

only as reliable as the information upon which it relies. Thus it is as much open to scrutiny as the ship brokers who traditionally performed this exercise.

49. In my view there are two further aspects of the Claimants' case which are of concern. The first is that the deductions are said to be estimated at £450,000 and the second is that the value of the bunkers are said to be an estimate. In his witness statement Mr Kemp has said: "*In the absence of any form of information from the Owners, we have made estimates based upon the available information*". Neither Mr Kemp nor Mr Rogers explained the nature of the information upon which the estimates were made nor any basis at all to support the figures given. However in Mr Phillips' response submissions he has stated that the figure of £450,000 is derived from an estimate provided by FDEC for repair. That document was provided by A&P Group Limited however it is only an 'initial indication of price' which is subject to inspection of the damage on arrival in dock. Given the extensive nature of the bottom damage to the Vessel as indicated by the diving and tank surveys it is, at least, possible that if repairs had actually been carried out the work needed would have been more extensive and thus more expensive. In my view this estimate can only be taken as providing some guidance as to what the repair costs might have been.

50. The second is that the casualty was sold by the Admiralty Marshal at the end of March 2019 for the sum of $1,003,000 which is presently in court and equates to £802,1994.40 at the present rate of exchange of $1/£0.80. The exchange rate has fluctuated between $1/£0.79 on December 18th 2018 dropping to $1/£0.66 around 29th March 2019 before rising again. For purposes of understanding the value of the sum in court I consider that the present rate is the most relevant however for the purpose of considering the salved fund the appropriate rate of exchange to be applied is that at the date of the termination of the services. The Admiralty Marshal gave notice of the sale and the payment into court on the 1st April 2019. To my mind the question is the extent, if any, that the court should give weight to this information. The court sale was, as usual, on an "*as is where is*" basis, ie. it is a sale price which recognised and accepted the fact that the Vessel carried damage. That is reflected in the Admiralty Marshal's conditions of sale which also includes the bunkers onboard as part of the sale. Thus the sale price represents a salved value for the Vessel in a damaged condition which includes her bunkers at the time of the sale.

51. Mr Phillips has submitted that the court sale price is irrelevant because it took place some three months after the termination of the services and therefore does not represent the salved value at the time and place of the services being terminated. Further he submits that, by its nature, it was a "*forced sale*" and thus not made between a "*willing buyer and willing seller*". However the eighth edition of *Kennedy & Rose* at paragraph 15-018, to which Mr Phillips has properly drawn my attention on the question of the effect to be given in respect of the actual sale, acknowledges that sales made after the termination of the salvage services may constitute evidence of the salved value, depending upon the nature of the sale and whether there have been fluctuations in the market after the services have terminated. It is also suggested at paragraph 15-019 that sales by the courts are generally to be regarded as "*forced sales which do not necessarily give a true reflection of the market value of the property.*" These views clearly do not exclude sales by the court from being taken into account although there may be questions as to the weight which should be given to that information. Moreover a submission that the court sale price is irrelevant does not lie easily with earlier judicial decisions as to the regard which should be paid to the effect of a sale by the Admiralty Marshal. Paragraph 15-017 of the 8th Edition of *Kennedy & Rose* notes: "*Where salved values have been appraised by the Admiralty Marshal, the general rule is that the appraisement is conclusive – The Duc Checchi (1872) L.R.4 A&E 35n*". Further the statement made in *The Gaupen*, above, indicates that the price to be taken is that which would be achieved if the "*Marshal had to sell the ship and cargo at* [the time when the services were terminated]". It has frequently been stated that a sale by the Admiralty Marshal may have an element of being a "*forced sale*" in the sense that the owner is not a party to it and the Marshal is acting under the direction of the court nonetheless no one is forcing the purchaser to buy and it does provide some indication of what the vessel is worth on the open market. Furthermore the Marshal must commission an appraisement which is also an indication of one broker's opinion of the 'as is where is' value. I accept that the time span may be significant if there was a significant change in the market during that three months however I have not been provided with any information on this point. The Admiralty Marshal gave notice of the sale on the 1st April 2019 and the Claimant's valuation was not made until the 8th April 2019 and it was therefore open

to the Claimants to put the actual sale price to their valuers and ask for an explanation as to the apparent discrepancy between their valuation and the actual sale price.

52. In my view the Claimant's case as to the salved values is unsatisfactory. As indicated above I consider that the sound value put forward is suspect. The salved value put forward for the Vessel is also suspect because the information to support the estimate of the deductions is, in my view unsatisfactory. In these circumstances I do not think that it would be correct to ignore the actual sale price, as Mr Phillips urges me to do. As a matter of fact, there is nothing to suggest that the state of the casualty had materially deteriorated over a period of only 3 months or that there was a fluctuation of the market or that either of those factors singly or jointly could have resulted in the loss of so large a proportion of the casualty's apparent value. In my view the reality must be that, at the time of termination, the sound value of the casualty was considerably lower than the figure put forward by the Claimants.

53. Bearing these factors in mind and the objective of the court to come to a fair conclusion I consider that the Court should come to a decision based upon all the evidence before it as best it can. I consider that it is appropriate to take as the starting point the value of the nearest comparable at $2.2 million. In my view the other comparables provided were so different in size and age as to be of little material assistance. That vessel was younger and larger than the casualty which was, therefore, probably of a lesser value. I consider that should be taken as being $2,000,000.

54. As to deductions there is no doubt that the casualty suffered significant physical damage whilst aground. The evidence provided is that the damage was extensive and significant. There is uncertainty as to whether repair costs would have been greater than that estimated by the Claimants. Such uncertainty would, at least in part, account for the lower court appraisement and sale price. I have also taken into account the fact that the court sale took place 3 months after termination and that there might have been a reducing market in operation although there is no actual evidence of that. It is also proper to make an allowance for the possibility of some continuing deterioration although I do not expect that would have been of great significance over a relatively short period with a vessel which was already of advanced years. Bearing those matters in mind I have therefore come the conclusion that a proper salved value should be

taken as being $1,500,000. Using Mr Kemp's exchange rate as at the time of the services the figure amounts to £1,186,328.78.

55. In my view this approach is supported by the views of Brandon J, as he then was, in the *Lyrma (No.1)* [1978] 2 Lloyds Law Rep 27. That was a case where affidavit evidence was provided as to the sound value of the vessel being £80,000 but where she was sold by court order *pendente lite* for a sum of £32,500. There was no reliable evidence as to the deductions to be set against the sound value to reach a salved value and the judge said: "*I can only do my best in the circumstances to put a value upon the salved value which seems to me to be just.*"

56. To that figure something must be added for the value of the bunkers. I have been informed by the Admiralty Marshal that, by the time of the sale, the casualty's bunkers had been wholly or virtually exhausted which gave rise to some problems at the time. However as the Vessel had been under arrest for some time it indicates that there must have been a quantity of bunkers onboard at the time of termination of the services. The original estimate put forward by the Claimants was £40,119. Initially the Claimants did not provide the basis for their estimate and Mr Turner has submitted that the figure of 105 tonnes of HFO referred to in the MAIB report should be accepted. The Claimant has since provided the bunker survey report made by R Pearce & Co on behalf of the Admiralty Registrar which indicates that there was 129.581 tonnes of HFO and 29.514 tonnes of MDO onboard on the 21st February 2019. There might have been some consumption between the end of the services and February 2019 but there is no evidence to suggest that further bunkers were taken onboard during that period. Thus the figure provided by R Pearce is probably reasonably accurate as to what was onboard at the relevant time which was also confirmed to Captain Rowe by the Master of the Vessel. In these circumstances I consider that the more accurate figure is 129.581 tonnes rather than the 105 tonnes referred to in the MAIB report. Mr Turner did not take issue as to the relevant price per unit and I therefore consider that the figure put forward by the Claimants is sufficiently accurate for present purposes to be accepted. That being so I find that the total salved fund at the date of termination should be found to have been £1,226,447.78.

57. For the sake of completeness it is to be mentioned that Mr Turner submitted that the sound valuation put forward was a demolition value. The basis for this submission is not clear. The valuation document provided by the Claimants is a Market Valuation Certificate. The disclaimer contained in the Valuation Certificate indicates that it is an open market valuation based upon a hypothetical transaction between a willing buyer and a willing seller (see note (a)). It was based upon a system of algorithms taking account of other sales details of which were provided on the face of the document. Note (b) in the disclaimer provides: "*If the Market Value is lower than the demolition value the latter is displayed and denoted by an asterisk. The estimated Demolition Value is calculated by multiplying the lightweight in long tons by the current demolition price estimated assuming delivery to a ship breaking yard in the Indian subcontinent* . . .". The only figure contained in the valuation certificate is a market value. If a demolition value was to be provided it should have been in addition to market value and be marked by an asterisk. There is no such figure. Furthermore a conclusion that the figure provided was a demolition value would be contrary to the explanations provided by the additional explanations provided by Mr Adrian Economakis and Dr Alex Adamou referred to above. In the circumstances I do not consider that Mr Turner's submission is correct.

Consideration of the additional factors which contribute to making an award.

58. Having considered the values of the property salved the assessment of the proper award involves an exercise of the court's discretion taking account of that and the other features of the case bearing in mind the criteria referred to in Art. 13. There is nothing which suggests that one of the criteria, or elements to be taken into account, is more important than another and each should be considered and given the weight which is appropriate to the circumstances of the particular case. A number of disputes have arisen between the Claimant and PJSC with respect to these elements

The dangers facing the Vessel.

59. It is trite law that the dangers facing a vessel are to be considered on the basis that no outside assistance would be provided. Whether the Vessel could have extricated

herself and the dangers facing her may be considered against the background of the circumstances leading to the casualty and her position aground. These were:

a. The MAIB report indicates the circumstances leading up to the Vessel grounding. On the night of the 17th to 18th December 2018 the Vessel was lying to anchor off the Gyllyngvase beach, Falmouth. She had received a weather forecast of high southerly winds and at 2100 on the 17th December the main engine was apparently ordered to immediate readiness. At 0400 (UTC) on the 18th December the wind was southerly gusting in excess of 52 knots. The Vessel began to yaw and at about 0425 she began to drag her anchor towards the North at a rate of about 1.4 knots. Attempts to use the main engine and rudder to check the leeway were unsuccessful. The Master ordered the anchor to be hove in which was completed with difficulty whereupon it was found that the anchor had fouled a length of chain whereupon the main engine was stopped. A further attempt to clear the anchor was unsuccessful and the Vessel continued to drift toward the shore.

b. At about 0510 the Vessel was about 6 cables off the beach, heading 274 degrees and making leeway to the North at about 2 knots. At that stage the Master apparently used full port rudder and full ahead on the main engine to attempt to turn the Vessel to the South into the wind. However at 0515 the Master considered that the Vessel could not clear Pennance Point which lay about half a mile to the West. He therefore stopped his engine. At 0519 the Vessel was within 2 cables of the shallows and the Master ordered that the port anchor be let go.

c. That was done but it did not hold and the Vessel grounded at 0525. That was about 2 hours before predicted low water at 0730. As the tide ebbed it is said that the Vessel settled with a 5 degree port list. The tidal information for Falmouth shows that the height at low water was 1.8 metres. The following high water was predicted at 1315 with a height of 4.4 metres. The tidal range was therefore 2.6 metres. The next low water was at 2004 with a height of 1.5 metres which indicates that the range was increasing towards the next spring tide. The wind built up after midnight on the 17th December and remained strong until after 1000 on the 18th December when the wind speed began to abate. The data, taken from Lizzard Point, shows that there were gusts of 61 knots at 0422, 43 knots at 0552, 52 knots at 0737, 35 knots at 0938 and 26

knots at 0953. The wind direction was largely southerly backing and veering from South East to South West. The shoreline in Falmouth Bay where the Vessel grounded was very exposed to the effect of high winds from the southerly quadrant and in these circumstances it was obvious that sea and swell would be running high. Wave heights of 4.5 metres have been referred to in the evidence. It needs to be remembered that wave height and swell will not drop simultaneously with a drop in the wind force and that it may take a considerable time for them to drop significantly.

60. On the evidence available I consider that the Vessel was grounded in a position of considerable danger. Her bow thruster was not working and her port anchor had not held and was eventually hove in. Although she had the use of her main engine her master considered that, even before grounding, she would be unable to clear Pennance Point by using her engine. That demonstrates that the Vessel could not possibly extricate herself from her predicament once she had grounded. Where a vessel has grounded a usual method of holding her in position, of reducing movement and therefore ongoing damage is by 'ballasting down'. However that was not a realistic option available to this vessel. There was therefore no means available to this vessel to reduce the dangers which she faced. The pre-stranding drafts were reported by the Vessel's Master, to Captain Rowe when he boarded which was shortly after 0745, as being 6.8 metre aft and 6 metres amidships. From visual inspection at that time Captain Rowe observed that the Vessel was about 1.5 metres out of draft aft, 1 metre amidships and 1 metre forward although he acknowledges that it was difficult to read the draft cuts and the Vessel had a port list at the time.

61. In her grounded position the Vessel was subjected to high seas and a not inconsiderable tidal range. Although she was built to ice strengthened specifications she was a vessel of considerable age. The Pilot, Captain Gurd, has stated that the Vessel appeared to him to be in very poor condition, that she was pounding heavily and that he was concerned as to whether the Vessel's bottom and tanks would be breached and whether she might suffer serious structural failure. There is evidence that she did suffer considerable bottom damage in a comparatively short period of time. She was pinned against a rocky shoreline and as long as she was subjected to swell and sea conditions there is reason to expect that the damage to her bottom

would worsen. In my view it is proper to accept Captain Gurd's evidence that he had the concerns which he mentions. He is an experienced mariner who has, so I am informed, no personal interest in the outcome of this case. In my judgment in the sea, swell and tidal conditions prevailing there was a considerable risk that the Vessel would continue to suffer damage and probably be driven further onto the shore. If that occurred then she would also face the danger of being strained and suffering yet further bottom or structural damage. She had grounded at a time of year when bad weather is to be expected. If she was not assisted I consider that further damage to the Vessel over a period of time was inevitable. In my judgment it was only a matter of time before she became a constructive total loss or actual total loss in the sense that she would cease to be worth salving.

62. It follows, in my judgment, that the risk of oil pollution was also high. There was already damage in way of the Vessel's fuel tanks. She was not heavily loaded with fuel but there was sufficient to cause a significant amount of pollution should it escape. The area is said to be one of particular interest from a tourist and ecological point of view. The risk of any oil pollution is therefore to be taken seriously even in winter and, at the very least, that would involve expense in clean up costs. It is to the credit of the Claimants that, although it did not need to be used, they were equipped with an oil boom and had put it on stand-by.

The status of the Claimants

63. The parties have made extensive submissions about this aspect. The Claimants submit that they are "professional salvors". PJSC disputes this. However it seems to me that there is a danger of losing sight of the underlying purpose of considering the status of a claimant. It needs to be borne in mind that this is merely one aspect to be taken into account when considering the amount of an award. One purpose of an award is to encourage an entity to make itself readily available to perform services and to have the equipment necessary to do so. Thus a salvor which maintains salvage equipment or keeps tugs on salvage station, rather than using them for commercial activities, may reasonably expect to be treated as having a higher salvage status and be rewarded more for so doing than a commercial entity which is prepared to perform salvage when the need for it arises. Similarly the claimant which has the commercial

capability to perform services and provides such services when necessary may expect to be treated as having a higher salvage status and receive a more encouraging award than a single vessel company which is not a dedicated salvor in any sense. It is not simply a matter of being 'dubbed' a 'professional salvor' or not and the status of each claimant needs to be regarded on its own merits in order to assess the level of encouragement for that organisation.

64. The Claimants are a consortium of three organisations which co-operated in performing the salvage services in the present case. Mr Phillips has made it clear that they seek a single award and therefore I do not consider that it is necessary to treat them separately but will consider them as a single entity which combines the attributes of all three. In my judgment these Claimants are clearly not, individually or collectively, in the highest echelon of salvage organisations. The tugs are not maintained on salvage station. They are commercial harbour tugs. Nonetheless there is a commitment of capital to some equipment, such as ground tackle, which may be used commercially or for salvage purposes. However there appears to be a willingness to co-operate to perform salvage services when the need arises and this is worthy of encouragement. That is particularly true today when there are far fewer tugs maintained on salvage station and the United Kingdom Government has, since 2011, reduced the number of Emergency Towing Vessels so that there is no longer such an entity standing by in the Western approaches. As a result, it is arguably important to provide encouragement to organisations, such as the present Claimants, to co-operate in performing salvage services in order to maintain sufficient cover to the waters around the shores of the United Kingdom.

The skill and efforts of the salvors in salving the vessel and other property

65. PJSC has submitted that the services, although considerable, were exaggerated. There is also a dispute as to who mobilised the equipment and organised these salvage services and, in effect, who was the mind behind the provision of these services. Mr Turner, relying upon the MAIB report, has submitted that it was the Harbour Master who exercised control in furthering the 'National Contingency Plan response'. In my judgment the salient features of the services were as follows:

a. The MAIB report states that it was the Harbour Master who mobilised the port's counter pollution contractor and mobilised the Falmouth harbour tugs "ST PIRAN", "PERCUIL" and "ANKORVA". In this respect it is said that a briefing took place at 1000 attended by the Harbour Master and representatives of the MCA and the Environment Agency. However it is the evidence of Mr Rogers, Managing Director of the First Claimant, that he and Captain Rowe, Managing Director of the Second Defendant, were the first on shore personnel to be aware of the grounding. It was Captain Rowe who alerted the Falmouth Coastguard and the UK Emergency services. Captain Rowe and Mr Rogers went to the coast and Mr Rogers gave instructions for the KML personnel and equipment to be mobilised. He also liaised with Captain Sansom, the Harbour Master, who stated that the Third Defendant had been informed and was due to indicate the availability of its tugs. At that stage the Harbour Master indicated that he was in contact with the SOSREP who he expected to take over direction of the salvage. It was also agreed that the Second Defendant would mobilise its resources.

b. From the MAIB report it also appears that Captain Sansom asked the SOSREP to take control on more than one occasion and from Mr Rogers' second witness statement it is apparent that there has been some 'contention' between the Harbour Master and the SOSREP that the latter did not take a more active role in dealing with the casualty. Mr Rogers has said that there was considerable confusion with no shore authority in full command and control of the situation. Whatever the reasoning behind the SOSREP's decision not to become involved at the outset it does appear to me that he did not and this left a situation where there was no proper overall command of the operation from the shore.

c. From the available evidence I conclude that the true situation was that: (i) the First and Second Claimants were mobilised by Mr Rogers and Captain Rowe respectively, (ii) Captain Sansom did play a co-ordinating and liaising role and informed the Third Defendant of the casualty and asked it to assist, (iii) however the Third Defendant provided its services throughout voluntarily, (iv) the initial onsite command of the situation was taken by Captain Rowe once

he had boarded assisted by Mr Rogers who remained in the RIB, (v) Captain Gurd took over the direction of onboard operations once he had boarded the Vessel but he was still materially assisted by Captain Rowe who encouraged and organised the Vessel's demoralised deck crew in the vital tasks of making fast the tugs.

d. In short although the SOSREP did not take an active role the operation was organised and run by the sensible collaboration of a number of persons including, 'in order of appearance', Captain Rowe, Mr Rogers, Captain Sansom and Captain Gurd. Had it not been for this collaboration it is difficult to see how the salvage operation could have been successful in which case the Vessel would have been left in a dangerous position. It is possible that had Captain Gurd not taken part Captain Rowe would have continued to command the onsite operations but he would have been hampered by not having a person in charge on the deck which would have made the operation considerably more difficult.

e. The swift response of Mr Rogers and Captain Rowe to the developing situation is commendable. As a result the "ST PIRAN" departed her berth in Fowey at 0654 and by 0711 the "SARAH GREY" was loading stores, including heavy anchors from the KML crane barges in Falmouth. It is to be borne in mind that, at this early stage, the use of ground tackle was still being contemplated and that, if the towage attempts before the first high water had been unsuccessful, a later deployment of ground tackle might have become both sensible and possibly decisive.

f. Having attended on the shoreline and organised the initial response from their own companies Mr Rogers and Captain Rowe then left Gyllyngvase beach at 0700 and departed from Falmouth on the RIB at 0725 and, in very severe weather, swell and wave conditions with two additional crew, proceeded to the Vessel arriving at about 0745. With skill Mr Rogers drove the RIB through the potentially dangerous breaking waves into the lee of the Vessel on her starboard side where the RIB could be put alongside the Vessel despite water turbulence. Captain Rowe then boarded the Vessel via a boarding ladder rigged and lowered by the Vessel's crew.

g. After assessing the situation Captain Rowe and Mr Rogers communicated by vhf. It was decided that ballasting was not an option as the discharge pumps were too inefficient for it to be beneficial but that, if sufficient tug power could be mobilised, an attempt should be made to refloat the Vessel as the tide rose. It was also decided that it would be too risky to personnel to deploy ground tackle at that time. From communications with Captain Sansom it was established that the Third Claimant's three tugs were mobilising and would proceed as soon as possible and that a harbour pilot was to board by helicopter.

h. Captain Gurd boarded by helicopter at about 0909 and, after discussion, it was agreed that he would direct operations from the Vessel's bridge, Captain Rowe would take command of the Vessel's deck crew and that Mr Rogers would remain in the RIB to assist in connecting with tugs and to provide a man-overboard response if required.

i. Mr Rogers instructed that the "SARAH GREY" should be despatched to assist with towing. At about 0730 the "ST PIRAN" arrived on scene and stood off to seaward. At about 0945 "PERCUIL" and "ANKORVA", which had been waiting in the lee of St Anthony's Light House since 0745, arrived on the scene. At about 0946 the Fowey Harbour tug "CANNIS" was chartered by the Third Defendant.

j. Attempts to approach the Vessel were dangerous and the "ST PIRAN" actually struck the sea bottom whilst seeking to do so. Attempts were made to pass lines by rocket but these were unsuccessful. As a result the RIB was used to take messengers, initially from the lee side of the Vessel, out through the breaking seas to the tugs where the lines could be hauled onboard so that towage connections could be made. Mr Rowe has described how this was done and the fact that the RIB was swamped or flooded by breaking waves on several occasions. I accept his description "*The conditions for the crew [of the RIB] were extremely challenging*" as being true. It is probably something of an understatement.

k. Once the messengers were passed the crew of the Vessel hauled tow lines onboard. In this way, at about 1045, the "ST PIRAN" was made fast to the Vessel's stern followed by the "ANKORVA" and the "PERCUIL" making fast to the port stern and bow of the Vessel at about 1055 and 1123 respectively. The tugs took the strain but there were problems with the Dyneema tow lines of "ANKORVA" and "PERCUIL" parting. On each occasion the connections were remade utilising the RIB. At this time "SARAH GREY" was proceeding towards the Vessel and at 1130 the Fowey Harbour tug "CANNIS" departed from Fowey distant about 18 miles.

l. Under the direction of Captains Gurd and Rowe attempts were made to haul in the Vessel's port bow anchor but this had no effect and it was eventually hove into the hawse pipe. At this time the Vessel was pounding heavily and there was a smell of HFO with some traces being seen on the sea surface. The "PERCUIL" broke so much of her towing gear that she had to stand off and await replacements brought out by the Third Claimant's crew boat. At about 1149 the "SARAH GREY" was on scene and was requested by Captain Gurd to push on the Vessel's starboard side aft. This involved the tug working dangerously close to the reef. As a result the "SARAH GREY" was made fast to the weather side of the Vessel using the RIB to effect the connection at about 1300. Mr Rogers states that by pulling at full power she was able to alter the Vessel's heading to port away from the reef which reduced the pounding.

m. The "ANKORVA" was then connected to the port bow of the Vessel using the RIB to make the connection. There was some risk of the "ANKORVA" striking the sea bottom whilst she manoeuvred close to the casualty to effect this connection. With "ANKORVA" and "SARAH GREY" applying full speed ahead of the casualty it is said that some movement was felt and Captain Gurd ordered the Vessel's main engine used in bursts. It is said that the heading of the Vessel became just East of South. That was at or shortly after 1315 which was about the time of high water. At 1340 "CANNIS" arrived on the scene and backed her stern to the starboard bow of the casualty, the change of the Vessel's heading and a moderation of the wind and sea conditions

allowing her to do so. She then made fast a towage connection with the assistance of the crew co-ordinated by Captain Rowe on the Vessel's foredeck.

n. With the three tugs pulling ahead at full power Captain Gurd ordered full ahead on the ship's engine and the Vessel started to move ahead slowly changing her heading onto about 147 degrees. It is said that "PERCUIL" which had replaced her towing gear also assisted on the Vessel's starboard bow whilst the "ST PIRAN" controlled the stern. By about 1430 the Vessel was free and being towed out to sea by the three head tugs. She was thereafter re-anchored.

66. Looked at as a whole it is apparent that the services were provided by the exemplary co-operation of the Claimants working in concert with others who included Captain Gurd and the Harbour Master. I do not accept the suggestion that the part played by the Claimants has been exaggerated. Without their personnel and the expertise and courage shown by the crew of the instruments which they provided the operation could not have been successful. Although some allowance must be made because of the organisational part played by the Harbour Master and the more significant part played by Captain Gurd on site and although this operation has been, in my view correctly, described as a most effective and successful co-operative effort it cannot be ignored that the vast majority of the physical work provided and risks run were undertaken by the Claimants. The reality is that without the skill and equipment provided by the Claimants the Vessel would not have been salved when she was.

The expenses and losses put forward by the Claimants.

67. In the present case the Claimants have put forward a sum of £118,500 made up of 10 items which they set out in a schedule. The schedule has been extended to include comments by PJSC and further responsive comments by the Claimants. Mr Turner has submitted that of the sum claimed the out of pockets properly so called amount to £41,900 which is the total claimed less the sums put forward for the winch of the tug "ST PIRAN" (£75,000) and for repairs to the RIB's electrical systems (£1,600). Of the sum of £41,900 he submits that the Claimants have provided vouchers for only £11,138 and that is overstated. He has submitted that a sum of only £10,750 should be

allowed as 'out of pocket' expenses, that nothing should be allowed in respect of the RIB and about half the sum claimed in respect of the winch on the "ST PIRAN".

68. It is convenient to consider the sums claimed by reference to the amended schedule.

    a. *Emergency mobilisation of the RIB put forward as being £2,900*. This item has a heading which refers to the 'mobilisation' of the RIB and its crew. However the invoice provided is for £3,000 (being £2,500 plus VAT). It is dated the 28th February 2019 and is from Mulciber Ltd based in the Isles of Scilly for the 'supply' of the RIB. This suggests that Mulciber Ltd was the owner of the RIB and that the RIB was chartered in for the service. That is surprising because Mr Rogers' first witness statement does not state that the RIB was chartered in for this service but gives the impression that the RIB was available on a more permanent basis as in paragraph 37 he states: "*KML maintains access to a high specification offshore RIB available at short notice . . . from its Falmouth Wharves base. . . . I am responsible for this RIB personally and am one of the main designated coxswains*". There is no evidence which explains who the owner was of the RIB or what the basis of the arrangement was for the use of the RIB by Mr Rogers or KML. I do not consider that this aspect is sufficiently evidenced to allow acceptance of the invoice from Mulciber to be put forward as an expense of the service. However the provision of the RIB was a very useful part of the equipment provided by the Claimants. It is obvious that she needed to be crewed and fuelled. The additional crew members of the RIB appear to have been SSL employees. In my view the provision of the RIB is a matter to be taken into account in assessing the award rather than as a specific expense of the services.

    b. *Consumption to destruction of messenger ropes, fenders, ropes, a drysuit, a vhf set and 'sundry equipment' onboard the RIB - £1,700.* No vouchers have been provided to support this. The Claimants state that there are none because the items were owned by KML and the figures are an estimate. This is not satisfactory as the obligation is on the Claimants to provide satisfactory evidence of damage done or expenses incurred and, if these items were so damaged that they required to be replaced there should be invoices to support the contention.

c. *180 Litres of fuel for the RIB - £300.* This is not vouched but it can be assumed that the RIB consumed some fuel. The estimate of the fuel used may or may not be accurate and the use of fuel is a matter to be taken into general account in assessing the award rather than as a proved expense.

d. *Subsequent repairs to the RIB - £1,600.* This is not vouched as the work was said to have been performed by KML. There is evidence that the RIB was flooded and/or swamped during the services. The fact that she was put at risk is an important part of these services and it is not surprising that some electrical damage was occasioned and that some work was necessary to clean and/or repair the RIB. That may be taken into account as a general feature of the services rather than as a proved expense.

e. *Consumption of fuel oil with respect to two tugs - £1,000.* PJSC has noted that no vouchers have been provided. PJSC's reference to the "NEW ROSS" is somewhat confusing as she is not mentioned in the Particulars of Claim and appears to have played only a minor part in the operation. From the Claimants' response it appears that the figure is put forward as a calculation of 1,800 litres based upon the unit price appearing in the recently provided invoices. As the basis for the calculation of 1800 litres is not provided this cannot be accepted as a specified out of pocket expense nonetheless some bunkers must have been consumed by the Claimants' tugs which may be taken into account generally for the purposes of considering the award.

f. *The emergency mobilisation and subcontract of the tug "CANNIS" - £14,000.* A claim for hiring in a sub-chartered tug is capable of being quantified and may form part of a salvor's expenses. However PJSC has observed that the voucher provided only supports a figure of £4,988. The Claimants respond that there are no further invoices in relation to this item. It is not explained how the figure of £14,000 is reached and, in the circumstances, the only figure which can be accepted as a sufficiently proved expense is £4,988.

g. *The demobilisation for the tugs "ST PIRAN", "ANKORVA", "PERCUIL" and "CANNIS" - £5,000.* This is said to include clearing up and drying out below. No vouchers have been provided and it is said that the work was done by KML. It does not seem to me that this is a valid cost or expense which can be taken into account as an out of pocket expense. It is not suggested that this is repair work to an area of damage. I accept that there must have been some

clean up work done to the Claimants' tugs but not the suggestion that KML would have been directly involved in cleaning the chartered tug "CANNIS". If there had been demobilisation costs arising from her use an invoice from her owners would be expected. None has been provided. This type of work may be considered as part of the services as a whole but is insufficiently proved to be considered as a specific 'out of pocket expense'.

h. *The consumption of approximately 10 tonnes of bunkers between the four tugs ("ST PIRAN", "ANKORVA", "PERCUIL" and "CANNIS") £5,000.* This is put forward as an estimate of fuel expended. No basis for this estimate has been provided although the invoice provided does indicate the unit price of the fuel. There is no evidence that the Claimants had to make further payment for the fuel expended by the "CANNIS". If that had been the case there should be an invoice available from her owners but no such invoice has been provided. Whilst it is accepted that the tugs would have used bunkers during the service and this may be taken into account in considering the value of the service provided this item is not sufficiently vouched to be treated as a specific out of pocket expense.

i. *The consumption/destruction of various rocket lines etc - £12,000.* PJSC submit that the invoices originally provided by the Claimants only support a figure of £3,650 and that the last indicates that 121 lines were provided which is outwith the number of lines used on the service. The Claimants have responded by producing further invoices which they claim indicate an expenditure of £11,578.36 for these damaged items. In fact it appears that the additional invoices indicate that sums of £1,881.12 and £5,358 were incurred, which provides for a total of £7,236.12. That added to the previous sum equates to £10,889.12. Although the last invoices were not provided earlier, as they should have been, and the Intervener has not had an opportunity to make submissions in relation thereto, there was direct evidence that tow lines had been damaged during the service and the invoices give an indication of the cost of replacing them. In my view the manner in which this evidence has been put forward is barely satisfactory however I consider that the figure of £10,889.12 may be treated as an out of pocket expense and taken into account for the purpose of assessing the award.

j. *The damages done to the winch of "ST PIRAN" - £75,000.* PJSC submits that this was not an expense of the service but a loss incurred in performing it. PJSC has also submitted that only part of the loss should be taken into account because of the fact that it is a new winch on a 30 year old tug and they have submitted that only half the sum should be allowed to provide for 'betterment' otherwise the Claimants would be overcompensated. The Claimants submit that there is no scope for an allowance for betterment but that the Claimants should be indemnified for the costs of replacing a functioning winch which was '*sacrificed as a proximate result of the service*'.

k. Art. 13.1(f) specifically provides that the award shall be fixed taking account of expenses and losses incurred by the salvors. That the court will take account of such expenses and losses is not new and may be traced back to the leading cases of *The Sunniside* (1883) 8 PD 137, *The De Bay* (1883) 8 App Cas. 559 (PC) and the *City of Chester* (1884) 9 PD 182 (CA). In *Law of Salvage by Kennedy and Rose* 7th Ed. at paras. 16.059-16.069 the learned editors have set out the effect of those judgments which includes "*It may be taken that, at the present time, the court will be careful to award, wherever possible, a sufficient sum to salvors to cover the expenses they have incurred and to give them a reasonable additional amount as compensation for their services. If, however, the salved values are too low to allow such amount and to leave an adequate amount for the owners of the salved property the salvors may in extreme cases, find themselves out of pocket. This is an element which is taken into account to enhance awards to salvors in cases where, by meritorious service, they have salved property of high value.*" (see para 16.061) and "*The tribunal may compensate the salvor for: (i) losses occurring in and as a result of, and expenses properly incurred in the furtherance, and before termination, of the salvage service; and (ii) losses and expenses directly occasioned by the performance of the salvage service. Indemnifiable losses occurring during the performance of salvage services include: the diminution in value of property involved in the salvage service, most obviously as a result of damage to the salving vessel or the salvor's equipment (in practice this will be the cost of repairs); loss of equipment . . . Where the salvor's vessel is lost or damaged whilst engaged in the salvage service, it is presumed that the loss . . . were caused by the necessities of the service, and*

not the default of the salvors; and the burden of proof lies on the salvees to shew that the loss was caused by the salvor's fault" (see para 16.063).

69. The fact is that the "ST PIRAN" suffered damage during the service and that gives rise to an ascertainable loss to the Claimants of £75,000. In my view betterment does not arise and the Court should seek to recompense the Claimants for this loss so far as is possible bearing in mind the restraints imposed by the size of the salved fund and fairness. With respect to the other 'out of pocket' expenses put forward I accept that there were significant sums expended in hiring the "CANNIS" and in replacing broken tow wires which also amount to allowable loss or expense. I consider that the following are expenses or losses which may be listed as 'monies numbered': (a) the proved charter fees in respect of the "CANNIS" - £4,988, (b) the costs of damaged towlines onboard "ST PIRAN", "ANKORVA" and "PERCUIL" - £10,889.12 and (c) the cost of replacing the winch on the "ST PIRAN" - £75,000. This gives a total of £90,877.12.

70. Although the tribunal is not bound to award a sum which covers the full costs of expenses or damage claimed, and it will not do so if the fund available from which to make an award is not sufficient to allow it to do so, nonetheless the general principle is that parties who assist in salvage services may bring the costs of doing so and any losses directly arising from the performance of the services to the attention of the court which should take them into account in reaching an award. The extent to which the court will do so will depend upon the evidence provided and the whether it is considered fair to allow the expense or loss.

71. The remaining expenses put forward have not been sufficiently proved so as to be taken into account as specific 'monies numbered' however it is probable that fuel was used and that work was done in clearing up when demobilisation took place. The Claimants have put themselves forward as having a professional status and many of the aspects raised are matters which a professional salvor would be expected to take 'in its stride'. In my view, the proper approach is to take these items generally into account when considering the appropriate award bearing in mind that it is part of public policy to encourage the performance of salvage services.

Conclusion with respect to the quantification of the award.

72. The salved fund is £1,226,447.78, which is lower than that put forward by the Claimants. It can be described as modest by modern standards. However, where services have been particularly meritorious it is acceptable to award a sum which may make a larger proportional inroad into the fund than might be appropriate if the fund was larger. The balance to be achieved, so far as possible, involves balancing fairness to each party. One aspect to be borne in mind is that the services should have preserved property for the respondent owners of the salved property.

73. In my judgment even though of quite short duration this salvage operation demonstrates many of the elements which should lead to a particularly encouraging award without being overly restricted by the size of the salved fund. By way of summary I consider that the Vessel was in a dangerous predicament. If unassisted she would most probably have been pushed further aground over the high tide period. The Vessel had already suffered significant damage, she was elderly and apparently not well maintained, and, in my judgment, she would have suffered further damage over the successive tides which were 'making'. In these circumstances she would probably be subject to hogging stresses, particularly as her after portion appears to have been in deeper water and therefore less likely to be supported at low tide. Over a period of time she would most probably become a constructive total loss or even uneconomic to salve. If further bad weather struck that would be likely to occur within the near future. She was beyond any useful form of self-help and there is no evidence of any other organisation offering assistance.

74. I consider that the services performed were of the highest order, promptly rendered and at considerable risk to personnel and equipment. The tugs worked close in shore in very severe sea conditions and they were materially assisted by the courageous and, in the circumstances, essential work performed by Mr Rogers and the crew of the RIB in making fast lines. Actual damage was suffered by one of the tugs and the Claimants are to be applauded for their services in the face of really testing conditions. The services were successful and, of particular importance in the present case, they were timely. The response was timely and the Vessel was refloated on the high water following her grounding. The successful outcome was brought about by the co-operation of the three Claimants and others, most significantly Captain Gurd, which

was very commendable. In the balance the actual time spent in the operation was relatively short and the award made must not be out of proportion to the services rendered.

75. Although Mr Rogers and Mr Kemp have suggested that the Claimants have the status of professional salvors in truth the Claimants are three separate organisations. The First and Second Claimants have some experience in salvage operations and have some equipment which can be used for those purpose. However it appears to me that they are both to be regarded as essentially commercial maritime organisations with a willingness to perform salvage if the opportunity should present itself. The Third Claimant is clearly a commercial tug company and its investment in equipment is for that purpose. However it is also prepared to put its equipment at risk in order to provide services when necessary. The input of the Third Claimant is significant because it provided the most powerful instruments used in the services. I do not regard the status of the Claimants, individually or jointly, as being such that they should be rewarded for maintaining a stance as professional salvors. However the fact that they were prepared to co-operate with each other, with Captain Gurd and with Captain Sansom is, in my view, highly meritorious and deserves encouragement. This is particularly true as it appears that there is a lack of emergency towing vessels on station in the area and there was no evidence of any professional salvor offering to take part in these services.

76. In my judgment, on the evidence before the court, these salvors deserve an encouraging award which, given the dangers and the nature of the services rendered, may represent a substantial proportion of the salved fund without being unjust to the salved interests. However it is to be recognised that the Pilot also rendered personal services as did the helicopter flight which put him onboard. Captain Sansom also co-operated and contributed to success albeit to a lesser extent. In considering the proper award to these Claimants it is proper to take account of, and make an allowance for, all those who contributed towards success.

77. Bearing these factors in mind including the expenses and losses considered above I conclude that an appropriate award to the Claimants is £450,000.

Interest

78. The Claimants originally submitted that interest on the award should run at 1.75%. Unless further submissions are made about this aspect I consider that is the correct figure for interest to run from the termination of the services. Judgment interest at the rate of 8% from the date the judgment is handed down is also appropriate.

Costs

79. The Claimants seeks an order for costs which they ask to be summarily assessed in the sum of £112,885.31. Mr Phillips has submitted that the intervention of PJSC has increased the costs by a significant amount and that PJSC should pay the Claimants' costs occasioned by the intervention. Mr Phillips further submits in the alternative that PJSC should bear its own costs of the intervention and that the Claimants should recover their costs from the fund in court. As a further alternative Mr Phillips has submitted that PJSC's intervention costs should form part of its recovery in its own judgment already obtained against the Vessel. Mr. Turner has made no specific submissions on this aspect but the Application Notice of PJSC dated 22nd July 2019, seeking permission to intervene, is accompanied by a draft Order which seeks costs from the Claimants for the costs of the application.

80. The claim form was issued *in rem*, the owners of the "KUZMA MININ" did not acknowledge service and have taken no part in the proceedings. In these circumstances the Claimants have sought an order for judgment in default with the quantum of the award to be assessed. PJSC has also obtained a judgment in default with respect to its interest as a mortgagee of the Vessel but has sought to intervene for the purpose of making submissions with respect to the quantum of the salvage award. Mr Phillips has, in my view correctly, submitted that this is done for the purpose of maintaining as large a fund as possible against which the mortgage claim may be enforced. In principle I can see no reason why there should not be such an intervention but where such an intervention takes place it is bound to increase the Claimants' costs.

81. In the normal course of events Claimants who are successful in obtaining judgment will be entitled to an order for the costs of obtaining that judgment, including the assessment of the quantum, which will be enforced against the *res.* In a case where the owners of the vessel dispute the quantum of the award, unless there is an offer to

settle which is effective, the claimants would also be entitled to the associated costs of that assessment. The Claimants' costs of having the salvage award assessed have certainly been increased by the fact of the intervention in much the same way that they would have been if the Owners of the Vessel had taken part. In these circumstances there is no logical reason why the Claimants should not be entitled to recover those costs against the fund which represents the *res.* In the absence of an effective offer the respondents to an assessment of the salvage award would usually bear their own costs. In my judgment the appropriate order for costs in the present case is that the Claimants are entitled to recover their own costs against the fund representing the *res* and that PJSC should bear its own costs of the intervention.

82. In my view the Claimants are entitled to recover for the reasonable costs of the solicitors team which is involved in obtaining the judgment and the assessment of the award for salvage. Part of that service may include taking a view of the likely salvage award particularly where it is necessary to obtain security for the claim or where the defendant has made an offer to settle the claim. It is less necessary where, as in the present case the Defendants have taken no part in the claim so that the essential job facing the Claimants' solicitors is a matter of obtaining the necessary evidence and placing that evidence before the court for a decision on the appropriate award.

83. Further it is to be expected that the team will bring their experience and expertise to bear for the benefit of their clients which should include taking a view of the probable award. In the present case the need for assessing the probable award was not directly necessary for the purposes of furthering the claim and, in my view, the opinions of those directly involved with the claim should have been sufficient and if that team wishes to discuss the matter within the firm of solicitors that is, in my view, a matter for the team acting for the Claimants. Put simply the reasonable costs to be attributed to the conduct of a claim should amount to the cost of the team directly necessary for that purpose and it is not reasonable to expect the parties to provide for an extra 9 members of the firm over and above the team directly engaged.

84. In the circumstances of this case I do not consider that the expense of obtaining the views of other members of the firm can be regarded as a reasonable expense of bringing the claim and I disallow the sum of £3,042.19 for the obtaining of the Art.13 award estimates.

85. In the absence of any submissions to the contrary I consider that the remaining sum of £109,843.12 is, prima facie, reasonable but I will allow further submissions on the costs at the handing down of the judgment if any party wishes to raise the matter further.

Conclusion

86. The Claimants are entitled to a sum of £450,000 as reward for the salvage services performed together with costs, subject to any further submissions at the handing down, in the sum of £109,843.12.

Dated this 19th day of December 2019