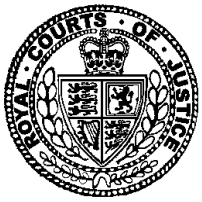

Neutral Citation Number: [2023] EWHC 1859 (Comm)

Case No: CL-2021-000177

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21/07/2023

Before :

MR JUSTICE JACOBS

- -

Between :

Technip Saudi Arabia Limited

Claimant

- and -

The Mediterranean and Gulf Cooperative Insurance and Reinsurance Company

Defendant

- -
- -

Peter MacDonald Eggers KC and David Walsh (instructed by **HFW LLP**) for the **Claimant**
James Brocklebank KC and Douglas Grant (instructed by **Clyde & Co LLP**) for the **Defendant**

Hearing dates: 15th – 18th and 23rd – 24th May 2023

- -

Approved Judgment

This judgment was handed down remotely at 8:45am on Friday 21st July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE JACOBS

Index

MR JUSTICE JACOBS:

A: Introduction

1. On 16th August 2015, the anchor-handling tug "MARIDIVE-43" (the "Vessel") collided with an un-manned wellhead platform known as NR-09 (the "Platform") in the Khafji Field, offshore Saudi Arabia. Since the incident involved a moving vessel and a stationary object, it was an "allision" rather than a "collision", and I will refer to it (as did the parties) as the "Allision".

2. The Claimant ("Technip") had chartered the Vessel to perform certain work as part of a project to improve certain production assets in the Khafji Field, in accordance with its responsibilities as the "Contractor" under a contract with an unincorporated joint venture known as the Al-Khafji Joint Operation ("KJO").

3. Technip's case, at the start of trial, was that the damage to the Platform resulted in Technip being liable to KJO in the sum of US$ 31,038,265 plus €458,052, comprising US$ 25,000,000 in respect of the cost of repair (for which Technip incurred a legal liability to KJO) and additional costs incurred by Technip in the sum of US$ 6,037,932 plus €458,052. Technip claimed an indemnity in respect of these sums (less the applicable deductible) under an offshore construction insurance policy (the "Policy") underwritten by the Defendant ("Medgulf"). These figures were reduced in various respects during the course of the trial and, in one respect, subsequent thereto. Notwithstanding these reductions, Technip's claim against the Defendant insurer remains a substantial one.

4. The Policy was written on an amended WELCAR 2001 Offshore Construction Project Policy wording ("WELCAR"). This is the standard form wording for offshore construction all risks cover. As is apparent from its name, the WECLAR policy wording has been in existence for many years, and it is discussed in two specialist treatises to which I was referred, namely: David Sharp, *Upstream and Offshore Energy Insurance* (3rd ed) ("*Sharp*") and Paul Reed KC, *Construction All Risks Insurance* (3rd ed) ("*CAR Insurance*").

5. WELCAR (including the Policy in issue in the present case) contains two distinct sections of cover. Technip's claim was originally advanced under Section I of the Policy, where the basic cover is in respect of physical loss and damage to the construction work being performed, but with liability cover in accordance with Institute Clauses for Builders' Risks also being provided. Ultimately, however, this aspect of Technip's claim, which was always their secondary claim, was not pursued. The relevant claim is therefore advanced under Section II of WELCAR. This provides cover in respect of liabilities arising out of the contract works. This Section II incorporates an "Existing Property Endorsement", whose interpretation and application to the facts of the present case are critical to the determination of Technip's claim. It is clear from the discussion in *Sharp* that the Existing Property Endorsement is a standard endorsement which can be added to a WELCAR policy.

6. Since the Policy is a liability policy governed by English law, a claim for recovery can only be made once the liability of Technip has been established by judgment or settlement: *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363. Technip contends that its liability has been established by a settlement agreement (the

"Settlement Agreement") concluded between Technip and KJO on 17th December 2019. There was no dispute that a Settlement Agreement was indeed concluded between the parties, and therefore Medgulf did not suggest that the claim advanced by Technip was premature (as had been successfully contended in *Post Office v Norwich Union*). It was, however, common ground that the Settlement Agreement did not establish that Technip was in fact liable to KJO in the amounts provided for in that agreement.

7. The basic rule under English law is that where a policyholder settles its liability to a third party claimant, and wishes to claim under its liability policy, it is not sufficient for the policyholder simply to establish the reasonableness of the settled amount. In order to succeed, the policyholder must prove (i) that it was in fact legally liable (here in respect of the damage to the Platform), and (ii) that the amount for which it would have been liable had the matter been litigated is at least as much as the amount paid under the settlement: *Colinvaux & Merkin's Insurance Contract Law*, B-0935; *Enterprise Oil Ltd v Strand Insurance Co Ltd* [2006] 1 CLC 33, per Aikens J at [27]; *Astrazeneca Insurance Co Ltd v XL Insurance (Bermuda) Ltd* [2013] 1 CLC 478, per Flaux J at [98]-[102]. As *Colinvaux* notes in footnote 2 to paragraph B-0935, other common law jurisdictions take the view that a failure by the insurer to pay is a repudiation of that obligation (albeit not of the contract as a whole) and that the policyholder's settlement with the third party is binding on the insurer if reasonable. A similar position applies under New York law: *Luria Brothers & Co v Alliance Assurance Co* 780 F2d 1082 (2d Cir 1986). English law, however, takes a different approach.

8. Technip notified Medgulf of the Allision in or about August 2015 and formally presented a claim to Medgulf for an indemnity under Section II of the Policy including by letter dated 29 June 2016.

9. On 29 July 2016, Medgulf informed Technip that there was no cover under the Policy by reason of the operation of certain Policy exclusions. These exclusions were those contained in (i) the Existing Property Endorsement and (ii) a "Watercraft" exclusion. Both of these exclusions are relied upon by Medgulf in the present proceedings, and they are a key part of Medgulf's defence.

10. In addition, Medgulf contends that Technip's claim does not get to first base, because Technip cannot prove that it had any legal liability at all to KJO in respect of the Allision. Even if that submission were unsuccessful, Medgulf contends that Technip's liability to KJO was substantially less than the amount reflected in the Settlement Agreement and which Technip now claims. A further argument advanced is that Medgulf were not asked to consent, and did not consent, to Technip's settlement with KJO, and that this provides a complete defence to the claim.

11. In its 29 July 2016 letter, Medgulf said that it was "grateful for Technip's confirmation that they are acting as a prudent uninsured". The evidence of Mr Marwan Cortas, who was a project manager for Technip and who gave evidence at the hearing, was that there were a number of occasions when Medgulf advised that Technip had to act as a prudent uninsured. Technip's case is that this is what they did, in entering into the Settlement Agreement with KJO.

12. On 11th November 2020, Technip's solicitors (HFW) issued a letter before action to Medgulf's solicitors, Clyde & Co. Medgulf has declined to indemnify Technip, thus giving rise to the present proceedings.

13. The trial took place over a period of 6 days, including opening and closing submissions. The only factual witness was Mr Cortas. He had been employed as a project manager with Technip since 2007. He had become involved in the relevant project (described in Section B below) following the Allision, and was appointed as its project manager in September 2015. His evidence described the background to the project and his involvement in the dispute which developed with KJO, following the Allision, and its ultimate settlement. Mr Cortas was an impressive witness, and he answered questions fairly and with a view to assisting the court. Some of his evidence resulted in certain aspects of Technip's claim being reduced. Whilst the evidence was valuable in explaining the commercial and technical background, ultimately Mr Cortas' evidence was not critical to any issue that requires resolution. His evidence explained, at least to some extent, why the settlement with KJO was a reasonable one in all the circumstances. However, by the end of the trial, it was common ground that the reasonableness or otherwise of the settlement was not a matter which the court needed to address. Rather, as explained above, Technip needed to establish the existence of a liability and that this was at least as much as the amount paid under the settlement. It was common ground that in the event that it was a lesser amount, then a claim could be made for the lesser amount, subject of course to the issues of coverage.

14. The bulk of the oral evidence at trial, which occupied the best part of 3 days, was given by experts called by each side in relation to the reasonable costs of repairing the damage caused by the Allision. Here, the position was somewhat unusual in that although the Allision had occurred many years ago, no repairs to the Platform had in fact been carried out. A significant amount of real money had been spent in carrying out a survey of the damage to the Platform. However, money had not actually been spent, either by KJO or Technip, in carrying out the necessary repairs themselves. It was rightly not suggested by Medgulf that this meant that Technip could not pursue a claim in respect of its liability for the reasonable costs of repair. It did, however, mean that the expert evidence was to an extent theoretical, in that the experts were assessing and disputing what would be required to carry out the repairs, rather than commenting on actual costs of actual repair work carried out.

15. Against this backdrop, this judgment contains the following sections:

    (1) Section B provides some further detail as to the background facts, including the contractual arrangements between KJO and Technip. The latter are particularly important in the light of Medgulf's argument that Technip had no legal liability to KJO in respect of the consequences of the Allision.

    (2) Section C sets out the relevant terms of the Policy.

    (3) Section D addresses the question of whether Technip had any legal liability to KJO at all.

    (4) Section E addresses Medgulf's argument based upon Technip's failure to obtain its consent to the settlement with KJO.

    (5) Section F addresses the claim under Section II of the Policy, and in particular the Existing Property Endorsement and Watercraft exclusion relied upon by Medgulf.

(6) Section G addresses the issues concerning the reasonableness of the repair costs and other quantum issues.

B: The chronology of events

The parties and the contractual relationships

16. Technip was, at the material times, a company based in Saudi Arabia specialising in project management, engineering and construction work for the energy industry. Medgulf was an insurance and reinsurance company also based in Saudi Arabia.

17. Under the Policy, Medgulf agreed to insure Technip as a Principal Insured on an amended WELCAR form. As extended by endorsements, the Policy provided cover for the period from 1st July 2015 to 31st December 2015.

18. Aramco Gulf Operations Company ("AGOC") and Kuwait Gulf Oil Company ("KGOC") were, at all material times, oil companies with operations in the Arabian Gulf region. AGOC and KGOC are partners in an unincorporated joint venture known as the Al-Khafji Joint Operation ("KJO"), through which they own and operate the Khafji Field, offshore Saudi Arabia. AGOC, KGOC and KJO were also Principal Insureds under the Policy. I will refer to AGOC, KGOC and KJO collectively as "KJO", unless the context otherwise requires.

19. Beginning in 2010, KJO undertook the Khafji Crude Related Offshore Projects ("KCROP" or "the Project"), which was designed to improve certain production assets in the Khafji Field. In particular, the KCROP included the installation of a submarine power cable and new power distribution platforms, the construction of a control and living platform and the installation of two new integrated well jackets. The KCROP is the Project defined in the Policy.

20. Technip (as "Contractor") entered into contract number HQ825PC09 (the "Contract") on 18 August 2010. The counterparty was AGOC "acting on its own behalf and on behalf of [KGOC] for Al-Khafji Joint Operations between KGOC and AGOC … at Al-Khafji, Saudi Arabia". AGOC was described as "Company". In its opening submissions, Technip described the Contract as having been concluded with "AGOC and/or KGOC and/or KJO". Nothing turns on whether the other contracting party was simply AGOC, or whether it included KGOC and the unincorporated joint venture KJO. For simplicity, I shall proceed, as did the parties, on the basis that the contract was with KJO; i.e. with the two joint venture partners.

21. The Contract comprised a short 5-page document signed by AGOC and Technip. Clause 2 was headed "Work", and provided as follows:

> "WORK
>
> The CONTRACTOR shall, in accordance with the terms and conditions set out in this CONTRACT, attached schedules and drawings, standards, specifications and other documents referred to in the schedules or in any of the referenced documents perform the WORK required for the Project entitled **KHAFJI CRUDE**

> **RELATED OFFSHORE PROJECTS**, which includes the following individual Projects:
>
> **i. INSTALLATION OF SECOND SUBMARINE POWER CABLE (SSPC)**
>
> **ii. INSTALLATION OF POWER DISTRIBUTION PLATFORMS FOR ESP PHASE-II (PDP-4&5)**
>
> **iii. CONSTRUCTION OF CONTROL AND LIVING PLATFORM (CLP)**
>
> **iv. INSTALLATION OF INTEGRATED WELL JACKETS 6&7 (IWJ-6&7)**"

22. In summary, Technip were therefore engaged to perform design, engineering, procurement and fabrication services in respect of the Project.

23. The 5-page document incorporated a large number of Schedules which were designated A – K and Q. Schedule A comprised "General Terms and Conditions". The terms in Schedule A (and to some extent B) are material to the issue of Technip's alleged liability to KJO, and are set out in Section D of this judgment.

24. Technip chartered the Vessel to perform certain of the Contract work from Maridive & Oil Services SAE, the registered owners ("Maridive") pursuant to a charterparty on an amended BIMCO SUPPLYTIME 2005 form, dated 1 December 2014 (the "Charterparty"). As Mr Cortas explained in his written evidence, the Vessel was engaged in work on the OCP/LQP (offshore control platform/ living quarters platform) refurbishment work and was primarily being used for anchor handling of the Falcon Warrior, an 8 point mooring barge.

25. Maridive procured P&I cover (the "P&I Cover") from Gard P&I (Bermuda) Ltd ("Gard") for the period from 20 February 2015 to 20 February 2016, which provided cover in respect of liability for loss of or damage to any fixed or floating object by reason of contact between the Vessel and such object.

The Allision

26. On 16 August 2015, at around 19.40, the Vessel allided with an un-manned wellhead platform known as NR-09. The Platform was a fixed structure and was not part of the Project, as defined in the Policy. This was an existing wellhead platform owned and operated by KJO. The Platform was located in the same field as where the KCROP works were being undertaken.

27. The Allision occurred when the Vessel was returning to anchorage, after being used in the carrying out of performance testing of a sump tank on an integrated well jacket, IWJ-7, which did form part of the Project. The Platform was located approximately 1 kilometer from IWJ-7.

28. The Platform comprises a tripod structure installed in 1960 and a four-legged tender structure installed in 1963 or 1971. It is relatively small: the topside is about 10m by 10m. It is not, therefore, a major oil platform. The evidence, discussed in more detail

in Section G below, shows that as at the date of the Allision, the wells and the Platform were in "shutdown". Thus, in December 2017, Mr Sairat, a production engineer working for KJO, was asked by Mr Wolozan of Technip to "reconfirm that there are no live subsea assets in the working area of the NR09 platform". The e-mailed response was:

> "No live subsea lines around the subject jacket since KJO operation is shutdown. All gas and oil lines are mothballed with minimum preservation pressure"

Accordingly, the Allision did not affect ongoing operations in any way.

29. It was common ground that the damage caused by the Allision was fairly summarised in a report prepared by DNV-GL in February 2018. It largely comprised bent, sheared and cracked components. The damage included disconnection of a main deck leg from the tripod structure and pile; several members being disconnected or sheared or bent; the doubler plate connecting the water injection line to the main tender structure being severely torn-off; a dent on the tripod leg; and miscellaneous cracks on weld joints and channel sections in different areas of the structure. DNV-GL's report also identified some historical damage. DNV-GL advised that none of the damage compromised the global structural integrity of the Platform. As Dr Lamport, Technip's expert, explained in his report, this meant that there was no risk of Platform collapse but for an operating condition or an extreme 100-year event. This meant that the repairs did not need to be performed immediately, but rather at a time convenient to KJO.

Events subsequent to the Allision

30. As at the date of the Allision, as Mr Cortas explained in his written evidence, the Project had been going on for 5 years, and the main activities had been physically completed. However, it had been a difficult project, and Technip was "in a dispute environment" with KJO. There were a number of big claims including invoices for weather delays that had been accepted by KJO but never paid, and a number of contractual change orders for additional works performed by Technip but which had never been approved by KJO. In summary,

    (1) KJO owed Technip around US$ 20m in unpaid invoices;

    (2) Technip held around US$ 24m of contractual performance bonds, such that (as Mr Cortas explained) Technip was exposed to a loss by reason of a drawdown under the bonds and was incurring costs for maintaining the bonds over an extended period of time;

    (3) Retention monies of around US$20m would only be returned to Technip on final acceptance of the Project; and

    (4) Technip and KJO were in dispute about various claims and change orders that Technip had submitted in respect of disruption, delays and additions to the Project, which together amounted to US$ 229m.

31. KJO's position was that it refused to discuss close-out of the Project – and therefore to release sums due to Technip or to discuss Technip's claims – until the parties had

resolved the dispute about the Allision. The Allision thus delayed the progress of any settlement with KJO in respect of Technip's various Project claims and change orders.

32. Following the Allision, Technip established an independent team to manage it, and Mr Cortas was appointed project manager, in co-ordination with the existing Technip project team managing the KCROP. Technip's strategy was to hire independent third-party contractors to assess the extent of damage to the Platform and what repairs would be required. From the outset, KJO made it clear that they were holding Technip liable under the Contract for the damage and costs associated with assessing the damage and repairing the Platform.

33. An investigation report was issued very shortly after the Allision, on 30 August 2015, in which Technip's "TOPSET" investigation team concluded that Maridive was responsible for the Allision due to their negligence. For example, there was poor watchkeeping, poor seamanship, complacency and improper use of the Vessel's navigation equipment by the Maridive crew on board the Vessel. There was no dispute at trial that it was negligence by Maridive's crew that had caused the Allision, and no suggestion that Technip's staff had been at fault in any respect. However, Maridive were reluctant to admit liability. Matters were conducted on their behalf by Ince & Co, appointed by Maridive's P&I insurers Gard.

34. Technip's approach after the Allision was to appoint third party agencies to conduct a survey of the Platform and to assess the damage. They required an engineering company to prepare the scope of work for the survey and complete a structural assessment of the Platform, and a marine "IRM" (Inspection, Repair and Maintenance) contractor to perform the survey. The engineering contractor's role was to analyse the results of the data collected by the marine IRM contractor, to generate structural reports and establish a methodology to perform the repairs. The IRM contractor's role was to mobilise the asset and perform the survey in accordance with the scope established by the engineering contractor.

35. A number of third parties were approached for these roles, and in due course DNV-GL was appointed, with the approval of KJO, for the engineering role. DNV-GL then prepared a detailed survey scope for the IRM contractor to perform. KJO's attitude was that Technip should perform as much data collection as possible to ensure that a proper survey campaign was performed. The IRM contractor, appointed for the purposes of performing the survey, was CCC Underwater Engineering ("CCC").

36. On 2 July 2018, Technip presented KJO with three repair methodologies. Technip recommended repair option 1, which involved minimal intervention on the Platform, satisfying structural code requirements to repair the main aspects of the Platform. KJO, however, insisted on repair option 3, which involved repairing all the damage caused by the Allision and bringing the Platform back to its pre-Allision condition, even though not necessary for structural integrity purposes. In their written opening, Medgulf submitted that option 3 was a departure from what was reasonably required to repair the Platform, and that repair option 1, or something like it, would have been sufficient. I disagree. As the owner of a Platform which had been damaged, KJO were in my view entitled to require that it should be brought back into its pre-Allision condition. Technip agreed to the repair option 3 approach.

37. In August 2018, DNV-GL produced a structural analysis based on repair option 3. This analysis generated the main design criteria to follow in order to effect the Platform repairs. The report established what the condition of the Platform would be after the repairs were carried out; for example, what loads the Platform could withstand. This structural analysis was the main report that DNV-GL produced after having agreement on repair option 3. KJO told Technip that their appointed consultants, Atkins, were also going to prepare a structural analysis based on the agreed repair scheme. KJO also made it clear that they would not enter commercial discussions until Atkins had completed their full structural analysis. Once available, Technip's intention was to compare the two analyses in order to create a schedule for the repairs and proceed with an assessment of the repair costs.

38. In April 2019 Atkins (KJO's appointed consultants) produced its structural analysis. On 21 May 2019, Technip and KJO held a technical review meeting to discuss differences between the parties' repair methods (both based on repair option 3). The parties agreed upon most items in an agreed repair scope (the "Agreed Scope") which was set out in a spreadsheet containing 23 items. Technip did not agree that two items should be included because they were not attributable to the Allision, but those repairs were later included in Technip's subsequent estimates at KJO's behest. The other disputed item in the spreadsheet was item 23:

> "General: safe access to wellheads and well suspension/closure and reactivation operations, including Preparation works such as flowlines, topside piping purging process, well suspension, Xmas tree protection, reinstating wells, in addition to the functionality of the J-tube internals (water injection flexible pipe)"

39. Technip's position was that these activities were for KJO to perform at KJO's cost. KJO's position was that these costs were the result of the incident and should be borne by Technip. The parties agreed to discuss this again later in May. One of the most significant issues in dispute in the present case, in relation to quantum, concerns these costs.

40. Another matter which was then under discussion, and which is one of the disputed quantum items, concerns the need for a "dimensional survey". Atkins had included a dimensional survey as something which needed to be performed. Technip's position, as stated to KJO, was that if Technip were to perform the repairs, then they did not believe that a dimensional survey was necessary: since there was enough data that had been collected from the survey campaign previously carried out. The purpose of a dimensional survey would be to re-verify the dimensions and measurements of certain elements of the proposed repair in order to avoid mobilising a vessel with materials to install, only to discover that the item did not fit. However, in its cost estimate, Technip priced in a dimensional survey to cater for the situation where a third party would be carrying out the repairs: the survey could then be included in a package which could be given to KJO and the third party.

41. In June 2019, Technip's in-house team produced a cost estimate of the repair schedule. This was sent to KJO in early July. The total was US$ 12,720,461. A note to the table containing this figure stated that KJO should hand over the Platform decommissioned and safe for repair activities, and that the costs of doing so had not been included in the

table. Following submission of these figures, KJO expressed a willingness to discuss the way forward for settlement of both the Allision issue and the disputes concerning the KCROP itself. A meeting was held on 6 August 2019, at which KJO provided (for the first time) its estimate of repair costs. KJO presented a repair estimate, in tabular form, of US$ 21,738,000. Technip was given to understand that this had been prepared by Atkins, although it was not actually on Atkins headed paper or in a report from Atkins. This figure was separate from additional sums set out in the table. These comprised US$ 11,630,000 in respect of well suspension costs and various other costs, to produce a total of US$ 36,393,010. The document containing these figures comprises two pages containing two tables: the first with the overall figure, and the second with a high level breakdown of the US$ 21,738,000. There is no underlying detail as to how any of these figures were calculated, and Dr Lamport acknowledged in his report that KJO had provided no information to support their estimate on the safeguarding costs.

42. In October 2019, Technip provided KJO with a revised estimate of US$ 15,823,008. This was based on a proposal for the repair work from CCC, whom Technip considered to be the most suitable contractor to provide a proposal because of their experience on the Project and in the field.

43. A settlement meeting then took place on 16 October 2019. As recorded in the Settlement Agreement, it was agreed that:

    (1) Technip would pay KJO US$ 33m, which amount was allocated US$ 25m in respect of the Allision (clause 1) and US$ 8m in respect of punch and warranty items (clause 2); and KJO would pay Technip US$ 33m in respect of additional claims and change orders (clause 3). Those sums cancelled each other out and were set off against each other (clause 4);

    (2) KJO would release all unpaid invoices (clause 5(a)). According to a presentation made by Technip in 2016, these amounted to around US$20m;

    (3) KJO would pay Technip an additional US$ 4,751,342.81 for weather stand-by compensation (clause 5(b));

    (4) Retention monies held by KJO would be released (clause 5(e)). According to the same presentation, these amounted to around US$ 19.2m;

    (5) Contractual performance bonds would be released (clause 5(f)). These amounted to around US$ 24.7m;

    (6) Technip would perform Home Office Detail Engineering for the Platform repairs at no additional cost (clause 5(c)(vii)).

44. Mr Cortas described the payments of US$ 33 million in each direction as a net zero settlement. He regarded this as good for the overall Project because it allowed closure.

45. Medgulf submitted that the court should approach the agreed figure of US$ 25m with considerable caution. In the end, however, it was common ground that it was necessary to look at the reasonable cost of repair independently of the figure which had been agreed in the Settlement Agreement. The figure of US $25m thus provided the

maximum amount that could be claimed in respect of Technip's alleged liability to KJO, but it was otherwise not relevant to the issues that required resolution.

46. Technip did not seek or obtain Medgulf's consent prior to entering into the Settlement Agreement. By the time it was concluded, indeed three years earlier, Medgulf had declined cover and was content for Technip to act as a prudent uninsured.

C: The Policy terms

47. The terms of Section II of the Policy which are of particular relevance to the parties' arguments are as follows:

INSURANCE SCHEDULE

INSURED:

PRINCIPAL INSUREDS:

i. Technip Saudi Arabia and/or Aramco Gulf Operations Company (AGOC) and/or Kuwait Gulf Oil Company (KGOC) and/or associated and/or subsidiary companies and/or Joint Venturers and or co-venturers as they may now or subsequently exist.

ii. Parent and/or subsidiary and/or affiliated and/or associated and/or inter-related companies of the above as they are now or may hereafter be constituted and their directors, officers and employees while acting in their capacities as such.

Other Insureds:

iii. Project managers

iv. Any other company, firm, person or party (including contractors and/or sub-contractors and/or manufacturers and/or suppliers) with whom the Insured(s) named in i, ii, iii, and iv have entered into written contract(s) directly in connection with the Project.

INTEREST/POLICY LIMIT:

All works and operations connected with the Khafji Crude Related Offshore Projects (KCROP), including but not limited to: project studies, engineering, design, project management, procurement, fabrication, construction, load out, loading/unloading, transportation by land, sea or air (including call(s) at port(s) or place(s) as may be required), storage, towage, mating, installation, pipelaying, burying, trenching, hook-up, connection and/or tie-in operations, trials, testing and

commissioning, existence, initial operations and maintenance all as more fully detailed in the Information Section contained herein.

…

Section II – Liability

Third Party Legal Liability and/or Contractual Liability as Welcar 2001, including Damage to Existing Property.

Section II – Liability

USD 125,000,000 any one occurrence combined single limit in respect of both third party liabilities and damage to existing property.

Deductibles / Excess (100%)

USD 250,000 for any one occurrence in respect of third party liabilities.

USD 500,000 any one occurrence in respect of damage to existing property.

OFFSHORE CONSTRUCTION PROJECT POLICY

Subject to the terms, conditions and exclusions herein, this Policy provides coverage for certain physical damage and liabilities incurred by the Insureds. Section I Physical Damage and Section II Liability are distinct sections, with the exception that the Scope of Insurance and General Terms and Conditions below shall apply to Section I and Section II.

SCOPE OF INSURANCE

(Applicable to…Section II)

Subject to the insuring agreements, applicable terms, conditions and exclusions, this insurance covers the following activities undertaken in the course of the project identified in Item 2 of the Declarations (hereinafter, the Project), provided such activities are within the insured values. Covered activities include but not limited to: design, engineering, management, procurement and supply of all materials, fabrication, construction, load-out, transit/tows, installation and existence during hook-up, testing and commissioning and all works associated with the Project,

being platform modifications all as more fully described in the Project Information.

The Policy shall be deemed to be a separate insurance in respect of each Principal Insured hereunder without increasing Underwriters limits of liability.

1. INSUREDS

PRINCIPAL INSUREDS:

i. Technip Saudi Arabia and/or Aramco Gulf Operations Company (AGOC) and/or Kuwait Gulf Oil Company (KGOC) and/or associated and/or subsidiary companies and/or Joint Venturers and/or co-venturers as they may now or subsequently exist.

ii. Parent and/or subsidiary and/or affiliated and/or associated and/or inter-related companies of the above as they are now or may hereafter be constituted and their directors, officers and employees while acting in their capacities as such.

Other Insureds:

iii. Project managers.

iv. Any other company, firm, person or party (including contractors and/or sub-contractors and/or manufacturers and/or suppliers) with whom the Insured(s) named in i, ii, iii and iv have entered into written contract(s) directly in connection with the Project.

GENERAL TERMS AND CONDITIONS

(Applicable to…Section II)

15. CANCELLATION

The first named Principal Insured set out in Item 1 of the Declarations may cancel the Policy on behalf of all Insured(s) at any time prior to the first Occurrence that gives rise or may give rise to a covered loss.

SECTION II – LIABILITY

INSURING AGREEMENT

1. COVERAGE

Underwriters agree, subject to the limitations, terms, conditions and exclusions herein, to indemnify the Insured(s) for Ultimate Net Loss which the Insured(s) shall be obligated to pay by reason of

i. liability imposed upon the Insured(s) by law, and/or

ii. Express Contractual Liability,

for Bodily Injury or Property Damage caused by an Occurrence, provided always that the Occurrence takes place during the Project Period and arises out of the activities described in the Scope of Insurance section herein.

TERMS AND CONDITIONS

(Section II only)

1. NOTICE TO UNDERWRITERS

In the event of an Occurrence, the Insured(s) shall provide written notice to Underwriters as soon as in practicable stating the following:

(1) the specific Occurrence; and

(2) the damages which may result or has resulted from the Occurrence; and

(3) the circumstance by which the Insured(s) first became aware of the Occurrence.

In respect of Claims to which Exclusion 15 applies, the Insured(s) shall provide such notice within the timing requirements set forth in that exclusion.

4. CROSS LIABILITIES

In the event of one insured incurring liability to any other of the Insured(s), this Policy shall cover the Insured against whom the claim is or may be made in the same manner as if separate policies had been issued to each Insured. However, the inclusion of more than one Insured hereunder shall not operate to increase the Limit of Liability.

In no case shall this Policy provide coverage for any physical loss or physical damage to or defects discovered in the property insured

Coverage in respect of Other Insured(s) does not apply to actual or alleged liability to other contractors and/or vendors and/or suppliers for consequential loss, loss of profit or business interruption.

DEFINITIONS

(Section II only)

2. "CLAIMS EXPENSES" shall mean reasonable legal costs and other expenses incurred by or on behalf of the Insured(s) in the defence of any covered claim including attorney's fees and disbursements, investigation, adjustment, appraisal, appeal costs and expenses and pre- and post- judgement interest, excluding salaries, wages and benefits of the Insured's employees and the Insured's administrative expenses.

3. "DAMAGES" shall mean compensatory damages, monetary judgments, awards, and/or compromise settlements entered with Underwriters' consent, but shall not include fines or penalties, punitive damages, exemplary damages, equitable relief, injunctive relief or any additional damages resulting from the multiplication of compensatory damages.

4. "EXPRESS CONTRACTUAL LIABILITY" means liability that the Insured has expressly assumed prior to any Occurrence covered by this Policy in:

a. any written contract; or

b. any oral contract reduced to writing within 7 days after the contract is orally agreed

7. "ULTIMATE NET LOSS" shall mean the total sum the Insured is obligated to pay as Damages, and shall include Claims Expenses in respect of claims covered under this Policy.

EXCLUSIONS

(Section II only)

The insurance afforded by this policy does not apply to actual or alleged liability:

5. arising out of the use or operation of watercraft, whether owned, time chartered, bareboat chartered or operated by any Insured, or for which any Insured may be responsible other than as declared hereto:

11.for loss of or damage to any well or hole.

i. which is being drilled or worked over by or on behalf of the Insured, or

ii. which is in the care, custody or control of the Insured, or

iii. in connection with which the Insured has provided services, equipment or materials:

13. for loss of or damage to any drilling tool, pipe, collar, casing, bit, pump, drilling or well servicing machinery, or any other equipment while it is below the surface of the earth in any well or hole:

i. which is being drilled or worked over by or on behalf of the Insured, or

ii. which is in the care, custody or control of the Insured, or

iii. in connection with which the Insured has provided services, equipment or materials.

15. for Bodily Injury or Property Damage directly or indirectly caused by or arising out of seepage, pollution or contamination however caused whenever or wherever happening:

This exclusion shall not apply when the Insured has established all of the following conditions:

a. the seepage, pollution or contamination was caused by an event;

b. the event first commenced on an identified specific date during the Policy Period set out in Item 3 of the Declarations;

c. the event was first discovered by the Insured within 14 days of such commencement;

d. Underwriters received written notification of the event from the Insured within 60 days of the Insured's first discovery of the event; and

e. the event did not result from the Insured's intentional violation of any statute, rule, ordinance or regulation.

Even if the above conditions a) to e) are satisfied, this policy does not apply to any actual or alleged liability:

i. to evaluate, monitor, control, remove, nullify or clean up seeping, polluting or contaminating substances to the

extent such liability arises solely from any obligations imposed by any statute, rule, ordinance, regulation or imposed by contract;

ii. to abate or investigate any threat of seepage onto or pollution or contamination of the property of a third party;

iii. for seepage, pollution or contamination of property which is or was, at any time, owned, leased, rented or occupied by any Insured, or which is or was at any time in the care, custody or control of any Insured (including the soil, minerals, water or any other substance on, in or under such owned, leased, rented or occupied property or property in such care, custody or control);

iv. arising directly out of the transportation by the Insured of oil (other than fuel or other substances used in furtherance of the Insured's operations) or other similar substances by watercraft; or

v. arising directly or indirectly from seepage, pollution or contamination which is intended from the standpoint of the Insured or any other person or organisation acting for or on behalf of the insured;

17. for loss of, damage to, or loss of use of property directly or indirectly resulting from subsidence caused by sub-surface operations of the Insured.

21. for damage to or loss of or loss of use of:

i. property owned or occupied by or rented or leased to the Insured;

ii. property used by the Insured; or

iii. property in the care, custody or control of the Insured or over which the Insured is for any purpose exercising physical control:

for the costs of removal, recovery, repair, alteration or replacement of any product (or any part thereof) which fails to perform the function for which it was manufactured, designed, sold, supplied, installed, repaired or altered by or on behalf of the Insured in the normal course of the Insured's operations.

48. Endorsement No 1 to the Policy was as follows:

ENDORSEMENTS

ENDORSEMENT 1

WATERCRAFT EXCLUSION Endorsement

Subject always to the terms and conditions of the Policy hereunder, Underwriters hereby agree that the Watercraft Exclusion 5 of Section II is deleted subject to watercraft associated with the Project maintaining Protection and Indemnity (P&I) cover up to a minimum of hull value.

All other insuring agreements, terms, conditions, definitions, exclusions, notice requirements, schedules and endorsements of the policy remain unchanged.

49. Endorsement 2 was the Existing Property Endorsement:

ENDORSEMENT 2

EXISTING PROPERTY Endorsement

Cover for damage to existing property is subject to the following Existing Property Contractual Exclusion and Buyback:

Existing Property Contractual Exclusion

The coverage provided under Section II of this policy shall not apply to any claim for damage to or loss of use of any property for which the Principal Assured:

1) owns that is not otherwise provided for in this policy;

2) has use of, custody, physical control, access, right of way or an easement to by operation of a contract or agreement, or

3) is liable or claimed to be liable by operation of any indemnification, hold harmless or similar provision contained within any contract or agreement.

All other insuring agreements, terms, conditions, definitions, exclusions, notice requirements, schedules and endorsements of the policy remain unchanged.

Existing Property Contractual Exclusion Buy-Back

Notwithstanding the Existing Property Contractual Exclusion above, it shall not apply to any claim for:

> Physical loss of and/or physical damage to existing property as per Schedule of Existing Property below and extends to anything reasonably ancillary thereto.
>
> All other insuring agreements, terms, conditions, definitions, exclusions, notice requirements, schedules and endorsements of the policy remain unchanged.
>
> Schedule of Existing Property:
>
> Offshore
>
> Gas lift structure (GLS)
> Riser platform (RP)
> Production platform (PP)
> Operational Control Platform (OCP)
> Living quarter platform (LQP)
> Utility platform (UTP)
> Integrated Well Jackets (IWJ) (12 units)
> Pipelines, flowlines and cables
>
> Onshore
>
> Main Oil Line (MOL)
> Substations

D: Did Technip have a legal liability to KJO?

D1: The relevant contractual terms

50. The critical terms principally relevant to the arguments of the parties on this issue are contained in Schedule A to the Contract, the "General Terms and Conditions". Specifically, Technip relied upon clauses 5.2.3 and 12.6 of Schedule A in support of its argument that it had incurred a liability to KJO. These clauses themselves referred to various terms defined elsewhere in the Contract, and the parties' arguments also referred to some other clauses within Schedule A as well as Schedule B.

51. The following provisions in Schedule A were those largely relied upon in the context of the liability issue, but I have also included some clauses which featured (albeit only in passing) in the context of the issues of insurance coverage.

> 1. DEFINITIONS
>
> 1.5 "FACILITIES" means the structures or items being designed, procured, fabricated, or constructed by CONTRACTOR pursuant to this CONTRACT.
>
> 1.6 "WORK" means all the FACILITIES, work, obligations and services to be performed by CONTRACTOR pursuant to this CONTRACT.

1.7 "WORK Site" means all locations at which CONTRACTOR performs any portion of the WORK.

1.37 "Subcontractor" means an organization contracted by and wholly responsible to CONTRACTOR for executing a specific part of the WORK.

5. CONTRACTOR's RESPONSIBILITY

5.2.1 The establishment or construction by CONTRACTOR of all WORK related storage areas and temporary structures on or adjacent to COMPANY premises must be authorized in advance by COMPANY and shall be confined to areas specified by COMPANY.

5.2.2 CONTRACTOR shall preserve and protect the environment at and adjacent to the WORK site

5.2.3 Except as may be otherwise provided in SCHEDULE "B", CONTRACTOR shall protect from damage all existing structures, improvements or utilities at or near the WORK Site, and shall repair and restore any damage thereto resulting from CONTRACTOR's failure to exercise reasonable care in protecting the same during CONTRACTOR's performance of the WORK. If CONTRACTOR fails or refuses to promptly repair any such damage, COMPANY may perform such repairs, or have them performed by others.

5.2.6 CONTRACTOR shall at all times keep the WORK Site neat, clean and free of waste material, any wreckage, debris of any kind and rubbish and dispose of same as instructed by COMPANY.

12. SUBCONTRACTS

12.1 Subcontracts for the performance of any portion of the WORK shall be procured only in accordance with the Subcontracting Plan contained in CONTRACTOR's bid, and only after CONTRACTOR has received written approval and authorization from COMPANY that CONTRACTOR may subcontract that portion of the WORK. In procuring subcontracts, CONTRACTOR shall select Subcontractors solely on the basis of financial and technical considerations, The submission of the Subcontracting Plan in the CONTRACTOR's Bid prior to Contract Award shall be considered as the minimum intention for compliance but shall not relieve the CONTRACTOR from its obligation to seek approval for the subcontractors after CONTRACT Award. The COMPANY reserves the right to reject a Subcontractor that is found unacceptable for the execution of the related part of the WORK,

even if the Subcontractor is specified in the Subcontracting Plan at the Bidding Stage.

12.2 After receiving COMPANY's written authorization that a portion of the WORK may be subcontracted, CONTRACTOR shall, before procuring any subcontract for part or all of that portion of the WORK, submit a notification to COMPANY containing the following information:

12.2.1 If the proposed Subcontractor is a sole proprietorship or partnership, the name(s) and address(es) of the proprietor or all members of the partnership, as the case may be.

12..2.2 If the proposed Subcontractor is a corporation, the place of its incorporation or formation and its corporate headquarters.

12.2.3 The name and address of the proposed Subcontractor's principal bank and a copy of the Subcontractor's latest audited financial statement.

12.2.4 Evidence acceptable to COMPANY of the proposed Subcontractor's technical qualifications to perform the WORK to be subcontracted.

COMPANY shall review the information and, provided that the proposed Subcontractor is, in COMPANY'S opinion, both technically competent and financially able to perform the WORK to be subcontracted, COMPANY shall advise CONTRACTOR in writing of its non-objection to the proposed Subcontractor. If COMPANY objects to the proposed Subcontractor, CONTRACTOR shall either itself accomplish the WORK which would otherwise have been performed by the proposed Subcontractor or shall select another Subcontractor and submit a revised proposal for the approval of the COMPANY.

12.3 CONTRACTOR shall ensure that all Subcontractors selected by CONTRACTOR abide by and observe, to the same extent required of CONTRACTOR, all applicable COMPANY's regulations, and CONTRACTOR agrees to insert or cause to be inserted into all subcontracts provisions to that effect.

12.4 In the event of any substantial breach of this CONTRACT by CONTRACTOR and without regard to whether COMPANY terminates this CONTRACT or a portion of the WORK pursuant to Paragraph 22 of this SCHEDULE "A", CONTRACTOR shall, if COMPANY requests, assign to COMPANY all of its rights under all subcontracts entered into by CONTRACTOR and COMPANY may, to the extent permitted by applicable law and after prior written notice to CONTRACTOR, enforce directly

against any such Subcontractor all rights of CONTRACTOR under such subcontract. All subcontracts entered into by CONTRACTOR shall contain a provision whereby the Subcontractor agrees and consents to such assignment by CONTRACTOR to COMPANY.

12.5 CONTRACTOR shall include in every subcontract under this CONTRACT, a provision prohibiting any further subcontracting of any portion of the WORK by the Subcontractor unless the Subcontractor first obtains the approval of CONTRACTOR. CONTRACTOR shall not give such approval without first obtaining approval of COMPANY.

12.6 CONTRACTOR shall be fully responsible to COMPANY for the acts, negligence, alteration, additions and omissions of all its Subcontractors at whatever tier, and their personnel, as if they were the CONTRACTOR's own personnel. CONTRACTOR shall manage, schedule and coordinate the work of all its Subcontractors so as to meet the Scheduled Completion Date and Critical Milestone Dates. Nothing in this CONTRACT shall create any contractual relationship between COMPANY and any Subcontractor unless COMPANY elects to exercise its rights under Paragraph 12.4. COMPANY's approval to subcontract any portion of the WORK and COMPANY's non-objection to CONTRACTOR's Subcontractor selection shall not relieve CONTRACTOR of any of its obligations under this CONTRACT.

14. DISTRIBUTION OF RISKS

The distribution of risks between COMPANY and CONTRACTOR set forth in Paragraphs 14.1 and 14.2 hereunder are subject to the specific exclusions set forth in Paragraph 14.3.

14.1 Persons and Properties

14.1.1 CONTRACTOR's Persons and Properties

The CONTRACTOR shall be liable to make payment for all CONTRACTOR's personnel, equipment, materials, services, tools, vehicles and other things required to be provided, secured and procured by the CONTRACTOR under this CONTRACT, and indemnify and hold the COMPANY harmless against and from any claims of whatsoever nature on account of the CONTRACTOR's failure to so pay.

The CONTRACTOR shall solely be responsible for and indemnify and hold the COMPANY harmless against and from any and all claims, demands, injunctions, judgments, suits, liabilities, costs and expenses of whatsoever nature arising or resulting on account of or in connection with

damage to, destruction or loss of the CONTRACTOR's equipment and any other properties of the CONTRACTOR howsoever caused, any injury or sickness, fatal or otherwise, or disablement suffered by anyone of the CONTRACTOR's personnel or any other person employed directly or indirectly by the CONTRACTOR, howsoever caused.

14.1.2 COMPANY Persons and Property

The CONTRACTOR shall be responsible for and indemnify and hold the COMPANY harmless against and from any and all claims, demands, injunctions, judgments, suits, liabilities, costs and expenses of whatsoever nature arising or resulting on account of or in connection with injury or sickness, fatal or otherwise, or disablement suffered by any person employed by the COMPANY or for whom the COMPANY may otherwise be responsible, and damage to, destruction or loss of any properties of the COMPANY, when caused by misconduct, negligence or omission on the part of the CONTRACTOR.

14.2 Third Party

Each party shall be responsible and indemnify and hold the other party harmless against and from any and all claims, demands, injunctions, judgments, suits, liabilities, costs and expenses of whatsoever nature arising or resulting on account of or in connection with injury or sickness, fatal or otherwise, or disablement suffered by any third party person, and damage to, destruction or loss of any third party property, when caused by such each party's misconduct, negligence or omission.

In the event of the joint or concurrent negligence of the COMPANY and the CONTRACTOR, the responsibility shall be determined and damages shall be apportioned in accordance with the applicable laws or as agreed by the parties.

"Third party" in this Paragraph 14.2 means a person, whether natural or artificial, other than the parties, but does not include such contractors and subcontractors of any tier as being currently employed by each party whether in performance of this CONTRACT or not. These CONTRACTORS and Subcontractors of each party shall be deemed identical with such each party particularly for the intent of Paragraph 14.

15. INSURANCE

15.1 CONTRACTOR shall carry and maintain in force at all times during the term of this CONTRACT the following insurances:

15.1.5 Fabrication and Transit Insurance

Insurance to cover the full value of any loss, damage or destruction of any materials for the FACILITIES and which shall cover fabricated subassemblies incorporating those materials while they are located at fabrication yard(s), while in storage and during transit from these foregoing locations to the Installation Site.

15.1.7 CONTRACTOR'S All Risk Insurance

For the full value of the WORK covering the materials and WORK in progress up to successful completion of the Performance Acceptance Test required and issuance of the Performance Acceptance Certificate under the CONTRACT

15.3 The policies of those insurances shall contain a waiver of subrogation in favor of the COMPANY.

The COMPANY shall be named as the additional insured under those insurance policies in addition to the CONTRACTOR and others as their interests may appear, except for the insurances required under Paragraph 15.1.1 above.

The policies of those insurances shall also contain a cross liability clause such that the insurances shall apply to the CONTRACTOR and the COMPANY as separately insured, except for the insurances required under Paragraph 15.1.1 above.

52. Schedule B contained a detailed description of the scope of the "Work" to be performed under the Contract. The relevant work being performed on the day of the Allision, and for which the Vessel was being used, was the offshore platform/ living quarters (or OCP/LQP) refurbishment work. This was referred to in clause 3 of Schedule B, which described the work to be performed.

3.1 Summary of Project FACILITIES

The purpose or FACILITIES encompassed within the related Projects hereby defined below, is to support maintaining the maximum sustainable capacity (MSC) of 300 thousand barrels per calendar day (MBCD) of Khafji crude and 50 thousand barrels per calendar day (MBCD) of Hout (KRL) crude:

i. INSTALLATION OF SECOND SUBMARINE POWER CABLE (SSPC)

ii. INSTALLATION OF POWER DISTRIBUTION PLATFORMS FOR ESP PHASE-II (PDP-4&5)

iii. CONSTRUCTION OF CONTROL AND LIVING PLATFORM (CLP)

iv. INSTALLATION OF INTEGRATED WELL JACKETS 6&7 (IWJ-6&7)

Pursuant to SCHEDULE "A", CONTRACTOR shall furnish, without limitation, all facilities, tools, labor, supervision, technical and professional services, material, equipment, supplies and consumables (except fuel which can be supplied by COMPANY on a back-charge basis at the market rates applicable at the time of delivery and water on a back-charge basis at the prevailing SWCC rate and those items specified in SCHEDULE "G") required to totally engineer /detailed design; procure, install, construct, test, pre-commission / mechanically complete, the FACILITIES in accordance with this SCHEDULE "B" – Job Specification.

Also CONTRACTOR shall assist COMPANY with start-up / commissioning and performance testing / acceptance activities as defined in Paragraph 9.7 of this SCHEDULE "B" and Scope of WORK documents.

3.2 Description of FACILITIES

CONTRACTOR shall refer to the documents outlined in Paragraph 4 of this SCHEDULE "B" for a detailed description of the FACILITIES' Scope of WORK, a summary description of which includes but is not limited to the following:

…

3.2.3 **CONSTRUCTION OF NEW CONTROL & LIVING PLATFORM (CLP)**

The objective of this Project is to accommodate the future expansion of offshore facilities and offshore manpower resources, by providing a new Control and Living Platform (CLP).

The existing Living Quarters Platform (LQP) and OCP will be refurbished to provide additional improved living and working facilities to personnel.

The Project Scope of Work will include but not be limited to:

New Offshore Facilities:

a) Installation of a Control and Living Quarters Platform for 69 people and Control Room to support 24 hours operation. The CLP will be provided with stand-alone utilities systems such as sea water, fresh water, hot water, fire water, instrument / plant air, sewage treatment, diesel etc.

b) Installation of Electrical, HVAC, Telecommunication & Process Control System (PCS).

c) Installation of an interconnecting bridge between CLP and existing UTP.

Modification to Existing Offshore Facilities:

a) Modifications to the UTP to allow Structural, Electrical and Piping Tie-ins to CLP

b) Refurbishment of three floor levels the OCP.

c) Refurbishment of two floor levels of the LQP.

3.2.4 **INSTALLATION OF INTEGRATED WELL JACKETS IWJ-6&7**

The objective of this project is to maintain crude oil production through the installation of two new integrated well jacket platforms to facilitate new producer and/or injection wells.

New Offshore WORK:

Installation of two (2) Integrated Well Jacket Platforms (IWJ-6&7). Each IWJ shall be provided twelve slots for drilling new producer and/or injection wells.

Installation of Electrical, Piping, Instrumentation and Fire and Gas system.

53. The work to be carried out was also identified in clause 2 of the 5-page contract to which the schedules were attached. This provided:

WORK

The CONTRACTOR shall, in accordance with the terms and conditions set out in this CONTRACT, attached schedules and drawings, standards, specifications and other documents referred to in the schedules or in any of the referenced documents perform the WORK required for the Project entitled **KHAFJI CRUDE RELATED OFFSHORE PROJECTS**, which includes the following individual Projects:

i. INSTALLATION OF SECOND SUBMARINE POWER CABLE (SSPC)

ii. INSTALLATION OF POWER DISTRIBUTION PLATFORMS FOR ESP PHASE-II (PDP-4&5)

iii. CONSTRUCTION OF CONTROL AND LIVING PLATFORM (CLP)

iv. INSTALLATION OF INTEGRATED WELL JACKETS 6&7 (IWJ-6&7)

D2: The parties' arguments

Technip's argument

54. Technip submitted that the effect of clauses 5.2.3 and 12.6 was as follows.

55. Technip was required to "protect from damage all existing structures … at or near the WORK Site".[1] This would have included the Platform, which was only about 1,000 metres from IWJ-7, the installation of which was within the scope of the "WORK" identified in clause 2(iv) of the Contract as well as Schedule B thereof.

56. Technip was required to "repair and restore any damage thereto resulting from CONTRACTOR's failure to exercise reasonable care in protecting the same during CONTRACTOR's performance of the WORK". In this regard, "WORK" was defined as meaning "all … work, obligations and services to be performed by CONTRACTOR pursuant to this CONTRACT" (see clause 1.6 of Schedule A). Schedule B of the Contract expanded upon the scope of the Work to be performed to include, under clause 3.4, transportation and "all other work items that are reasonably inferred from the CONTRACT as necessary for proper execution of the WORK".

57. Therefore, to the extent that - vis-à-vis KJO at least - it was Technip itself (the charterer) which was responsible for sailing the Vessel into the Platform, it would have been liable in respect of the damage under clause 5.2.3 of the Contract.

58. Further or alternatively, to the extent that it was Maridive (the owner of the Vessel) that was responsible for the damage, Maridive was a "Subcontractor" within the meaning of clause 1.37, viz. "an organization contracted by and wholly responsible to CONTRACTOR for executing a specific part of the WORK". By clause 12.6 of the Contract, Technip remained liable "for the acts, negligence, alteration, additions and omissions of all its Subcontractors at whatever tier, and their personnel, as if they were the CONTRACTOR's own personnel". As such, it would be no defence to a claim under clause 5.2.3 of the Contract to say that Technip was not responsible for Maridive's "failure to exercise reasonable care".

59. Clause 5.2.3 was clearly engaged. The Allision took place during the performance of the Work. The Vessel was in fact being used, at the relevant time, in relation to the OCP/ LQP offshore work. It was true that the Vessel had finished its active duties for the day: it had left the IWJ-7 Platform and was en route to a designated anchorage overnight, before resuming its active duties the following day. The Vessel's passage was within the scope of Work set out in clause 1.6 and Schedule B, and at the very least was an item which was necessary for the proper execution of the Work. The Platform was also "near" the Work Site defined in clause 1.7: it was only 1,000 metres away from Platform IWJ-7.

[1] In this section, I will fully capitalise terms where I am quoting a provision where they are so capitalised. However, where I am not quoting a provision, I will only capitalise the first letter of relevant defined terms such as "Work" or "Subcontract" or "Contractor" or "Subcontracting Plan".

60. Clause 12.6 was also engaged. Maridive was a Subcontractor within the meaning of the Contract. Medgulf was wrong to suggest that Maridive was not responsible for executing a specific part of the "WORK". The charterparty with Maridive plainly contemplated that the Vessel was being chartered for the purpose of the Project. Technip referred to a number of charterparty clauses in that respect, and to authority which recognised that a registered or disponent owner of a vessel can be a sub-contractor in respect of services to be provided by a charterer. It did not matter that the contractual procedure for approval of sub-contractors may, possibly, not have been fully applied in the case of Maridive: it was only ever contemplated that major sub-contractors would be the subject of the approval process. In any event, KJO was plainly aware of and approved the use of the Vessel.

61. There was nothing in clause 12.6 which meant that it could not be an independent source of liability on the part of Technip. Medgulf was therefore wrong to suggest that it was necessary to find a source of liability elsewhere in the Contract. But if such source was needed, then it was provided for by clause 5.2.3.

62. There was clearly negligence on the part of Maridive. This had been admitted in an arbitration between Maridive and Technip. There could be no defence of lack of negligence in a case where the Vessel had sailed into a fixed object like the Platform.

Medgulf's argument

63. Medgulf submitted that Technip did not assume responsibility for Maridive's negligence under clause 12.6 because Maridive was not a "Subcontractor" within the meaning of the Contract. Furthermore, clause 12.6 did not create a freestanding basis of liability: Technip would need to identify another contractual provision which was breached by reason of Maridive's negligence. They could not do so, because clause 5.2.3 did not apply, for two reasons: (i) the Platform was not at or near the Work Site, and (ii) the Allision did not occur during performance of the Work.

64. Maridive was not a "Subcontractor", because that expression only included parties which had been contracted to perform an identified element of the Work described in Schedule B. A distinction was to be drawn between (i) a party which had autonomy in, and responsibility for, the performance of a specific, defined task, and (ii) someone who merely provided an ancillary service or facilitated the Contractor's performance of the work. The former would be a Subcontractor, but the latter would not. Maridive fell into the latter category. It was not possible to identify any "WORK", as defined under the Contract, that Maridive was supposedly responsible for performing. The OCP/ LQP refurbishment was "WORK" as defined in the Contract. However, Maridive's anchor-handling vessel merely facilitated the performance of that Work. The services provided by the Vessel did not constitute a specific part of the Work. The relevant question was not whether the Vessel was involved in performing Work. It is whether Maridive (the owners of the Vessel) were performing any relevant Work. The charterparty between Maridive and Technip was a typical time charterparty, and was not in the nature of a subcontract pursuant to which Maridive was obliged to perform a specific part of the Work.

65. In relation to this submission, Medgulf drew attention, in particular, to Technip's liability under the charterparty to pay for fuel and also for any anchor handling wires and accessories in the event that such equipment was lost or damaged, other than as a

result of Maridive's negligence. These provisions would make no sense in the context of a subcontract, where the subcontractor's expenses in performing the subcontracted work would usually be for its own account.

66. Medgulf thus submitted that Maridive's role was fundamentally different from that of Subcontractors in the sense set out in clause 12 of the Contract. This referred to the "Subcontracting Plan contained in the CONTRACTOR's bid". Such parties would be Subcontractors. Maridive were not in that category, and therefore it is no surprise that the subcontracting approval processes referred to in clause 12 were not followed. The Subcontracting Plan referred to the major portion of fabrication and offshore installation work being performed by two nominated Subcontractors, one of which was Offshore Oil Engineering Co Ltd ("COOEC"). COOEC was a relevant Subcontractor. Although the Subcontracting Plan referred to "local support vessels" providing supply and crew changes, the registered owners of those vessels would not necessarily be Subcontractors. In any event the Vessel was not provided for the purposes of supply and crew changes, but anchor handling. Technip did not receive written approval and authorisation to subcontract any Work to Maridive. The fact that the Vessel was approved had nothing to do with the subcontracting provisions in the Contract.

67. Accordingly, and in summary, Medgulf submitted that there was no basis for Technip's assertion that Maridive was a "Subcontractor" within the meaning of the KCROP Contract. Maridive was not "wholly responsible… for executing a specific part of the WORK". Further, none of the subcontracting provisions was complied with in respect of Maridive: KJO did not approve the subcontracting of the supposed "WORK" performed by Maridive; it did not approve Maridive as a subcontractor; and Maridive was not identified in the Subcontractor Master List. All of this served to underscore the common sense conclusion that the registered owner of a vessel cannot sensibly be characterised as the time charterer's 'subcontractor' for a construction project.

68. Even if Technip could establish that Maridive was a Subcontractor for the purposes of clause 12.6, it must also establish that Technip was liable under clause 5.2.3. clause 5.2.3 provides a specific and limited indemnity for damage to property "at or near the WORK Site" as a result of a failure to exercise reasonable care "during… performance of the WORK". These two aspects of clause 5.2.3 are linked: property "at or near the WORK Site" must be the property which, by virtue of its proximity to the "WORK Site", is exposed to the risk of damage during "performance of the WORK".

69. The Allision occurred when the Vessel was returning to anchorage, having been in use at IWJ-7 earlier that day. IWJ-7, which is the relevant "WORK Site" for these purposes, was approximately 1,000m away from the Platform. Thus, the Platform was not "at or near the WORK Site" and the Allision did not occur "during performance of the WORK". It follows that clause 5.2.3 was not engaged.

D3: Discussion

70. The question of whether there was a liability under clause 5.2.3 or 12.6 of the Contract is to be determined in accordance with the principles of contract interpretation under English law. The Contract is not in fact governed by English law: Schedule E to the Contract provides for Saudi law and arbitration. However, neither party asserted that the principles of Saudi law were materially different, and therefore both parties were content to argue the case on the basis of English law principles.

71. It is not necessary to set out the applicable principles of construction of English law in detail. They are conveniently summarised in the judgment of Popplewell J. in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd* [2018] EWHC 163 (Comm), which is quoted in *Chitty on Contracts* 34th edition paragraph 15-053:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

72. The Contract is detailed and professionally drafted, and I start with the language of clause 5.2.3. The clause begins by imposing what appears to be an absolute obligation on Technip to protect "all existing structures, improvements or utilities at or near the WORK site". However, in the light of the phrase requiring repair or restoration "resulting from CONTRACTOR'S failure to exercise reasonable care in protecting the same", the contractual obligation to protect is not absolute but is (as Technip submitted) in substance an obligation of reasonable care.

73. The clause is concerned with structures which are either at the Work Site itself (i.e. "all locations at which the CONTRACTOR performs any portion of the WORK" – see clause 1.7) or which are "near" the Work Site. I consider that the latter would naturally encompass the Platform. It was in close proximity to the IWJ-7 Work Site: any reasonable person would consider that a Platform which was only 1 km away, was "near" to that Work Site. It was, admittedly, outside a 500 metre exclusion zone around

the nearest Work Site; i.e. the zone which passing traffic could not enter. However, this does not mean that the Platform was not "near" the IWJ-7 Work Site.

74. Furthermore, where offshore work is being performed, it is obvious that vessels will be used to provide various services: for example bringing supplies or equipment or the workforce itself, or (as here) anchor-handling services. In the present case, the Platform was clearly a structure which was at or close to the route which such vessels might take. The evidence was that it was only a matter of minutes between the Vessel leaving IWJ-7 and hitting the Platform. I can see no good reason why the word "near" should be construed, as Medgulf's argument posits, to exclude a structure which is so close to the place where contractual work is to be carried out, and which is at or close to the route which vessels would take in order to get there. The obvious purpose of clause 5.2.3 was to seek to protect KJO's structures from damage, and there is no good reason why reasonable people in the parties' position would have considered that the Platform, which was at or close to the route taken by vessels, was for some reason too far away to qualify for the protection provided by that clause. Indeed, as Mr MacDonald Eggers pointed out in the course of his oral submissions, the Platform was closer to IWJ-7 than another part of the Work Site, namely IWJ-6.

75. I therefore reject Medgulf's argument that the Platform was not "near" the Work Site.

76. I also reject Medgulf's argument that the Allision did not happen "during CONTRACTOR's performance of the WORK". Once it is recognised that the protection required by the clause extends to structures which are not at the Work Site itself, but are "near" to it, then it must necessarily follow that this protection is not confined to the situation where Work is actually being physically carried out in situ at the Work Site itself. The concept of Technip's "performance of the WORK", in the context of damage occurring near but away from the Work Site itself, must encompass a situation where, as Technip submitted, an anchor-handling vessel engaged in work at the Work Site is proceeding to a designated anchorage before resuming active duties the following day. This seems to me to be a paradigm case where clause 5.2.3 applies in the context of damage which is not at the Work Site itself.

77. This conclusion is reinforced by the definition of Work in clause 1.6, which encompasses the terms of clause 3.4 of Schedule B. As discussed in more detail below, the engagement and use of an anchor handling vessel were "work items that are reasonably inferred from the CONTRACT as necessary for proper execution of the WORK". These words in clause 3.4 must extend (as Technip submitted) to the Vessel standing down for the day and going to an appropriate anchorage before resuming the next day. I also accept that this also comes within the meaning of "transportation", which is used earlier in clause 3.4.

78. I also consider that Technip's construction of clause 5.2.3 is far more consistent with business common sense than Medgulf's. Medgulf's argument posits only a very narrow restricted protection for KJO's structures, improvements or utilities. Business common-sense would in my view lead to the opposite conclusion; namely that KJO was looking for wide protection against damage to structures, improvements and utilities, and that clause 5.2.3 provided it.

79. I agree that this reasoning does not answer the question of whether Technip should be answerable only for a failure to exercise reasonable care where its own directors or

employees could personally be blamed for what had happened, because they were themselves personally negligent in some respect. The alternative is that Technip is also answerable under clause 5.2.3 where the operative negligence is that of a third party such as Maridive, which Technip had engaged in the context of the performance at the Work Site of its obligations under the Contract.

80. It was accepted by Medgulf, correctly, that Technip would be answerable under clause 5.2.3 (assuming that it applied) if Maridive was a Subcontractor as defined in the Contract. However, Medgulf's argument was that Maridive was not a Subcontractor, and that therefore Technip was not liable if (as was clearly the case on the evidence) Maridive's negligence caused the damage.

81. Ultimately, this argument gives rise to a question of construction of the word "Subcontractor" in the context of this particular Contract. But it is noteworthy that there is no conceptual difficulty in treating a shipowner as a subcontractor of a charterer: see the decision of Colman J in *Homburg Houtimport BV v Agrosin Private Ltd (The "Starsin")* [2000] 1 Lloyd's Rep 85, 98 – 99. The Court of Appeal and House of Lords reached the same view as Colman J on this issue: see [2003] UKHL 12, paras [28] – [29].

82. For essentially the reasons given by Mr MacDonald Eggers, and summarised above, I am persuaded by Technip's submission that Maridive are Subcontractors for whom Technip is liable under clause 12.6. The points which I consider to be significant are as follows.

83. Clause 12.6 is drafted in very wide terms, and creates a responsibility on the part of Technip for the acts, negligence, alteration, additions and omissions of <u>all</u> its Subcontractors <u>at whatever tier</u> as if they were the Contractor's own personnel (my underlining). The words "at whatever tier" are wide: they would extend to parties who are sub-sub-contractors. Clause 12.6 also creates an obligation on the part of Technip to manage, schedule and coordinate the work of all its Subcontractors so as to meet the critical dates. It would be surprising if this obligation somehow excluded – on the grounds that Maridive was not a Subcontractor – any obligation to manage, schedule and coordinate the work of Maridive, whose Vessel was to be on-site and which would be carrying out important work. I do not consider that there is anything in this comprehensively drafted clause which suggests that a distinction is to be drawn, as Medgulf contends, between parties engaged to perform contractual work and parties engaged to facilitate Technip's performance of its contractual work. This distinction would not have occurred to any reasonable person when considering the wide language of this clause.

84. At the heart of Medgulf's submission is the definition in clause 1.37: a Subcontractor means an organization contracted by and wholly responsible to Contractor for executing a specific part of the Work. When this clause is read in the light of other definitions, and the Contract as a whole, I do not consider that it can be construed in the narrow manner for which Medgulf contends. Clause 1.6 refers to the work, obligations and services to be performed by Technip pursuant to the Contract. Clause 1.6 needs to be considered in conjunction with Schedule B of the Contract. Clause 3.4 in Schedule B describes Technip's "Scope of Supply and Services" in very wide terms: it includes "transportation" and, perhaps more significantly, "all other work items that are reasonably inferred from the CONTRACT as necessary for proper execution of the

WORK". The engagement and use of an anchor-handling vessel was, in my view, necessary for the proper execution of the Work. Accordingly, it came within the Scope of Supply and Services described in clause 3.4 of Schedule B, and can therefore properly be regarded as part of the Work to be performed by Technip pursuant to the Contract. There is then no difficulty in regarding Maridive as an organization which falls within the definition of Subcontractor in clause 1.37. Anchor handling was a service which was necessary for the proper execution of the work, and Maridive was responsible for executing that service under the terms of the charterparty concluded between the parties.

85. In his oral closing, Mr Brocklebank submitted that clause 3.4 did not assist on the question of the scope of "WORK" under the Contract. The matters covered in that clause were separate from the "WORK" albeit necessary for it. Ancillary services, such as obtaining visas for staff, might be reasonably necessary for the performance of the Work, but it did not follow that they were part of the Work itself. He also emphasised that clause 1.37 referred to the role of a Subcontractor as being to "execute a specific part of the WORK".

86. I do not accept this argument. The definition of "WORK" starts off with a reference to "FACILITIES". This is defined as "the structures or items being designed, procured, fabricated, or constructed by CONTRACTOR pursuant to this CONTRACT". Thus, "FACILITIES" covers what Mr Brocklebank's submission would regard as the core or heart of the Work to be performed. However, the definition goes beyond Facilities, and refers to "work, obligations and services to be performed by CONTRACTOR pursuant to this CONTRACT". It seems to me that this readily embraces the Scope of Supply and Services in clause 3.4 of Appendix B. I do not accept that a reasonable reading of the Contract would result in the distinction which Mr Brocklebank's submission seeks to draw.

87. I do not consider that there is any force in Medgulf's argument based upon the absence of reference to Maridive in the Subcontracting Plan referred to in clause 12.1. That Subcontracting Plan, which clearly forms part of the factual matrix to the Contract, is (as Technip submitted) clearly focused on the major sub-contractors. Two such sub-contractors are identified, but other contemplated sub-contractors were not. Thus, the plan refers to local support vessels being used by COOEC for supply and crew changes, but it does not identify the owners of such vessels. Whilst I accept that supply vessels are different to anchor-handling vessels, there is not such a significant difference to affect the points of substance, namely that (as Technip contends): the Subcontracting Plan was focused on major subcontractors; it was envisaged that there would be other subcontractors albeit not named specifically; and it cannot realistically be contended that the engagement of an anchor-handling vessel from Maridive was impermissible or outside the scope of the Subcontracting Plan. KJO's approval of the Vessel was contractually required under Box 9 of the charterparty: the period of hire was "subject to the approval of the Vessel by authorized inspection of KJO in Abu Dhabi, UAE in advance of the date of delivery". This approval was then given: KJO confirmed in a letter dated 7 April 2015 that the Vessel met the safety requirements and was "Acceptable". I agree with Technip that this operated as an approval of the sub-contracted services to be performed by the Vessel. Thus, there is nothing in the point that the engagement of Maridive as a Subcontractor fell outside the scope of the Subcontracting Plan.

88. It is correct, however, that the further procedures in clause 12 of the Contract do not appear to have been followed in relation to Maridive: in particular, the processes envisaged in clause 12.2 were not followed. However, as Technip submitted, it cannot be a pre-condition to liability under clause 12.6, or indeed 5.2.3, that all the contractual procedures had been followed in relation to the negligent Subcontractor. Otherwise, the very odd result would be that Technip would be liable to KJO only for the conduct of its approved Subcontractors, and not for any unapproved Subcontractors. That odd result could not be reached for another reason: clause 12.6 expressly provides that KJO's "non-objection to CONTRACTOR's Subcontractor selection shall not relieve CONTRACTOR of any of its obligations under this CONTRACT". Mr Brocklebank, in his oral closing, sensibly accepted that a party could be a relevant Subcontractor even if the procedures were not followed: he was not saying that Maridive was not a Subcontractor because the procedures were not followed.

89. Accordingly, I conclude that Maridive was a Subcontractor within the meaning of clause 12.6. In the light of that conclusion, and my conclusion that clause 5.2.3 is applicable, Technip was responsible for the negligence of Maridive in damaging the Platform. Furthermore, I reach the same conclusion on the basis of clause 12.6 alone, and I reject Medgulf's argument that that clause is insufficient in itself to create a liability on the part of Technip without reference to other contractual obligations. There is nothing in the language of clause 12.6 which limits its scope and application to breach of contractual obligations elsewhere in the Contract. On the contrary, there is a clear responsibility under clause 12.6 for "negligence", and I see no reason why this responsibility should be in some way dependent on KJO showing that there was a breach of some other contractual provision.

90. Even if my conclusion that Maridive was a Subcontractor were wrong, I consider that clause 5.2.3 would impose liability on Technip for the negligence of a third party, such as Maridive, whom they had engaged in order (as Medgulf described it) to facilitate the performance of Technip's work at the Work Site. I am not persuaded that there is any good reason for contending that a different regime applies, in the context of clause 5.2.3, as between "Subcontractors" and other parties who are directly engaged in relation to the Work that Technip was carrying out and where (as I have already concluded) there was damage to structures near the Work Site during Technip's performance of the Work. In other words, I do not ultimately think that it is critical, for the purposes of clause 5.2.3, to determine whether or not Maridive was a Subcontractor as defined by the Contract. It makes far more commercial sense, in the context of a clause which protects KJO from damage to its structures near the Work Site, to say that Technip should be answerable for negligent damage to those structures caused by parties engaged by Technip to facilitate its performance of the Work and who were working at the Work Site at the relevant time.

91. In that context, it is relevant that the opening words of the clause are drafted as an absolute obligation on the part of Technip to protect the structures, improvements or utilities. The words "failure to exercise reasonable care in protecting the same", when seen in the light of a clause which requires the protection to be provided, is to be construed as meaning that Technip would bear responsibility for damage whether or not the negligent party was a Subcontractor or a party engaged to facilitate Technip's work at the Work Site.

92. Accordingly, I accept that there was a liability on the part of Technip to KJO for the Allision.

93. The parties' submissions referred briefly to the indemnity provision in clause 14.1.2. Technip did not base its case on that clause, no doubt because of a concern that a liability based on that clause might be excluded under the Existing Property Exclusion discussed below. Technip's case was based on clauses 5.2.3 and 12.6, and I have reached my conclusions without regard to clause 14.1.2. I have, however, considered that clause and ultimately do not consider that it affects or adds to the analysis set out above.

E: Absence of consent to settlement

The issue

94. The policy provides, in Clause 1, an indemnity to the Insured for its "Ultimate Net Loss". This was defined so as to mean "the total sum the Insured is obligated to pay as Damages …" Damages was in turn defined as follows:

> "**DAMAGES**" shall mean compensatory damages, monetary judgments, awards, and/or compromise settlements entered with Underwriters' consent, but shall not include fines or penalties, punitive damages, exemplary damages, equitable relief, injunctive relief or any additional damages resulting from the multiplication of compensatory damages".

95. It was common ground that Technip did not obtain Medgulf's consent to the compromise settlement which it had concluded with KJO in 2019. Medgulf contended that there were, in those circumstances, no "Damages" as defined by the policy which Technip could claim as part of its Ultimate Net Loss. This was disputed by Technip.

The parties' arguments

96. Technip contended that the sum agreed to be paid under the Settlement Agreement constituted "compensatory damages" as well as a "compromise settlement". There was no requirement to obtain consent in connection with "compensatory damages". The authorities established that "compensatory damages" simply meant pecuniary recompense for an actionable wrong: see e.g. *Bedfordshire Police Authority v Constable* [2009] EWCA Civ 64.

97. Technip also submitted that the absence of Medgulf's consent did not preclude a claim in respect of its "compromise settlement". Consent was not, in that context, stipulated to be a condition precedent to recovery. The insurer's remedy would be to claim damages for loss caused by the failure to obtain consent.

98. Furthermore, in circumstances where in 2016, 3 years before the Settlement Agreement, Medgulf had declined liability to indemnify Technip and confirmed that Technip should act as a prudent uninsured, any requirement to obtain Medgulf's consent no longer applied. Technip relied in particular upon the decision of Edwards-Stuart J in *William McIlroy Swindon Ltd v Quinn Insurance Ltd* [2010] EWHC 2448 (TCC) para [70]. In

his oral submissions, Mr MacDonald Eggers submitted that this result should be reached as a matter of construction: the premise of the provision referring to consent is that the insurer accepts liability under the contract or at least does so with qualifications and reservations. It could have no application where there had been, as here, an unqualified denial of liability.

99. Finally, Technip submitted that if consent was required, and if it was a condition precedent to Medgulf's liability, it was now sought on the grounds that it could not be unreasonably withheld in circumstances where there was an actual liability on the part of Technip to compensate KJO in a sum of at least US$ 25 million.

100. Medgulf disputed all of these arguments. Mr Brocklebank submitted that since there was no consent to the Settlement Agreement, the sums purportedly payable thereunder did not meet the definition of "Damages" and therefore "Ultimate Net Loss". It was nothing to the point that the consent requirement was not expressed as a condition precedent: it was an integral part of the definition. In his oral submissions, Mr Brocklebank made it clear that Medgulf accepted that it was not a condition precedent. But it was nevertheless an element of the definition of damages, and references to conditions precedent are not relevant.

101. This requirement of consent could not be circumvented by characterising the payment pursuant to the Settlement Agreement as "compensatory damages". That part of the definition did not apply: if it were to do so, the requirement for consent would be redundant in every case. In every case, a party could avoid obtaining underwriters' consent to a settlement, and then bring a claim on the basis of "compensatory damages". Compensatory damages were, he submitted, something that a party was ordered to pay. An agreement voluntarily to pay compensation was a settlement, and this required consent. Damages and in particular "Compensatory Damages" were something ordered by a court or tribunal.

102. In relation to the *McIlroy* case, Mr Brocklebank submitted that the passage relied upon was obiter. It was also premised on a point overturned on appeal.

103. Medgulf also submitted that retrospective consent was not contractually possible.

Discussion

104. It is clear, as Mr Brocklebank fairly accepted, that there is a degree of overlap between the four categories identified in the first part of the definition of Damages. Thus, "monetary judgments" or "awards" will likely include sums which are "compensatory damages". The same can be said of compromise settlements, whether or not entered into with the Underwriters' consent: they will also likely include sums which are "compensatory damages". Thus, the four categories cannot be regarded as separate watertight compartments.

105. In these circumstances, I see no reason why the policy should be construed on the basis, as submitted by Mr Brocklebank, that "compensatory damages" must necessarily be sums which are awarded by a court or tribunal. Provided that amounts paid by the Insured to a third party claimant are properly to be characterised as "compensatory damages", I consider that the language of the policy entitles an Insured to say that these sums fall within the definition of "Damages" and therefore "Ultimate Net Loss".

106. In the present case, there is no difficulty in regarding the US$ 25 million in the Settlement Agreement as being "compensatory damages", within the ordinary meaning of that term. They were sums paid as compensation for the damage caused to KJO's Platform, for which Technip was contractually responsible (see Section D above). As Longmore LJ said in *Bedfordshire Police Authority v Constable:*

> ""Damages" to an English lawyer imports this idea, that the sums payable by way of damages are sums which fall to be paid by reason of some breach of duty or obligation, whether that duty or obligation is imposed by contract, by the general law, or legislation".

107. I do not accept that Medgulf's argument that this would result in "compromise settlements entered with Underwriters' consent" being redundant. Where such a settlement had been concluded with consent, an Insured would be able to say that the amount of the settlement was covered, because it came within the definition of "Damages" and therefore "Ultimate Net Loss". Accordingly, in such a situation, it would be difficult for an Insurer to contend that the Insured was required to prove the existence and amount of its liability to the third party. If such an argument were advanced, then it might strike the court as being just as surprising as the point raised and rejected (obiter) in *Legg v Sterte Garage Ltd* [2016] EWCA Civ 97 para [71]: namely the argument that there would be no coverage for "all costs and expenses incurred with the [insurer's] written consent" in the event that the insured had no liability to the third party.

108. It also seems to me that it could be said that Medgulf's argument seeks to make redundant the words "compensatory damages" (as well as to fail to give effect to their ordinary meaning). The argument asserts, in substance, that "Damages" must either be a judgment/ award, or a settlement agreed with Underwriters' consent. The well-known Bermuda Form policy (which is governed by New York law) does, in substance, adopt this approach: see the "Loss Payable" clause quoted in paragraph [14] of the judgment of Flaux J in *AstraZeneca.* But the language of the present policy is not identical, and does not take the same approach.

109. Accordingly, I accept Technip's argument that the absence of the Underwriters' consent does not preclude a claim under the policy, since Technip's settlement with KJO involved a payment of "compensatory damages".

110. It is therefore not necessary to address the various other arguments advanced by Technip as to why Medgulf's reliance on the absence of its consent to Technip's settlement did not provide an answer to the claim. I did, however, consider that there was particular force in Technip's argument that there could not, in the relevant factual circumstances, have been a requirement for Technip to obtain Medgulf's consent to its settlement. If this had been a critical argument for Technip, I would have been strongly inclined to accept it for the following reasons.

111. The factual position is straightforward. Medgulf made it clear to Technip in 2016 that there was no coverage in respect of its alleged liability for damage to the Platform, and that therefore Technip should act as a prudent uninsured. There was no evidence of any change in Medgulf's position in the period prior to the conclusion of the Settlement

Agreement, and of course their position throughout these proceedings has been consistent with their denial of liability in 2016.

112. It would in my view be a surprising result if an insurer could defend an insurance claim on the basis of absence of consent to a settlement in circumstances where there had been a denial of liability and the insured had been told to act as a prudent uninsured. If the insured, in those circumstances, concludes a settlement without consulting or seeking the consent of the insurer, it seems to me that it would be acting in accordance with what it had been told to do. An uninsured person would, by definition, have no reason to consult or seek the consent of an insurer. I consider that a court would have little difficulty in concluding that the insurer had waived any requirement for the insured to seek its consent or was estopped from asserting that such consent should have been sought and insured. Mr MacDonald Eggers submitted that the same result could be reached as a matter of construction. I was inclined to think that this would be more difficult than a waiver or estoppel analysis, although an implied term argument might also succeed.

113. The only English authority which was cited by Technip, and which relates to this issue, is the decision at first instance in *McIlroy.* The issue in that case was whether (in the context of claim under the Third Parties (Rights Against Insurers) Act 1930) an insured's claim against its insurer under a liability policy was made too late, in circumstances where no claim had been made following the insurer's denial of liability. The judge held that the time-bar argument succeeded, even though this produced the result that the insured's claim was time-barred long before liability had been established against the insured in respect of the underlying claim. In the course of his judgment, Edwards-Stuart J said this:

> "[70] It must be remembered that in this policy, like almost every other liability policy, there is a condition which provides that the insured shall not negotiate, admit liability or make any promise, payment or settlement without the insurer's written consent (General Condition 7b). Under general principles of English contract law I consider that where an insurer has notified the insured that it will not be granting indemnity in respect of a claim notified by the insured, the insurer cannot insist on compliance by the insured with his obligations under the policy in relation to that claim such as, for example, the obligation not to negotiate a settlement or admit liability, The insurer, having refused to perform his primary obligations under the contract in respect of that claim cannot at the same time insist on the insured complying with his primary obligations in respect of that claim. The conduct of the insurer means that the insured is effectively uninsured and must therefore take such steps as he reasonably can to protect his own interests. Such steps may well include attempting to negotiate a reasonable settlement of the claim against him."

114. I agree with Mr Brocklebank that this is not a strong authority. The judge's decision on the issue of time-bar was reversed by the Court of Appeal: [2011] EWCA Civ 825. Paragraph [70], quoted above, is part of the judge's reasoning on that issue, albeit that it does not appear that the point there discussed was an issue which required resolution.

Furthermore, whilst I am instinctively inclined towards the judge's view, there is no identification of the "general principles of English contract law" which led to his conclusion in that paragraph.

115. A more detailed discussion of the issue, including relevant earlier Irish and New Zealand authorities, is contained in the decision of the New Zealand Court of Appeal: *Napier City Council v Local Government Mutual Funds Trustee Ltd* [2022] NZCA 422, paragraphs [91] – [108]. However, some care is required when considering that authority. New Zealand law permits recovery for the amount of a reasonable settlement, at least in circumstances where there has been a denial of liability, whereas English law would still require the liability to be proved. Nevertheless, the case is instructive in identifying waiver and estoppel as possible reasons why an insurer, which has denied liability, cannot then rely on clauses which require the insured not to admit liability or obtain consent to a settlement. The court referred, in footnote 79, to an Australian case where the insurer had advised the insured that it should act as a prudent uninsured, and the court held that an estoppel precluded the insurer from denying liability to indemnify the insured for any payment made under a settlement, policy conditions to the contrary notwithstanding.

116. In view of my conclusion on construction of "compensatory damages", it is not necessary to express a concluded view on this point. Mr Brocklebank made the fair point that the authorities relied upon by Technip, such as *McIntyre* and the New Zealand cases, were concerned with clauses where there was a contractual obligation not to admit liability or settle without the insurer's consent. By contrast, the present case concerns a clause where consent is required in order for a settlement to qualify for inclusion in the "Damages" definition. Whilst this is a fair point, I was not persuaded that it provided a powerful answer to a case of waiver or estoppel.

117. The issue which I am here considering (the impact of an insurer's denial of liability and telling the insured to act as a prudent uninsured) is, however, of relevance to the issue of construction of "compensatory damages" already addressed. A scenario whereby an insurer denies liability for a claim, and advises the insured to act as a prudent uninsured, is far from unusual. If Medgulf's argument were accepted, a refusal of consent to a proposed settlement in those circumstances would preclude the insured from claiming recovery under the policy; at least unless it could be established that the underwriters' refusal of consent was unreasonable. It seems to me that, in this foreseeable scenario, Technip's argument – that "compensatory damages" covers the amounts paid in settlement for which the policyholder can prove that it was liable – makes far more commercial sense than Medgulf's contrary argument.

118. Accordingly, I reject Medgulf's case based on the absence of consent to the settlement.

F: The Existing Property Endorsement and other exclusions

F1: Introduction and the parties' arguments

Introduction

119. Apart from the issue addressed in Section E above, Medgulf's defence to liability under the Policy was principally based upon the exclusions contained in Endorsement 2. A defence was also advanced based on the Watercraft exclusion (exclusion 5 in the main

policy wording) and this required consideration of Endorsement 1. Although Medgulf had also relied upon exclusion 21 in the main policy wording, Mr Brocklebank accepted that for practical purposes Endorsement 2 had replaced exclusion 21 and that the latter did not add anything to Medgulf's case.

120. The majority of the parties' arguments were focused on Endorsement 2, the "Existing Property Endorsement". This contains both the "Existing Property Contractual Exclusion" ("the Existing Property Exclusion") and then the "Existing Property Contractual Exclusion Buy-Back". The Buy-Back referred to the Schedule of Existing Property at the foot of the page. This identified various structures and other assets which were covered. It was common ground that this did not include the Platform which had been damaged by the Allision.

121. This Schedule of Existing Property had its origin in responses by Technip in a questionnaire completed in August 2010 (the "Marsh questionnaire"). The questionnaire was on the letterhead of Marsh, the brokers. It was headed: "Offshore Builders Risk Questionnaire – General Information Required". Question 9 was:

> "**Third Party Property**
>
> Details of any third party property - pipelines, platforms etc. - in vicinity of contract plus any indemnities provided under contract"

122. In response, Technip provided the following table and text:

DAMAGES TO EXISTING PROPERTIES			
Existing properties	**Value (USD)**	**Nature of the potential damage**	**Potential maximum risk (USD)**
OFFSHORE			
Gas lift structure (GLS)	180,000,000.00	Riser J-tube Structure	5,000,000.00
Riser platform (RP)	100,000,000.00	Riser J-tube Structure	5,000,000.00
Product platform (PP)	140,000,000.00	Riser J-tube Structure	5,000,000.00
Operational Control Platform (OCP)	120,000,000.00	Riser J-tube Structure	5,000,000.00
Living quarter platform (LQP)	80,000,000.00	Riser J-tube Structure	5,000,000.00
Utility platform (UTP)	120,000,000.00	Riser J-tube Structure	5,000,000.00

WHJ (12 units, each 50MUSD)	600,000,000.00	replacement	50,000,000.00
Pipelines and frowlines [sic] (200km)*	300,000,000.00	puncture	10,000,000.00
Cables and submarines (350km)*	120,000,000.00	cut	15,000,000.00
Onshore			
MOL	5,000,000.00	damage equipment	1,000,000.00
Substations	15,000,000.00	puncture	1,000,000.00
TOTAL	1,780,000,000.00	**Maximum risk to ensure per occurrence:**	50,000,000.00

*damages to these facilities can be simultaneous.

> "Contractual requirements regarding third parties are in ATTACHMENT E.
>
> For further information, see ATTACHMENTS previously given to MARSH"

The Existing Property Endorsement: Medgulf's argument

123. Medgulf's primary case was that the Platform was property owned by a "Principal Assured", namely KJO. It was therefore caught by the paragraph (1) (or "limb 1") of the Existing Property Exclusion which applied to damage or loss of use of any property "for which the Principal Assured: 1) owns that is not otherwise provided for in this policy".

124. I note at this stage that, as both parties accepted, limb 1, when read with the words that precede it, is ungrammatical. The word "for" (before "which") makes no sense in the context of limbs 1 and 2. It makes sense in the context of limb 3. The drafting has thus become overcompressed, but it is obvious that, in the context of limbs 1 and 2, the word "for" should be treated as redundant. Accordingly, when quoting the clause in the context of limb 1, I have put the word "for" in square brackets.

125. Medgulf submitted that it was not a persuasive reading of the Policy that "the Principal Assured" in limb 1 of the exclusion meant that it is only the property of the Principal Assured which is making the claim that is excluded. The clear commercial rationale for the Existing Property Exclusion is to identify specific categories of property that are excluded, save to the extent that cover is specifically bought back. This control mechanism on the cover available in respect of "existing property" is required because such property is at a relatively high risk of damage during the project (and can be of very high value). The exclusion and Buy-Back mechanism enables the insurer to price the cover accordingly. This is why the insureds were required to declare the values of and maximum potential risk in respect of any existing property for which cover was required. Medgulf referred, in that connection, to the answer to the Marsh questionnaire.

126. Accordingly, the exclusion is concerned with the identity and nature of the property, not with which insured party has suffered a loss in respect of it.

127. Medgulf submitted that authorities relied upon by Technip in relation to "composite" policies, such as *Arab Bank plc v Zurich Insurance* [1999] 1 Lloyds Rep 262, were of no relevance in the present context and in any event made no difference to the analysis. The Existing Property Exclusion is not concerned with whether the acts of one insured affect another. Instead, it is concerned with identifying the types of property insured. It makes no sense to construe it as applying only to property owned by the Principal Insured that happens to be making a claim.

128. The obvious purpose of the Existing Property Exclusion, namely to exclude cover in respect of "existing property", will primarily and most obviously concern property owned by KJO. It is not concerned, or at least primarily concerned, with property owned by the contractor, Technip, which would likely be covered under other insurance. The Existing Property Endorsement can only plausibly have been drafted in contemplation of one insured incurring liability in respect of damage to another's insured property. A Principal Assured will rarely, if ever, incur a liability in respect of damage to or loss of use of its own property. But on Technip's construction, the only scenario in which the Existing Property Exclusion can operate, so as to exclude a claim by Technip, would be if Technip was claiming in respect of damage which it caused to its own property.

129. Medgulf also relied, separately, on paragraph (3), or "limb 3", of the exclusion. This applied to damage or loss of use of "any property for which the Principal Assured … 3) is liable or claimed to be liable by operation of any indemnification, hold harmless or similar provision contained within any contract or agreement". Medgulf submitted that the clauses which were relied upon by Technip as giving rise to its liability for damage to the Platform, namely 5.2.3 and 12.6, were both caught by limb 3.

The Existing Property Endorsement: Technip's argument

130. Technip submitted that limb 1 did not apply, both as a matter of Policy language and also having regard to the composite nature of the Policy. The substance of the argument was that limb 1 had no application where the property owned by one Principal Insured (here KJO) was damaged by another Principal Insured (here Technip). Nine points were advanced in Technip's written closing in support of this argument.

131. (1) As a matter of Policy language, the reference to "the Principal Assured" was in connection with the ownership of the property damaged. That must be a reference only to the Principal Assured which is claiming an indemnity for its liability for such damage. No other Principal Assured is referred to. If the intention had been to exclude liability for any property owned by any or all of the Principal Assureds, the exclusion would have so provided, but even the use of the words "any" or "all" are, without more, not sufficient.

132. (2) All of the property in the Khafji Field - both inside and outside the Work Site - is owned by KJO. The parties' intention must have been to provide cover to Technip for any liability for damage to property unless that property was Technip's own property and was not declared. If Medgulf's were the true construction, the Policy would have provided simply that there is no cover for any physical damage to property unless it is declared or scheduled. Alternatively, there would have been an "insured v insured"

exclusion, but there is none. If Medgulf's argument were right, there could be no realistic cover for Property Damage afforded by Section II unless the relevant property were scheduled. The cover for Property Damage would be emasculated.

133. (3) There are other Section II exclusions which must refer and be limited to the circumstances of the claimant Insured and not extend to the circumstances of any other (non-claiming) Insured: *e.g.* liability to an Insured's employees or their families (exclusions 6-10), liability for damage to wells or equipment being drilled by an Insured (exclusions 11 and 13), liability for subsidence caused by an Insured (exclusion 17), liability for products manufactured or supplied by the Insured (exclusions 20, 22 and 26). Similarly, the notification provision in Section II, which requires the Insured to notify an Occurrence or a circumstance by which the Insured became aware of the occurrence, could not sensibly be said to apply to any Insured (whether the Insured who bears the liability or any other Insured) who acquires knowledge of the Occurrence or the circumstance; it must be limited to the claimant Insured.

134. It was incumbent on Medgulf to include Policy language to render the Existing Property Exclusion as broadly as it contends. For example, the Cancellation provision in the Policy makes the position clear. There is no such clear language in Limb 1.

135. (4) The Policy is a composite policy. The Policy provides that: "The Policy shall be deemed to be a separate insurance in respect of each Principal Insured hereunder without increasing Underwriters' limits of liability". Therefore, there is a separate insurance contract involving each Insured and the reference to "the Insured" must be to the claimant Insured.

136. This is important, because – in accordance with the various authorities, including those discussed in *Arab Bank plc v Zurich Insurance Co* and more recently *Corbin & King Ltd v AXA Insurance UK plc* [2022] EWHC 409 (Comm) – no conduct or knowledge on the part of one Insured can be attributed to another Insured for the following purposes:

    a. Avoidance of the Policy by reason of a non-disclosure or misrepresentation by another insured will not prejudice the claimant insured.

    b. The application of an exclusion based on wilful misconduct is limited to the guilty insured.

    c. The application of other types of exclusion based on the conduct of an insured other than the claimant insured.

    d. The application of a breach of warranty by one insured will not ordinarily affect another Insured.

    e. The application of policy limits.

137. Indeed, given the number of Insureds (to which Exclusion clause 21 applies), the exclusion could be very wide-ranging if Medgulf were correct in its construction. Indeed, the definition of "Principal Assured" is also potentially very wide.

138. (5) Clause 4, Section II concerns "Cross Liabilities" owed by one Insured to another. This presupposes that the Policy should be treated as separate contracts with each Insured. Moreover, it makes it clear that the one Principal Assured shall be insured on the basis that it is the only Principal Assured in the contract. It would follow that the reference to the Principal Assured in Limb 1 should solely be to the claimant Principal Assured, namely (in the context of the present claim) Technip. The fact that the Platform was owned by KJO is irrelevant.

139. (6) Medgulf's argument – that a Principal Assured will rarely (if ever) incur a liability in respect of damage to or loss of use of its own property – is misconceived. An insured can bear a legal liability in respect of its own property in a variety of ways. For example, the owner of property may be sued by a joint owner, joint venturer, charterer, tenant, lessee or occupier for property damage or for loss of use by reason of property damage (not to mention Bodily Injury).

140. (7) In so far as Medgulf's argument places weight, not on the Policy language, but on alleged (but unpleaded) industry practices or indemnity regimes which are not in evidence before the Court, such argument should be rejected.

141. (8) The correctness of Technip's construction is evident from the fact that Limb 3 is an exclusion defined by reference to the particular Principal Assured's obligation of indemnity (which is the subject of the claim under the Policy) and not any other Principal Assured's obligation of indemnity.

142. (9) If Medgulf's argument were correct, there would be a different meaning to be given to the words "Principal Assured" as applicable to Limb 1 from that applicable to Limb 3. However, a word/phrase will generally be taken to carry the same meaning within the contract; the word/phrase will certainly have the same meaning when applied to two different sub-paragraphs of the same provision.

143. Limb 3 of the exclusion was equally inapplicable. The reference to "indemnification, hold harmless or similar provision" is to a contractual assumption of responsibility for loss irrespective of whether the loss occurred by reason of the indemnifier's fault, breach of duty, act or omission and/or whether the indemnifier would be liable to compensate the person suffering the damage to property even in the absence of the relevant indemnification, etc, clause. Clauses 5.2.3 and 12.6 do not fall within this description. The intention behind Limb 3 is to limit cover to liability based on negligence or breach of duty and not a contractual assumption of responsibility irrespective of fault. Therefore, Limb 3 does not apply to exclude cover.

F2: Discussion

144. The applicable principles of construction were not in dispute. In *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1, [2021] AC 649 on appeal from the decision of the Divisional Court (Flaux LJ and Butcher J) [2020] EWHC 2448 (Comm), the Supreme Court summarised the effect of the authorities as follows:

> "[47] The core principle is that an insurance policy, like any other contract, must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they

> entered into the contract, would have understood the language of the contract to mean. Evidence about what the parties subjectively intended or understood the contract to mean is not relevant to the court's task".

In that regard, the Supreme Court referred (at paragraph [47]) to the summary of the relevant principles and case-law in paragraphs [62] – [66] of the judgment of the Divisional Court.

145. I was also referred to the discussion of the contra proferentem principle in paragraphs [71] – [74] of the judgment of the Divisional Court. This concluded with approval of the analysis in a judgment of Mr MacDonald Eggers, sitting as a Deputy High Court judge in the Commercial Court, in *Crowden v QBE Insurance (Europe) Ltd* [2017] EWHC 2597 (Comm) at [65]:

> "[65] In my judgment, applying this approach, the Court must adopt an approach to the interpretation of insurance exclusions which is sensitive to their purpose and place in the insurance contract. The Court should not adopt principles of construction which are appropriate to exemption clauses - i.e. provisions which are designed to relieve a party otherwise liable for breach of contract or in tort of that liability - to the interpretation of insurance exclusions, because insurance exclusions are designed to define the scope of cover which the insurance policy is intended to afford. To this end, the Court should not automatically apply a *contra proferentem* approach to construction. That said, there may be occasions, where there is a genuine ambiguity in the meaning of the provision, and the effect of one of those constructions is to exclude all or most of the insurance cover which was intended to be provided. In that event, the Court would be entitled to opt for the narrower construction. This result may be achieved not only by the applicable of the *contra proferentem* approach, but also the approach adopted by Lord Clarke, JSC in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900, that in the case of ambiguity, the Court may opt for the more commercially sensible construction, at paragraph 21: "*If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other*". That said, as Lord Clarke, JSC also said, at paragraph 23 of his judgment: "*Where the parties have used unambiguous language, the court must apply it*". This would, however, be subject to considerations of absurdity or where something plainly has gone wrong with the language of the contract."

146. In accordance with these authorities, and the further summary in the *Lukoil* case (see Section D above), I need to consider the language of the endorsement in the context of the Policy as a whole, the relevant factual matrix, and the commercial consequences of the parties' rival constructions.

Limb 1

147. Starting with the language of the Existing Property Endorsement, the opening words refer very broadly and in unqualified terms to "existing property". The endorsement is therefore applicable to all property which exists at the time that the Policy was concluded, irrespective of its precise location and ownership. It would therefore apply not only to all existing property owned by any of the Principal Assureds (referred to earlier in the policy as "Principal Insureds"), but also property owned by the "Other Insureds" and indeed by unrelated third parties.

148. In practical terms, however, the relevant "existing property" would likely be in the vicinity of where the contract was being carried out in Saudi Arabia, because of the nature of the coverage set out in the "Interest" and "Scope of Insurance" provisions; i.e. it was coverage in respect of the Project. Mr Brocklebank submitted that the property which would most likely fall within that description would be property owned by KJO, as the operator of the field. I agree. This is consistent with the property then identified in the Schedule, which is the subject of the Buy-Back described below, all of which was owned by KJO.

149. The Platform itself was plainly existing property: it had been in existence for many years. Whether or not it was subject to any exclusion, however, depends on the scope of the words in the next section.

150. The exclusion which then appears, under the heading "Existing Property Contractual Exclusion", does not generally exclude liability for all existing property. Rather, under limbs 1 and 2, the exclusion is concerned with damage to or loss of use of property where there is an ownership or possessory or similar relationship between the property and the "Principal Assured". Limb 3 is concerned with a different type of relationship between the Principal Assured and the damaged property, namely the source of the Principal Assured's liability for the damage: i.e. whether this has arisen by operation of any indemnification, hold harmless or similar provision.

151. Although the opening words of the endorsement refer to any existing property generally, and the limb 1 exclusion which then follows applies to "any property [for] which the Principal Assured owns", the endorsement contemplates that certain property in the ownership of the Principal Assured will be excluded from the operation of the exclusion. The exception to the exclusion is, therefore, the property which is subject to the "Buy-Back", and which is then to be identified in the "Schedule of Existing Property". In the present case, the Schedule of Existing Property identifies certain "Offshore" and "Onshore" assets. It is not disputed that all of these assets were owned by KJO, and had been listed in response to the question in the Marsh questionnaire which asked for details of any third party property which was in the vicinity of the contract. *Sharp*, paragraph 9.4.3, makes the point that in providing the Buy-Back, insurers will ask for the details of any existing property exposure.

152. The structure of the endorsement was therefore, in summary: (i) to identify all existing property as being subject to the endorsement; (ii) to specify property which the Principal Assured owns (or has custody etc.) as being excluded; but (iii) then expressly to provide "Buy-Back" cover in respect of certain identified property, all of which was owned by KJO. This was against the background of Technip having been asked to identify third party property which was in the vicinity of the contract, and then

providing details of certain KJO property, the value of that property, the nature of the potential damage, and the potential maximum risk. It is also in the context of a contractual definition of "Principal Assured" (the Policy itself uses the equivalent expression "Principal Insureds") as encompassing a number of entities, and specifically naming AGOC, KGOC (the two joint venture partners in KJO) as well as Technip.

153. In the light of this contractual scheme, I consider that a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the policy to mean simply as follows: if damage was caused to the existing property owned by any Principal Assured, then the only property where there was coverage was that identified in the Schedule of Existing Property in the endorsement. If, therefore, the property was identified, there was coverage for that property. If it was not identified, then the exclusion operated.

154. There is no difficulty in giving the language of the endorsement this meaning. It is the ordinary meaning of the words "any property … which the Principal Assured owns". These words do, of course, have to be seen in the context of parties identified as the "Principal Assured" (or "Principal Insureds") earlier in the Policy. This identifies a very large number of legal and natural persons or businesses: Technip; AGOC; KGOC; associated and/or subsidiary companies; Joint Venturers and/or co-venturers as they may now or subsequently exist; parent, subsidiary, affiliated, associated and inter-related companies of the foregoing, and their directors, officers and employees whilst acting as such.

155. It is obvious from such a lengthy list that the relevant words in the endorsement ("any property … which the Principal Assured owns") could not be directed at property which was jointly owned by all of the persons and businesses defined as "Principal Insureds". It would be most unlikely, if not impossible, that there would any property in which all of those Principal Insureds had an ownership interest. The relevant words must therefore have been directed at any property which was owned by a Principal Assured. This is confirmed by the inclusion of property owned by KJO (i.e. the AGOC and KGOC joint venture) in the Schedule of Existing Property. KJO was a Principal Assured (or strictly the two joint venture partners were each a Principal Assured). The reason that the property was scheduled was, very obviously, that otherwise the exclusion would have applied so as to prevent recovery in respect of that property.

156. Accordingly, in my judgment the exclusion applies to any property owned by any of the Principal Assureds. The language of the exclusion can naturally be read as excluding damage to any such property. The exclusion is, as Medgulf submitted, concerned with the identity and nature of the property, and not with which insured party has suffered a loss in respect of it.

157. Technip's contrary argument is, in substance, that any particular item of existing property is subject to the exclusion if the claim is made by one insured, but is not subject to the exclusion if the claim is made by another insured. Thus, here, the Platform would qualify as excluded existing property if the damage was caused by KJO itself and KJO were then seeking to claim under the policy. However, it would not qualify as excluded existing property if, as here, the damage was caused by Technip (or those for whom Technip was responsible) and the claim was therefore being made by Technip. I do not consider that there is anything in the language of the endorsement which produces this

complex and rather odd result. The exclusion is, in my view, much more straightforward: limb 1 is simply concerned with the identity and nature of the property.

158. Technip's argument does not dispute that KJO can come within the scope of the words "Principal Assured". However, a proposition that is critical to Technip's argument is that it does not do so when considering the position of Technip. It only does so when considering KJO's position. This conclusion is said to flow, at least principally, from the fact that the Policy is a composite policy, with the consequence that each insured entity, including Technip, is separately insured. On this basis, when considering the separate insurance between Technip and Medgulf, there is only one entity that qualifies as "the Principal Assured", namely Technip itself.

159. There was no dispute that the Policy is a composite policy. The second paragraph under "Scope of Insurance' provides that "The Policy shall be deemed to be a separate insurance in respect of each Principal Insured hereunder without increasing Underwriters' limits of liability". The Cross Liabilities condition is to similar effect. Discussion of the nature of composite policies is contained in various authorities, most recently the decision of Cockerill J in *Corbin & King Ltd v Axa Insurance UK plc*. The judge there summarises the position by saying (at [230]) that it is "fair to say that the expectation raised by the authorities is that a composite policy is treated as a series of contracts – and will hence be treated as giving the relevant cover per contract". The judge cites (at [232]) leading textbooks; for example, *Arnould on Marine Insurance* 20th edition states that "a composite policy is treated as a series of bilateral contracts between the underwriters and each assured."

160. I do not consider that the composite nature of the present policy affects the analysis as to whether or not "property … which the Principal Assured owns" includes property owned by KJO, in the context of the bilateral contract between Technip and Medgulf. The "Principal Assured" referred to in the Endorsement is a reference to those who are identified as "Principal Insureds" earlier in the Policy. It therefore includes KJO, as a matter of the construction of the endorsement as a whole. It includes KJO whether one is considering the bilateral contract between KJO and Medgulf, or the bilateral contract between Technip and Medgulf, or indeed any of the other bilateral contracts which are created. As Mr Brocklebank submitted, correctly in my view, treating the cover as applying separately to Technip does not change what is meant by "property [for] which the Principal Assured owns". Those words identify the property within the scope of the endorsement and exclusion, and the identified property does not change depending upon which insured is being considered.

161. A construction which posits that it refers only to Technip (in the context of Technip's bilateral contract) makes no commercial sense for reasons discussed below, and also pays no regard to the context in which the Policy was placed including the Marsh questionnaire. By contrast, the straightforward reading of the clause advanced by Medgulf, which I accept, makes commercial sense, is supported by the factual matrix and is more consistent with the endorsement as a whole.

162. Contrary to Technip's submissions, I consider that there is significance in the nature of the property identified in the Schedule and that this has a bearing on how the exclusion is to be construed. The essential point is as follows, in the light of the endorsement as a whole. The Schedule lists the property which is the subject of the Buy-Back: in other words the property which is excepted from the exclusion. This is all property owned by

KJO. The parties have agreed that notwithstanding the "Existing Property Contractual Exclusion" above, it shall not apply to the scheduled KJO property. The parties must therefore have understood that if there had been no Buy-Back, the exclusion would be applicable. This in turn leads to the conclusion that the words "property … which the Principal Assured owns" must cover property owned by KJO. In other words, KJO comes within the scope of the words "Principal Assured". This is scarcely surprising, in circumstances where the two joint venture partners in KJO are both specifically identified as Principal Insureds.

163. Technip's contrary argument posits that, as far as Technip's potential liabilities for damage to KJO's property is concerned, the listing of the specific property in the Schedule was irrelevant. In my view, this makes no commercial sense, and certainly far less commercial sense than Medgulf's contrary argument.

164. It is difficult, to say the least, to see the rationale for the parties specifying particular KJO property as being insured against damage, when the position for all practical purposes is (on Technip's case) that damage to all of KJO's property is covered, provided that the damage is not caused by KJO itself but rather is caused by another Principal Assured such as Technip. The supposed rationale is even harder to discern when one takes into consideration the fact, as is obvious from the question and answer in the Marsh questionnaire, that the identification of the relevant third party property was relevant for the insurers' consideration of the risk and their exposure. Mr MacDonald Eggers also realistically accepted, albeit that there was no specific evidence on this point, that one would expect an additional premium to be paid in order to reflect the additional coverage for the property identified in the endorsement. This seems to me to be a very reasonable, indeed obvious, inference to be drawn from the listing of specific property and information as to its value and likely loss. Since the identification of the relevant property was relevant to the consideration of the risk and the premium to be charged, it cannot sensibly be the case that damage to all of KJO's property, whether or not specified, was insured, provided only that the damage was caused by Technip or another Principal Assured (other than KJO itself – a point to which I return below).

165. Thus, I agree with Medgulf's submission that the clear commercial rationale for the Existing Property Exclusion is to identify specific categories of property that are excluded, save to the extent that cover is specifically bought back; and that the exclusion and Buy-Back mechanism enables the insurer to assess and price the risk accordingly.

166. The strength of Medgulf's argument is illustrated and reinforced by considering the position of "Other Insureds". There are various "Other Insureds" who are specified in the policy; i.e. "Project managers", and "Any other company, firm, person or party (including contractors and/or sub-contractors and/or manufacturers and/or suppliers)" who have direct written contracts in connection with the Project with other insureds. Since the policy is a composite policy, each of these "Other Insureds" would be party to a bilateral contract with Medgulf on the terms of the Policy. The bilateral contract with those Other Insureds therefore, in my view, includes Endorsement 2, since that forms part of the Policy.

167. If one of the Other Insureds caused damage to the Platform and brought a claim, there could be no realistic argument that the exclusion in limb 1 was inapplicable. Assume

that a claim was made by X, who is one of the Other Insureds. X could not contend that the words "the Principal Assured" included X itself, let alone was confined to X itself in the context of X's bilateral contract. This is because X is not a Principal Assured at all. Accordingly, in the context of X's bilateral contract, "the Principal Assured" must refer to someone else who fits that description. In that context, it must obviously include KJO. The short answer to X's claim would be that the exclusion applies, because the relevant damaged property was owned by one of the Principal Assureds (i.e. KJO). The same short answer applies to the claim of Technip. Thus, the critical words of the endorsement in the context of limb 1 do not mean something different in the context of claims by KJO or Other Insureds or Technip. In each case, what matters is the identity and nature of the relevant property which has been damaged. Limb 1 is therefore not concerned with who has a liability to whom.

168. In his oral reply submissions, Mr MacDonald Eggers sought to meet Medgulf's argument, based on the position of "Other Insureds", by submitting that Endorsement 2 did not concern Other Insureds at all. I do not accept this argument. The Endorsement forms part of the Policy. The opening words are quite general: cover for existing property is subject to the exclusion and Buy-Back. The Endorsement (specifically limbs 1 and 2 of the exclusion) applies generally to claims made by any of the insureds under the Policy: i.e. whether they are claims made by persons falling within the definition of "Principal Insureds" or by "Other Insureds". The application of the Endorsement to all insureds is confirmed by the opening words of the exclusion: "The coverage provided under Section II of this policy shall not apply to any claim ….". It is true that limb 3 is not relevant to the position of Other Insureds. But this is not because the Endorsement is not binding upon the Other Insureds. Rather, it is because limb 3 only applies where the claim for damage is one for which the "Principal Assured" (i.e. not all insureds) is liable pursuant to an indemnification or hold harmless or similar provision.

169. Technip's construction has a number of other surprising uncommercial consequences. It has the illogical effect that exactly the same loss, in respect of categories of property to which the endorsement potentially applies, will be covered if claimed by one insured, but will not be covered if claimed by a different insured. I do not consider that there is anything in the language of the endorsement, when viewed in its commercial context, which would produce this result.

170. As previously discussed, the effect of Technip's submission is also that its potential liability for damage to KJO's property is unaffected by the terms of the endorsement and that there is therefore coverage for all of KJO's property whether or not listed in the Schedule of Existing Property. This gives rise to the question: what, therefore, was the point of including a list of certain specific property in that Schedule? On Technip's case, the reason for so doing must have been to ensure that if KJO (meaning either of the two joint venture partners, AGOC and KGOC) damaged its own property, there would be coverage for the resulting liabilities. Mr Brocklebank accepted that it is possible to conjure scenarios where a person could be liable for causing damage to property which he himself has an ownership interest; for example a liability of one co-owner to another in respect of jointly owned property, or a liability for a third party's loss of use of an asset which an owner has damaged.

171. However, such scenarios seem to me to be a very long way from the subject-matter of this insurance, and the real risks associated with the carrying out of the Project. The "Interest" section of the policy identified the subject matter of the coverage as: "All

works and operations connected with the Khafji Crude Related Offshore Projects (KCROP), including but not limited to project studies, engineering, design, project management, procurement [etc]". This description clearly encompassed the work and obligations which Technip was to perform in relation to the Project under the Contract. The same is true of the somewhat similar language in the "Scope of Insurance" clause: "Covered activities include but not limited to: design, engineering, management [etc]". It is therefore no surprise that, as I was told, it was Technip which had arranged the insurance. The fact that Technip did so is consistent with the way in which the questionnaire was answered. Thus, the answers to the question concerning "Past Loss Record" referred to Technip's record, with separate information about "our subcontractor COOEC". Similarly, the answer to question 9, concerning third party property, was the table listing KJO's property. No doubt this was because, as far as Technip was concerned, KJO was a third party – albeit that the intention appears (from the answer to question 4, concerning parties to be insured) to include coverage for AGOC alongside Technip and its subcontractors. It is also consistent with clause 15 of the Contract, which requires Technip to take out various insurances.

172. Against this background, it is apparent that the significant liability risk was that Technip, or those for whom it was responsible (or perhaps others) would cause damage to the property of third parties, and in particular KJO whose property was in the vicinity, in the course of carrying out the extensive work that the Contract required. There is nothing to suggest that the parties were concerned to deal with the risk that one of the joint venture partners would cause damage to its own property, and that this was the reason why certain specific KJO property was subject to a Buy-Back. It is far more plausible to suppose, as the response to the Marsh questionnaire indicates, that the parties were concerned to deal with the risk that KJO's property, in the vicinity of the work being performed under the Contract, would be damaged by one of the other insureds (either a Principal Insured or an Other Insured), and in particular by Technip or those for whom they were responsible. The exercise of construction involves considering the commercial consequences of the rival interpretations. Medgulf's construction gives a very sensible reason why there was a Buy-Back (and the likelihood of an additional premium) in respect of specific KJO's property. Technip's construction does not.

173. Mr Brocklebank had a further point which in my view had force. For reasons already given, the property which the parties would, at least principally, have had in mind as coming within the scope of "existing property" would be the property of KJO, as the operator of the field. Mr Brocklebank submitted that the parties are unlikely to have had in mind Technip's property, as falling within "existing property". At the time when this type of insurance is being put in place, one would not expect a contractor such as Technip to have started work and therefore to have brought any property to the work site so as to be at risk of damage from covered activities. Mr Brocklebank did not submit that Technip's property fell outside the definition of "existing property". His point was that it would be odd to interpret the endorsement (as Technip's argument posits) as being applicable, as far as Technip was concerned, only to Technip's property in circumstances when, at the time that the Policy was put in place, the property had not even been brought to the field for the purposes of the Project. I agree.

174. Mr MacDonald Eggers placed reliance on various other authorities, in different contexts, where the composite nature of a policy had the result that one insured was not

prejudiced by the misconduct of another insured. He referred in particular to the decision of Siopis J in the Federal Court of Australia: *Alstom Ltd v Liberty Mutual Insurance Co and others* [2013] FCA 116. In that case, Alstom was successful in its argument that an exclusion, concerning unsuitable packing "through fault of or with the knowledge and consent of the Insured", did not apply where the fault was that of a co-insured (Compton Greaves) under the policy. In my view, however, the Existing Property Endorsement needs to be considered in the light of its particular wording and in the contractual setting that I have described. I do not therefore derive any assistance from considering very different policies placed in very different circumstances, and where the issues had no real similarity with the issue which I need to resolve.

175. A number of arguments were advanced by Technip based on the wording of the endorsement. Mr MacDonald Eggers placed emphasis on the word "the" before Principal Assured. Although he disputed this, I consider that if the endorsement had used the word "a", before Principal Assured, Technip's present argument would be unarguable. Regardless of whether or not that is right, I do not consider that the use of the word "the" rather than "a" or "any of the" is of any significance. Indeed, if one were to give a literal meaning to "any property [for] which the Principal Assured owns", one would be looking for property jointly owned by all of the Principal Assureds. As previously discussed, it is improbable to say the least, that such property would actually exist. Accordingly, a reasonable person reading the Policy, with the relevant background, would understand that the words referred to property owned by any of the Principal Assureds. Furthermore, the endorsement is a standard form, as is clear from the discussion in *Sharp* paragraph 9.5.1. The use of the word "the" reflects the fact that, as Mr Brocklebank submitted, there will be cases where the WELCAR policy has a single Principal Assured, with other insureds being identified as "Other Insureds".

176. In his oral closing, Mr MacDonald Eggers emphasised the location of the words "the Principal Assured". They occurred after words which referred to the claim for damage to or loss of use of any property. He submitted that this presupposed that the relevant "Principal Assured" must be the person answering the claim for damage. Here this was Technip. In addition, the same "Principal Assured" (again Technip) must be the owner of the property which has been damaged. Otherwise, a different meaning would be attached to "Principal Assured" in both parts of the sentence.

177. I disagree. The sentence, when read as a whole, is concerned to identify the nature of the claims which are excluded. Such claims have (for present purposes in the context of Limb 1) two relevant aspects: they must be (i) a claim for damage to or loss of use of any property; and (ii) such property must be owned by "the Principal Assured". The linkage involving the Principal Assured, in the context of Limb 1, is therefore between the Principal Assured and ownership of the relevant property. There is nothing in this language which suggests that the claim must be against a Principal Assured which itself owns the relevant damaged property. As already discussed, I reject for various reasons the argument that the Endorsement was concerned with protecting each individual insured from the consequences of damage to property which it owned.

178. Mr MacDonald Eggers submitted that "Principal Assured", in the context of limb 3, must mean the "Principal Assured" which has liability for the claim, or who is alleged to have had such liability. I agree that this is what it must mean in the context of limb 3, but I am not persuaded that the same conclusion should follow when those words are read in the context of limbs 1 and 2. Limbs 1 and 2 are not concerned with whether the

Principal Assured has liability or alleged liability for a claim. Unlike limb 3, they do not use the words "liable or claimed to be liable". Limbs 1 and 2 are concerned with the ownership (custody etc) of property, and thus the relationship between the Principal Assured and the relevant property. As Medgulf submitted, limbs 1 and 2 operate differently to limb 3. Limbs 1 and 2 are concerned with excluding liability in respect of particular property. Limb 3 is concerned with excluding liability which has its origin in particular contractual clauses.

179. I also did not consider that Medgulf's construction involved giving a different meaning to the words "Principal Assured" in the context of limbs 1 and 2 when compared to limb 3. In all cases, the reference is to any of the Principal Assureds defined in the Policy. As Mr Brocklebank said, what is different is not the meaning of Principal Assured, but rather the mechanism by which the exclusion operates.

180. I do not accept that the Cross Liabilities clause in the Policy affects the analysis. That clause contemplates that there may be a covered liability of one insured to another insured. It does not follow that all such liabilities are covered. That depends upon the terms of the Policy, and thus the answer to the critical question as to the effect of the exclusion in the endorsement. If, for example, Technip damaged one of the properties which were identified in the endorsement's schedule, the Cross Liabilities clause would make it clear that Technip could claim. Mr MacDonald Eggers accepted in his oral reply submissions that this clause did not provide a self-standing ground of liability.

181. Mr MacDonald Eggers referred to a number of other policy provisions. I accept, of course, that a policy should be construed in the light of all of its provisions. I will not discuss these other provisions in detail, since I also do not consider that any assistance is derived, in analysing the exclusion in the Endorsement, by considering the effect of other unrelated exclusions, or how the cancellation clause works, or how notice of occurrence would be given. Some of the issues raised in argument, in particular as to how other exclusions operate, are not straightforward. Even if I were to analyse each of the other exclusions within the Policy or other policy terms in detail, I would still need to come back to the language of the Existing Property Endorsement as a whole, in the context of the relevant factual background and in the light of the commercial consequences of the parties' rival constructions. I was unpersuaded that the other policy terms threw any light on how the endorsement is to be construed.

182. I also do not accept Technip's argument that Medgulf's construction results in there being no realistic cover for property damage. There is cover for damage to property owned by a Principal Assured where the property is identified in the schedule, because it has been bought back. There is also cover for damage to property which is not owned by a Principal Assured, and it is possible to identify realistic scenarios in which that might be the case. There may be damage to the property of a sub-contractor who qualifies as an Other Insured rather than a Principal Assured. Subject to the terms of the pollution exclusion, there may be damage to the property of third parties caused by pollution. If the Vessel had collided with another vessel in the vicinity of the Platform, then (again subject to the exclusions) there would be coverage. If Technip had caused damage to the Vessel itself, then that would in principle be covered. There would also be coverage for bodily injury, which falls completely outside the endorsement.

183. Ultimately, I was unpersuaded by all of Technip's points and I accept Medgulf's argument on this issue. The consequence is that liability under the Policy is excluded, and that therefore Technip's claim fails.

Limb 3

184. In the light of this conclusion, Medgulf's alternative argument based on limb 3 does not arise. I will therefore deal with the point briefly. I do not consider that the exclusion in limb 3 applies. The relevant liability of Technip to KJO arises (see Section D) under clause 5.2.3 or 12.6 of the Contract, or both. I do not consider that either of these clauses is an "indemnification, hold harmless or similar provision". They are both clauses which define the scope of Technip's liabilities under the Contract for the Work that it was engaged to carry out. The Policy clearly covers "Express Contractual Liability", and thus (broadly speaking) cover liabilities for bodily injury and property damage which arose in the course of Technip's contractual performance and were the result of Technip's fault. Clause 5.2.3 creates a fault-based liability for damage to KJO's property at or near the Work Site. Clause 12.6 makes it clear that Technip's fault-based liability extends to Subcontractors that it has chosen to employ. A reasonable person, with the relevant background knowledge, would not have understood limb 3 to apply the liability which arose under either or both of these clauses.

F3: The Watercraft exclusion

185. Again, in the light of my earlier conclusion on limb 1 of the Existing Property endorsement, Medgulf's alternative argument based on the Watercraft exclusion does not arise. I will again deal with the point briefly.

186. Endorsement 1 deleted the Watercraft exclusion contained in exclusion 5 of the main body of the Policy. This deletion was "subject to watercraft associated with the Project maintaining Protection and Indemnity (P&I) cover up to a minimum of hull value". The evidence is that the Vessel was indeed entered with Gard up to a minimum of hull value. The requirements of the "subject" were therefore met, so that there was no relevant exclusion. I agree with Technip that there is nothing in the wording of Endorsement 1 which required Technip to be a co-insured under the Gard policy. Accordingly, the Watercraft exclusion cannot be relied upon by Medgulf.

G: Quantum issues

187. Since Medgulf is not liable under the Policy to Technip, it is not necessary to resolve the disputes on quantum. However, in view of the possibility that my decision on liability may be appealed, it is sensible for me to set out how I would have resolved the quantum disputes had it been necessary to do so.

G1: Introduction to the issues

188. Technip's financial claim comprised two elements. The main element comprised sums which formed part of its liability to KJO. There were two principal components here. First, there were various costs associated with safeguarding the Platform in preparation for the necessary repairs. Secondly, there were the costs of actually carrying out the repairs in situ. This claim gave rise to various disputes between the parties and their experts.

189. In relation to the safeguarding costs, there was a fundamental dispute as to whether such costs were required to be incurred at all. Medgulf submitted that they were not, or at least Technip had not proved by any sufficient evidence that there was any liability on the part of Technip to KJO in relation to any aspect of these costs. In the event that there was a liability for such costs, there was a dispute on quantum which concerned the reasonableness of the figures relied upon by Technip. Dr Lamport's evidence, for Technip, was that the costs were in the range of US$ 8.039 million to US$ 15.765 million. Mr van Beek's evidence, for Medgulf, was that the appropriate figure (if any sums were to be awarded at all) was US$ 5.524 million.

190. In relation to the costs of actually carrying out the repairs, a key issue concerned the scope of the repair work which needed to be carried out or which it was reasonable to carry out. Dr Lamport's figures, and Technip's claim, was based upon the "Agreed Scope" of the work: i.e. the agreement, described in Section B above, between KJO and Technip which had been reached in the course of the discussions in May 2019. Mr van Beek's figures were based on what was referred to as the "Reduced Scope". His evidence was that it was not necessary or reasonable to do all of the work set out in the Agreed Scope: the "Reduced Scope" of work would be sufficient to restore the Platform to its pre-Allision condition. The main issue here concerned whether or not it was necessary or reasonable to allow for the entire removal and replacement of the tripod deck of the Platform.

191. The question of whether Technip's liability to KJO should be assessed on the basis of the "Agreed Scope" or Mr van Beek's "Reduced Scope" had significant implications for the quantum of the claim. Dr Lamport's figures, based on the Agreed Scope, was a range between US$ 9.068 million and US$ 10.264 million. Mr van Beek's figure, based on the Reduced Scope, was US$ 4.958 million. If, however, the court were to conclude that the Agreed Scope was the relevant approach, then Mr van Beek took issue with Dr Lamport's figures: Mr van Beek's figure for the Agreed Scope was US$ 7.329 million.

192. The second element of the claim was based not on Technip's liability to KJO as such, but upon the terms of the Policy which included "Claims Expenses" as part of the claimable "Ultimate Net Loss". Claims Expenses were defined as follows:

> "**"CLAIMS EXPENSES"** shall mean reasonable legal costs and other expenses incurred by or on behalf of the Insured(s) in the defence of any covered claim including attorney's fees and disbursements, investigation, adjustment, appraisal, appeal costs and expenses and pre- and post- judgement interest, excluding salaries, wages and benefits of the Insured's employees and the Insured's administrative expenses."

193. The experts were able to reach a fair measure of agreement on many of these expenses. For example, agreement was reached on the costs of the DNV survey as well as on the insurance cost for the offshore survey that had been carried out by CCC. There was disagreement, however, on whether the full amount which had been paid to CCC for the offshore survey should be recoverable, with Dr Lamport supporting a figure of US$ 2.53 million and Mr van Beek accepting only US$ 1.371 million.

194. This second element of Technip's case was reduced when its closing submissions were served, no doubt in the light of the evidence of Mr Cortas and the express exclusion in the Claims Expenses definition for salaries, wages and benefits of the Insured's employees and the Insured's administrative expenses. Accordingly, Technip said in its closing submissions that it was reducing its "Additional Expenses" claim by limiting it to the damage survey costs and the costs of extending the performance bonds provided by Technip. Subsequent to the conclusion of the trial, HFW on behalf of Technip wrote stating that it was no longer pursuing its claim under the Policy in respect of the costs of extending the contractual performance bonds.

195. The figures to which I have hitherto referred are contained in a schedule which formed part of Medgulf's closing submissions, and which conveniently set out Dr Lamport's position and Mr van Beek's final position. The latter contained some relatively minor changes to figures contained in Mr van Beek's reports, principally increases resulting from certain points that Mr van Beek accepted during expert discussions and correction of a double counting error. The topic of these changes was discussed at the conclusion of closing arguments, and Technip had an opportunity to consider the revised figures. I did not understand that there was any objection to the figures put forward as Mr van Beek's final position, and I therefore base my decisions on that schedule. The schedule is annexed to this judgment, and I have added a final column with my decision on the quantum of Technip's claim.

196. I was also helpfully provided, subsequent to the hearing, with a document prepared jointly by both parties and which contained reference to the documents and written and oral evidence bearing on the various items in the schedule.

197. If I were actually awarding any amounts to Technip, then it was common ground that allowance would have to be made for the US$ 500,000 deductible under the Policy. Credit would also need to be given for any recoveries made by Technip from Maridive pursuant to the arbitration award which was issued shortly before the trial.

G2: Legal principles

198. In *Coles v Hetherton* [2013] EWCA Civ 1704, the Court of Appeal was concerned with a number of issues (in a dispute between insurers) relating to the quantum of recovery

for the cost of repairing motor vehicles. Counsel for the (successful) claimant submitted (see para [24]) that:

> "… when loss was incurred by physical damage to a chattel and it could be economically repaired, then the diminution in value caused by the tort was measured by reference to the reasonable cost of repairs which, in practice, was "likely to be the lowest reasonably obtainable cost of repairs"."

199. In the judgment of the court, Aikens LJ set out the relevant principles, by reference to prior authority, as follows at paragraph [27]:

> "(1) Where a chattel is damaged by the negligence of another that loss (the "direct" loss) is suffered as soon as the chattel is damaged. (2) The proper measure of that loss is the diminution in value that the chattel has suffered as a result of the negligence of the defendant. This follows the general principle in awarding damages, i e that of restitution: see *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39, per Lord Blackburn. In Lord Hobhouse's phrase, "this can be expressed as a capital account loss". (3) If the chattel can be economically repaired, the claimant is entitled to have it repaired at the cost of the wrongdoer, although the claimant is not obliged to repair the chattel to recover the direct loss suffered. (4) Events occurring after the infliction of the damage are irrelevant to calculating the diminution in value measure of damages: see *Burdis v Livsey* [2003] QB 36, para 95. Thus, subsequent destruction of the chattel, or a decision to delay repairs (*The Kingsway* [1918] P 344), or an ability to have the repairs done at less that cost (*Jones v Stroud District Council* [1986] 1 WLR 1141) or for nothing (*The Endeavour* (1890) 6 Asp MC 511; *Burdis v Livsey* [2003] QB 36, where no sum was payable because the repairs were carried out under an unenforceable credit agreement) will not prevent the claimant from recovering the diminution in value of the chattel that has been caused by the negligence of the tortfeasor. (5) Generally, the practical way that the courts have calculated this diminution in value is to ask how much would be the reasonable cost of repair so as to put the chattel back in the state it was in before it was damaged. In general this is a convenient practice which we think the courts should continue to follow. Only if the sum claimed appears to be clearly excessive will the court be justified in investigating whether that sum exceeds the cost that the claimant would have incurred in having the repairs carried out by a reputable repairer."

200. Two other passages are also relevant:

> "[32] In summary, if a claimant, whose damaged chattel is capable of economic repair, chooses to repair it at a cost which is not reasonable, then the reason why he cannot recover that unreasonable cost as damages will be because that cost does not

> represent the diminution in value of the chattel. What is the diminution in value of a chattel or the "reasonable cost of repair" will always be a question of fact for the trial judge to determine if it is in dispute.
>
> …
>
> [44] The claim in respect of the physical damage to the vehicle is a claim in general damages and the measure of damages recoverable is the monetary amount of the diminution in value of the vehicle caused by the negligence of the defendant. That diminution in value figure is usually calculated, as a rule of thumb, by the reasonable cost of repairs (to the claimant) in a case where the vehicle is capable of economic repair. If, as is assumed by the form of the question in the third preliminary issue, it is the *insurer* that has arranged and paid for the repairs to the claimant's vehicle and the claimant then sues for the cost incurred by the insurer as the sum representing the diminution in value of the vehicle resulting from the negligence of the defendant, the court has only one question to consider. It is whether the actual sum claimed is equal to or less than the notional sum this claimant would have paid, by way of a reasonable cost of repair, if he had gone into the open market to have those repairs done. The court will examine the components of the notional overall figure which is said to represent what the claimant (not the insurer) would have had to pay if he had organised the repairs, to ensure that that sum represents the "reasonable cost" of repairs that the claimant would have had to pay. It will then compare that figure (stripped, if necessary, of any "unreasonable" elements) with the total sum representing the actual cost to the insurer, which will be the sum claimed by the claimant."

201. Although the parties' submissions addressed various aspects of reasonableness, and I was referred to a number of other authorities, including in Australia, I consider that the judgment in *Coles* provides appropriate guidance for the purposes of addressing the quantum issues in the present case, in particular those relating to the quantification of Technip's liability to KJO for the cost of repairs flowing from the Allision. As stated in paragraph [32], the "reasonable cost of repair" is simply a question of fact for a trial judge to determine. I need to deal only briefly with the principal points raised in that regard.

202. First, there is the question of the relevance, or otherwise, of the US$ 25 million figure in the Settlement Agreement in the determination of the reasonable cost of repair. The relevant principle, already discussed in Section A above, is as stated by Aikens J in *Enterprise Oil*:

> "Again, generally speaking, in order to claim under a liability policy where the insured has *settled* the claim of the third party the insured still has to demonstrate that it was or would have been liable to the third party. It cannot simply rely on the fact of

> the settlement to demonstrate either liability or that the amount of the settlement was reasonable. In order to show the settlement was reasonable, the insured must show that the amount of damage for which it would have been liable is at least as much as the amount paid under the settlement".

203. Accordingly, Technip needs to prove the amount of damage for which it would have been liable. This involves, in substance, proving the reasonableness of the repair costs which were being claimed by KJO; since Technip would have had no liability to KJO, in respect of the costs of repair, for anything other than the reasonable repair costs. The amount of the settlement cannot prove the reasonableness of the repair costs which were being claimed. It follows that I need to consider the extent to which Technip in fact had a liability to KJO for each of the items of relevant cost which were being claimed by KJO and in respect of which Technip alleges that it was liable. At times, Mr MacDonald Eggers accepted that this was the position: for example in an exchange at Day 5 page 124 (which it is not necessary to set out in full). At other times, he tended to elide the question of whether there was a liability for the amounts claimed with the reasonableness of the US$ 25 million paid. I do not accept that this elision was appropriate.

204. Secondly, Mr Brocklebank's submissions referred at times to a test of necessity. In its opening submissions, Technip submitted that "the cost of repair must be reasonable, in that the work must be necessary and the charges must not be extravagant". In support of that proposition, Technip referred to *The Pactolus* (1856) Swabey 173 and *McGregor on Damages* 21st edition, paragraph 37-006. The latter states:

> "The method of assessing the cost of repair has been elaborated in a number of cases. (1) The cost of repair must be reasonable, both in that the work must be necessary and the charges must not be extravagant".

In their opening submissions, Medgulf said that this was common ground.

205. In my view, as the quotation from *McGregor* indicates, necessity is really an aspect of reasonableness. It is not a separate point, certainly in the context of the present case. Here, the Platform was damaged, and repairs were necessary. The manner in which those repairs were to be carried out (for example, whether the tripod deck should be replaced), as well as the cost to be incurred in so doing, are aspects of reasonableness.

206. I do, however, agree with Mr Brocklebank's point that the word "extravagant" does not carry any connotation that the expenditure needs to be absurd or irrational. In *The Pactolus* itself, the judge used the word extravagant to refer simply to "charges exceeding the ordinary and accustomed rate". I do not consider that the word "extravagant" adds anything to the word "reasonable".

207. I also agree with Mr Brocklebank that the reference in the judgment in *Coles* to a sum claimed being "clearly excessive" does not result in an added dimension to the question of whether a sum was reasonable. Elsewhere in the judgment, and indeed earlier in subparagraph (5) itself, the court refers to reasonableness as being the relevant test. However, as Mr Brocklebank accepted, the courts as a practical matter are unlikely to be very receptive to an argument that a person, who had his car repaired at garage A,

could have had his car repaired more cheaply by taking it down the road to garage B whose charges were modestly below those of garage A. The reputation and reliability of garage A may well be a relevant factor, since reasonableness does not simply depend upon price. Moreover, in the area of the cost of repairs, as in many other factual areas with which courts are concerned, there will often be a range of reasonable prices which could be paid by the victim of a tort, and which will therefore be recoverable.

208. Thirdly, submissions were made as to how the court should approach reasonableness, where repairs had not been carried out, in the context of the existence of a range of possible costs for those repairs. I drew the attention of the parties to the decision in *Lion Nathan Ltd v C-C Bottlers Ltd* [1996] AC 1438, which was applied in *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191. Those cases considered the question of ranges in the context of claims for a negligent forecast and a negligent valuation. The relevant principle, as conveniently summarised in *Chitty on Contracts* 34th edition, para 29-195 is as follows:

> "Where the court must fix the "proper" valuation of a property there is normally a range of valuations which might have been made by reasonably careful valuers: the court must choose the figure which it considers to be the most likely outcome of careful assessment: the defendant is not given the benefit of damages being assessed by reference to the highest figure which might have been given without negligence".

209. In my view, this principle assists when considering aspects of Technip's argument based upon the ranges given by Dr Lamport. Ranges are potentially relevant whether repairs have been carried out or not. In each case the court is seeking to decide upon a reasonable cost of repair, and to arrive at a figure which can be the subject of a money judgment. However, the evidence available to the court is different in these two different situations, where repairs have or have not been carried out, and this has an impact on the court's decision-making process. Where a repair has been carried out and paid for, the court will be focusing on whether the amount actually paid was reasonable. There is a firm figure as a starting point, and the court can then consider whether or not that figure falls within whatever range of reasonable repair costs exists. Where no repair has been carried out, the court does not have that firm starting point. If the court is persuaded that (as may well be the case) there is a range of possible repair costs, then the court will need– in order to fix upon the appropriate figure to be awarded -- to decide the most likely outcome in terms of what the repair cost would be. This may well be a figure in the middle of a range, if the evidence shows that there is indeed a range. But it may be a figure either side of the mean, depending on the evidence. However, Mr Brocklebank was correct to submit that a claimant whose expert can identify a range cannot simply claim the highest value figure in the range, just as a defendant cannot simply ask for the cost of repair to be assessed on the basis of the lowest figure in the range. Ultimately, the court must decide what is the most likely outcome in terms of the reasonable cost of the particular repair. This is essentially the same approach as in *Lion Nathan*.

210. Finally, Mr MacDonald Eggers referred to the fact that the assessment of Technip's liability to KJO in the present case is not, strictly speaking, to be carried out by reference

to the diminution in value of the relevant asset. Clause 5.2.3 creates a liability on the part of Technip to carry out the repair. I agree, but this does not make any practical difference to the approach to the key factual question: what is the reasonable cost of repair for which Technip has proved its liability?

G3: The expert evidence

211. Both experts were clearly well qualified to give evidence on the topics that they addressed. It was to the credit of both witnesses that they had made serious efforts to reach agreement in so far as they could. Their joint expert report was a very helpful document which clearly set out the areas of disagreement, with reasons in a convenient summary form.

212. I considered that Mr van Beek was generally a more impressive and reliable witness than Dr Lamport. By the end of the cross-examination, which lasted approximately 2 ½ days, I generally had more confidence in the evidence given by Mr van Beek than Dr Lamport, where they differed. It seemed to me that Mr van Beek's evidence, taken as a whole, was more coherent. Dr Lamport agreed with many of the questions that were put to him in cross-examination. However, when challenged on documents or in areas which were (as it seemed to me) difficult for Technip, his answers were less than persuasive and also at times difficult to reconcile with other answers which he gave. These points will be illustrated in the more detailed discussion below.

G4: Safeguarding costs

213. A very significant part of Technip's claim concerned its alleged liability for the costs of safeguarding the Platform prior to carrying out the actual repairs. Dr Lamport's evidence was that these were in an amount ranging between US$ 8.039 million and US$ 15.765 million. The mid-point of this range is US$ 11.9 million. Mr van Beek's evidence was that extensive safeguarding was not required. He accepted that some measures were required in any event, and included the necessary costs in his repair cost estimates. However, he disputed the need for the very significant costs claimed by Technip and supported by Dr Lamport's evidence. Mr van Beek's evidence, and Medgulf's case, was based on their interpretation of two statements made by KJO and Atkins at the time, and the fact that hot work had been performed on the Platform, in relation to the J-tube installation, shortly before the Allision. Medgulf submitted that these three elements provided powerful (and in their submission conclusive) evidence that the Platform was already safe for hot work and for work of the kind involved in the anticipated post-Allision repairs. They all presented a consistent picture of a Platform in shutdown and safeguarded for the purposes of hot work and significant construction (such as the J-tube installation). On this basis, Medgulf submitted that the correct finding of fact is that no further well safeguarding was required before the repairs could be implemented.

214. In my view, each of the three matters relied upon by Medgulf individually, and all three taken together, suggest that the safeguarding costs which formed part of Technip's claim were not required, or at the very least raise very serious questions as to whether they were actually required. It is for Technip to prove, on the balance of probabilities, that they incurred a liability for these safeguarding costs. In my view, the evidence which they have adduced at the trial falls a long way short of satisfactorily addressing each of the points relied upon. That evidence consists of Dr Lamport's evidence, which

essentially seeks to explain away each of the three matters relied upon. I do not consider that he could do so satisfactorily. If Medgulf's case was to be addressed effectively, then in my view it would have been necessary to have had some evidence from KJO, or Atkins, or both. If this had been a claim made by KJO itself for US$ 11.9 million, or figures in the range identified by Dr Lamport, no court would conceivably have ordered payment of such a sum on the basis of the materials which were before me at trial. I do not see that any different result is reached in the context of a case where Technip must establish its liability to KJO for such sums.

215. The background is that KJO did, in the course of its discussions with Technip, assert a claim for significant safeguarding costs. A figure of US$ 11,630,000 was put forward in August 2019 as being the cost of temporary suspension of the two wells on the Platform by plugging and un-plugging. This figure was contained in a table, but there was no breakdown of how it had been computed. Technip's position in the discussions, prior to that time, had been that it was for KJO to present the Platform so that it was ready for the repairs to be carried out. It is not clear that that position changed, and there is no evidence that Technip ever took steps to look into detail at the merits of including this element of the claim, or to challenge it. This was probably because Technip was preparing for a commercial negotiation, in which the overall outcome was what really mattered. Mr Cortas accepted in cross-examination that Technip had not done any analysis to work out what safeguarding work was actually required, and had assumed that the Platform would be handed over free of hydrocarbons to allow repair activities; and that Technip did not know what KJO had already done.

216. The fact that Technip did not look in detail at the merits of the claim does not in itself affect its validity. As Medgulf accepted, ultimately the question of whether there was a liability for this sum is an objective question. However, it does serve to explain why Technip has been unable to produce, leaving aside Dr Lamport, any relevant evidence in support of its validity.

217. The first of the documents relied upon by Medgulf in its closing submissions, albeit the second chronologically, was produced in 2019. It is a report of Atkins headed "Structural Integrity Assessment and Repair Study of Damaged NR-09 Platform – Phase 2", and is dated 24 April 2019. On a page headed "Mitigation Implementation Schedule", Atkins stated:

> "The proposed Implementation Schedule for the chosen mitigation scheme is presented in Table 9-1, considering the criteria set in Section 5.1.
>
> In order to implement the repair mitigation schemes effectively with minimum possible schedule, experienced Offshore Repairs Contractor(s) shall be assigned to carry out the repair works.
>
> The major assumptions/considerations affecting the schedule are presented below.
>
> 1. As per KJO standard safety practice, temporary suspension of the two (2) Wells K-10 and K-213 is shall be performed prior to any repair/mitigation

> 2. Removal of piping, protection of Xmas trees and other topside facilities are expected to be carried before starting any repair works. (Atkins understand that NR-09 platform is currently in shutdown, hence hot work is permitted on the platform without further well intervention)".

218. This statement that hot work is permitted on the platform without further well intervention is, in my view, a clear statement to the effect that no significant work is required on the wells in order to prepare the Platform for the proposed repairs. Hot work is obviously a risky type of structural work, if not the most risky. Since it was permitted to take place on the platform without further safeguarding of the wells, the obvious conclusion – which was the one drawn by Mr van Beek – was that the wells had already been safeguarded. If that conclusion was not to be drawn, then in my view it would be necessary for some evidence to be called, either from KJO or from Atkins, or preferably both, which gave a convincing explanation as to why this reading was incorrect. I did not consider that paragraph 1, quoted above, assisted in negating the conclusion that Mr van Beek drew. Paragraph 1 appears simply to identify KJO's standard safety practice. It is paragraph 2 which says that hot work is in fact permitted without further well intervention.

219. I agree with Medgulf's submission that Dr Lamport's attempts to maintain a contrary position were unconvincing. Dr Lamport accepted in his evidence – and he really had no choice but to accept – that paragraph 2 meant that demolition of the topside piping, including hot works, could be done without safeguarding the wells. However, he could in my view give no satisfactory explanation as to how this could be the case if the wells were not already safeguarded. He suggested that whether well safeguarding was required before hot works depended on "how close you are to the well". There was a "hazardous area where you can have a spark". But he did not actually know the size of the hazardous area. He accepted, however, that the Platform was "very small". Mr van Beek's evidence was that the Platform was so small that the hazardous area would encompass most above water areas on which repairs might be carried out. Given the small size of the Platform, it is in my view overwhelmingly likely that if the Platform was safe for hot work in dismantling the piping, it must also be safe for hot work in Mr van Beek's Reduced Scope.

220. Dr Lamport then suggested that there was a distinction between the "demolition" (for which well safeguarding was not required) and "actual repairs" (for which well safeguarding was required). In the context of hot work, I did not consider that this distinction had any validity. As Mr van Beek said, "Hot work is hot work."

221. This document on its own gives rise to serious question marks as to whether Technip in fact had a liability to KJO for the safeguarding costs claimed. It does not, however, stand on its own. In the context of a pre-survey inquiry, Ahmed Sairat, a KJO production engineer, informed Technip that there were no live subsea lines around the Platform as the KJO operation was in shutdown and that:

> "All gas and oil lines are mothballed with minimum preservation pressure. (gas line = 100 psig & oil line < 50 psig)".

222. There was a dispute between the experts as to what was meant by all the gas and oil lines being mothballed with minimum preservation pressure. Mr van Beek's evidence

was that this indicates that there were no hydrocarbons present in the lines or in the first section of the lines closest to the Platform. Inert gas had been injected into the lines, flushing the hydrocarbons. He said that for gas and oil lines "which you want to make safe for hot work, you use the terminology mothballed and preservation pressure". He said that this could not refer to anything other than inert gas. Dr Lamport did not accept this, but it seemed to me that Mr van Beek's explanation fitted well with the Atkins document (discussed above) as well as the evidence concerning the J-tube.

223. The factual position in relation to the J-tube was that this was installed in March 2015, a few months before the Allision. I accept Mr van Beek's evidence that this installation would have required hot work, and it was not clear to me that Dr Lamport actually disputed this. His suggestion appears to have been that the hot work may not have taken place in a hazardous zone. However, given the small size of the Platform, I thought that this was highly unlikely. He also appeared to suggest in his evidence that, for some reason, KJO may have permitted this hot work to be carried out even though the wells had not been safeguarded:

> "KJO …. have their certain procedures in place, what requirements they required … and those pipe supports did not require suspension of the wells otherwise they wouldn't have put it in their bid to have it done… So on offshore platforms, you can do work on them all the time, there is always hot works done … it just has to be done safely."

In my view, however, the rational explanation for the carrying out of work on the J-tube installation, which did require hot work, is that the wells had been safeguarded.

224. Ultimately, much of Dr Lamport's evidence on this topic (and indeed in Technip's closing submissions) was based on the proposition that KJO had included a substantial sum for safeguarding in the figures which they presented, that there was no reason for them to do so if this work was not required, and that Technip would have to comply with KJO's requirements. However, the assertion by KJO that such work was required, and should be paid for by Technip, cannot in itself establish that Technip had a liability to KJO for this work. It certainly cannot do so in circumstances where the evidence relied upon by Medgulf suggested very strongly that the safeguarding work was not required, and where Technip could in my view produce nothing of any weight to counter the strength of that evidence.

225. Accordingly, the claim in respect of the safeguarding costs fails.

G5: Repair costs: Agreed Scope or Reduced Scope?

226. The principal issue here concerned whether it is reasonable for the repair costs to include the complete replacement of the tripod deck. The DNV-GL findings indicated that there was no, or at least no significant, damage to the upper part of the tripod deck in consequence of the Allision. However, the Agreed Scope repairs envisaged the complete replacement of the deck and supporting structure. Medgulf contended that this was not necessary, and that the reasonable repair costs should only include Mr van Beek's "Reduced Scope" costs. Technip contended that the removal and replacement of the tripod deck, which was part of the scope of repairs agreed between KJO and Technip in the "Agreed Scope" was a reasonable method of repair.

227. In cross-examination, Dr Lamport readily and fairly accepted that Mr van Beek's "Reduced Scope" was technically feasible and would have repaired all the damage caused by the Allision. I was unpersuaded that Technip's liability to KJO would extend beyond the costs of implementing the Reduced Scope. Two separate matters feed into this conclusion.

228. First, the Agreed Scope repairs would have been significantly more expensive than the Reduced Scope repairs. The bottom line figures for the cost of the repair items which are set out in items 14 – 22 of the Appendix, are US$ 4.958 million for the Reduced Scope and US$ 7.329 million for the Agreed Scope, using Mr van Beek's figures. Dr Lamport's figures for the Agreed Scope are significantly higher: US$ 9.068 – 10.264 million. Even on Mr van Beek's lower figure for the Agreed Scope (which Technip contended to be too low), there was a significant difference in the cost. It is true that much of this difference is related to the vessel to be used for the repairs: Mr van Beek used a jack-up barge for his Reduced Scope, but a more expensive jack-up rig for the Agreed Scope. However, as Mr van Beek said in evidence, there was still a large amount of money – some US$ 700,000 – which is not accounted for by that difference.

229. Secondly, it was in my view clear on the evidence that there were increased risks associated with the Agreed Scope as compared to the Reduced Scope. Mr van Beek said, in cross-examination, that the biggest difference between the two scopes was:

> "… that you introduce more risk by disconnecting all the piping from the risers, which is connected to other platforms and the reservoir and also you introduce more risk by taking out and you need to disassemble a large portion of the structure, you don't know what the impact is of residual stress if you remove – a large cost construction on both the tripod deck, to take the tripod deck out and bring a new deck you need to remove that complete structure and that structure is in place to keep the top part of the legs together, it is part [of] the integrity but if you remove you have a high risk that residual stresses will give a lot of deviations in the structure.
>
> But also removing the topside piping connected to the risers brings more risk and the transport of the complete tripod deck in a plane subject to wind load introduces more risk. So in the ranking of safety objectives and doing a risk assessment for the construction methodology, I would never change out the tripod deck and the piping and the structure involved. If it is not damaged, it is not needed, it brings more risk and is more expensive".

230. Shortly before this passage in his evidence, Mr van Beek referred to the fact that during the removal and reinstallation, the platform would be "subject to wind load and even create more risk that you damage the Christmas tree". The so-called Christmas trees are very important structures of a Platform such as the present.

231. I considered that this evidence was logical and persuasive. Contrary to one submission advanced by Technip in its written closing, Mr van Beek did not accept that the proposition that the tripod deck removal was a reasonable repair proposal. His response

to that proposition was that the tripod deck removal and the installation of a new one was "not necessary because it is simply not damaged". He also said in his evidence that there was no reason at all to do this.

232. It seemed to me to be self-evident that the work involved in replacing the tripod deck and installing a new one would require considerably more offshore work. Dr Lamport said in his evidence, unsurprisingly, that "if you are offshore you have to have a vessel to work off of to have the people on, then you are working over water subject to the weather so it is a much more expensive and risky to do offshore work than it is onshore work".

233. The "Agreed Scope" clearly involved more offshore work than the "Reduced Scope": for example, the tripod deck removal and reinstallation would require the removal and installation of piping which would involve some 10 days work. Dr Lamport agreed that the Agreed Scope would involve demolition work, but refused to accept that it was significant. It seems to me, however, that the removal of all the piping, over a period of 5 days, was clearly significant work. I was also not impressed by Dr Lamport's later suggestion (which was made for the first time in the course of cross-examination) that the Reduced Scope would require an equivalent amount of time to carry out temporary bracing work. It also seemed to me to be self-evident that the removal and replacement operation would create more significant risks of further structural damage, for example to the Christmas trees. Again, Dr Lamport refused to accept that this was so, and again I found Mr van Beek's evidence on this point to be far more persuasive than Dr Lamport's.

234. In summary, I accept Medgulf's submission that it is self-evident that the Reduced Scope involves less offshore work and less risk, and I accept Mr van Beek's evidence in that regard. Both the Agreed Scope and the Reduced Scope involve the same offshore work to repair dents and cracks in various members. In addition, the Agreed Scope involves the demolition of a large part of the Platform and the installation of a substantial new structure. That demolition and installation work all has to be conducted offshore; and the installation would involve significant offshore work to connect the new structure to the remaining elements of the Platform. On top of that, the Agreed Scope requires the demolition and subsequent reinstatement of all of the topside piping. On any sensible view, the Agreed Scope requires more offshore work and more risk, as well as greater expense.

G6: Reduced Scope – repair costs

235. It is therefore necessary to consider what the reasonable repair costs of the Reduced Scope were. Medgulf's final figures (as set out in the Appendix hereto) were US$ 4.958 million for the repairs themselves, and a total of US$ 6.264 million for the overall costs including ancillary items such as KJO's management and supervision. These figures contained, as previously discussed, small adjustments to the figures set out in Mr van Beek's revised table 7 produced as part of a supplemental report. This contained a line by line analysis of the various costs.

236. A significant part of those costs were referable to the use of a jack-up barge for the purposes of the repair. The evidence addressed the suitability of a jack-up barge (as opposed to a more expensive jack-up rig or "DPV" or dynamic positioning vessel) for the purposes of this work. Here again Dr Lamport's evidence was less than satisfactory.

As Dr Lamport accepted in the joint memorandum, Technip itself had originally proposed a jack-up vessel (i.e. a barge). When asked about this towards the beginning of cross-examination, he was asked whether it would have been a "technically appropriate way of doing it". His response was: "if it would have been allowed you could use a jack-up vessel to do it, correct". He explained that the reason that he had given for not using it was that KJO had rejected it. He did not at this stage in his evidence provide any technical reason as to why a jack-up barge could not be used: he referred only to KJO's refusal to accept a jack-up vessel and its requirement for a DPV vessel. In his evidence on the following day, however, Dr Lamport gave an explanation as to why a DPV was required. He suggested that when the wells were first drilled (i.e. back in the 1960's), a jack-up rig would have left impressions in the sea floor, and that the use of a jack up barge would create another set of holes which, if they start overlapping, could cause big problems including safety problems. He said that he had considered why Technip was not allowed to use a jack-up, and why KJO requested a DPV, and "so I said oh, why was that and that is the reason I came up with".

237. It seemed to me that there were considerable difficulties with this evidence. There was no documentary or indeed other evidence supporting the proposition that KJO's refusal to allow a jack-up barge, and to require a DPV, was in any way related to holes on the seabed. Mr van Beek in his evidence explained why he considered that there was no technical validity to this point: in short, because nothing that happened 50 or 60 years earlier could have had any relevant impact. Mr van Beek said that he had "never heard of that in my life, that you need to use the same footprint for the holes that are created 60 years ago".

238. It also did not seem to me that there was any clear evidence that KJO had in fact refused to allow a jack-up barge and that they had insisted on a DPV. Even if they had refused to allow it, however, that would not entitle KJO to recover from Technip the cost of using a more expensive DPV or a jack-up rig in preference to a jack-up barge, in circumstances where the latter was technically suitable. Dr Lamport had earlier in his evidence indicated that there was no technical reason why a jack-up barge could not be used, and his later evidence about holes seemed to me to depart from that evidence. On the evidence, I see no technical reason why a jack-up barge could not have been used, and I accept Mr van Beek's evidence that this was a suitable means by which to carry out the repair.

239. Generally speaking, I did not see any reason for rejecting the detailed line-by-line analysis of costs of Mr van Beek. I have generally preferred his evidence on important issues to those of Dr Lamport, and it is also fair to say that the focus of Dr Lamport's figures was the cost of the Agreed Scope rather than criticism of Mr van Beek's figures for the Reduced Scope. Accordingly, I accept Mr van Beek's figure of US$ 4,958,166 in respect of items 14 – 23 in the Appendix. These items relate to project management and engineering, mobilisation and demobilisation, and offshore repairs (including downtime). They broadly correspond to the work covered in a quotation from CCC which Dr Lamport had used for the purposes of his comparison.

240. Items 25 – 38 in the Appendix are various other costs. These costs merit some brief further discussion.

241. Item 27 concerns costs to be incurred by KJO. Dr Lamport's evidence in his written report was that he had seen no documentation that explained how KJO (or indeed

Technip) generated their engineering assistance estimate for the construction phase. Dr Lamport referred to a figure of US$ 523,000, which was a figure given by or on behalf of KJO in 2019. He said that this cost was "most likely associated with a third-party consultant, such as Atkins, providing assistance to KJO". The cost therefore "most likely includes for an Atkins representative to be offshore during at least a portion of the offshore repair work, which is fairly standard practice for an owner". He said, however, that given that "no back-up documentation has been found, I have taken the lower and upper range for KJO's estimate as US$ 500,000". By contrast Mr van Beek said, in the joint report, that since KJO would not be "executing engineering, already done by Technip and reviewed by DNV … the provisions for review of engineering are already included in the other owner's costs in this statement". He said that the costs agreed to compensate the owner are well covered in other sections.

242. In my view, item 28 is an area where the fact that the repairs have not actually been done (so that there was no actual engineering assistance carried out by KJO), combined with the absence of evidence from KJO as to how relevant (projected) costs are broken down, lead to the conclusion that Technip has failed to prove that it was liable for this amount to KJO. Dr Lamport's evidence, summarised above, indicates uncertainty as to exactly what these costs are, and in my view there is no sound basis for a conclusion – based on Dr Lamport's view of reasonableness – that Technip incurred a liability to KJO in this amount.

243. In these circumstances, and given my general preference for the evidence of Mr van Beek over that of Dr Lamport, I would not consider it appropriate to award any sums greater than those accepted by Mr van Beek in relation to items 25 – 32 in the Appendix, which are generally concerned with additional engineering, management, supervision and inspection costs.

244. A separate issue concerns a significant sum of money (between US$ 1.876 million and US$ 1.959 million on Dr Lamport's figures) for a dimensional survey. The factual position here, as Medgulf submitted, was that very extensive information concerning the condition and dimensions of the Platform was already available, in particular from the survey which had been carried out by CCC in December 2017/January 2018. In 2019, Technip did not consider that a further dimensional survey was required, and their position was that they would not need a further survey if they were to do the repairs. The evidence does not in my view establish that another contractor would have required a further dimensional survey. I was therefore not persuaded that the substantial cost of a further survey was reasonable.

245. The only area where I would consider it appropriate to increase Mr van Beek's figures is the contingency (item 36). In *The Brillante Virtuoso* [2015] EWHC 42 (Comm) para [243], Flaux J referred to prior authority stating that a "large margin should be applied to the arithmetical calculation of the cost of repair". In that case, a figure of 10% was applied as a contingency, in circumstances where there had been limitations in carrying out inspections to ascertain the extent of damage. That is not the case here; detailed survey work had been carried out, and I accept Mr van Beek's overall assessment that this was not a particularly complex repair operation. However, it seems to me that Mr van Beek's proposed contingency of US$ 54,939 – which was 5% applied to only a relatively small part of the projected cost – was too low, and overstated the level of certainty associated with the cost of repair. I think that it is appropriate to apply a 5% contingency to all of the costs which I would have awarded in relation to items 14 – 36.

These items total US$ 6,209,173, and therefore the contingency is increased to US$ 310,458.

G7: Miscellaneous costs

246. *Insurance (Item 40).* In the joint report, Dr Lamport explained that the difference in the experts' insurance cost figures is a consequence of their disagreement as to the scope of the cost of repairs to the Platform. Since I have accepted Mr van Beek's evidence as to the scope of repairs, I will also accept his figures for insurance cost: US$ 190,385.

247. *Withholding Tax and VAT (Item 41).* Dr Lamport gave a range for these two items collectively. The lower bound of his range was US$ 788,019. This correlated with figures in cost estimates provided by Technip to AGOC in October 2019, where the substantial majority of this sum was VAT (US$ 753,477) with withholding tax amounting to US$ 34,542. Dr Lamport said in cross-examination that he was not a VAT expert, and that he had "assumed Technip would know how to calculate this number so, you know, if they said they had to do it that way that is the way it is". He went on to say that he had assumed that Technip knew what they were doing.

248. Medgulf submitted that Technip had not adduced any evidence either of the applicable VAT regime or of how it would apply to items making up the cost estimates. Nor was there any competent evidence as to whether any VAT would be capable of being reclaimed by the paying party. There was therefore no evidential basis for any VAT amount in any cost estimate. I agree. Indeed, Technip's evidential difficulty with this aspect of their case may explain why VAT and withholding tax were not addressed in their closing submissions.

249. As far as withholding tax is concerned, Mr van Beek accepted US$ 16,662 in respect of this sum. This was below the figure of US$ 34,542, which was calculated (in Technip's October 2019 letter) by reference to the quotation from CCC for the repair work. Since I have not proceeded on the basis of that quotation (which formed the basis of Dr Lamport's figures), but rather have accepted Mr van Beek's Reduced Scope, I see no reason to disagree with Mr van Beek's figure for withholding tax of US$ 16,662.

250. *CCC offshore survey.* The only remaining issue with which I have not previously dealt concerns the quantum of the claim for the CCC offshore survey work carried out in late 2019/early 2018. In contrast to most of the other disputed figures, the figure of US$ 2,530,000 was actually incurred by Technip in relation to CCC's work. This was a figure based on a contract price which, as Technip submitted, arose from a competitive tender, and this was followed by CCC reducing its quoted price. Although Mr van Beek had criticisms of the amount of work carried out, I was not attracted by these criticisms. As Mr Cortas explained, a comprehensive survey was required, in order to get the most complete data for the purposes of repair. Overall, I considered that it was reasonable for Technip to have CCC do the survey which they did, and that the cost incurred came within the range of reasonableness.

251. I have included a final column in the Appendix which sets out the relevant amounts which I would have awarded to Technip, if liability had been established under the Policy. For that purpose, I have – in the case of items 14 – 23, simply included the final figure.

252. The sums set out in the Appendix total: US$ 10,377,059 (US$ 3,650,381 + US$ 6,519,631 + US$ 207,047).

CONCLUSION

253. Technip's claim under the Policy fails because of limb 1 of the exclusion in the Existing Property Endorsement.

254. If the exclusion in limb 1 had not applied, then Technip's claim would have succeeded in the sum of US$ 10,377,059.

APPENDIX

Item	Description	Dr Lamport	Mr van Beek (Reduced Scope)	Mr van Beek (Agreed Scope)	Judge's Decision
Scope definition					
1	DNV survey[2]	US$328,458	US$328,458	US$328,458	US$ 328,458
2	CCC offshore survey*	US$2,530,000	US$1,371,347	US$1,371,347	US$ 2,530,000
3	Insurance for offshore survey*	US$87,995	US$87,995	US$87,995	US$ 87,995
4	TPAD internal costs*	US$2,346,530	US$1,187,171	US$1,187,171	0 (No longer claimed)
5	TPAD survey costs*	US$88,126	US$88,126	US$88,126	0 (No longer claimed)
6	Atkins survey	US$503,928	US$503,928	US$503,928	US$ 503,928
7	KJO owner's cost	US$100,000	US$100,000	US$100,000	US$ 100,000
8	Salaries, travel cost of ESD and shareholders attended meetings by KJO	US$200,000	US$100,000	US$100,000	US$ 100,000
9	**Scope definition subtotal**	**US$6,185,037**	**US$3,767,025**	**US$3,767,025**	**US$ 3,650,381**
Safeguarding (if required)					
10	Well safeguarding	US$7,140,000-US$14,280,000	US$5,435,762	US$5,435,762	0
11	Safeguarding risers and pipelines	US$626,020-US$1,105,544	US$88,320	US$88,320	0
12	Safeguarding topside piping	US$273,847-US$380,411	Included in no. 11 above	Included in no. 11 above	0
13	**Safeguarding subtotal**	**US$8,039,867-US$15,765,955**	**US$5,524,082**	**US$5,524,082**	**0**

[2] Costs marked with an asterisk are claimed as Additional Losses.

Item	Description	Dr Lamport	Mr van Beek (Reduced Scope)	Mr van Beek (Agreed Scope)	Judge's Decision
Platform Repairs					
14	Mobilisation/demobilisation	US$1,174,000	US$361,600	US$440,000	
15	Project management and engineering	US$275,000-US$316,250	US$212,160	US$224,640	
16	Offshore repairs	US$7,701,500-US$8,856,725	US$4,221,686	US$6,401,125	
17	- Tripod deck removal	- Inc.	- Not required	- Inc.	
18	- Jacket repair works	- Inc.	- Not required	- Not required	
18a.	- Divers	- Inc.	- Inc. US$17,189	- Inc. US$60,161	
19	- New tripod deck installation	- Inc.	- Not required	- Inc.	
20	- Topsides piping materials	- Inc.	- Not required	- Inc.	
21	- Topsides offshore hook-up/comm.	- Inc.	- Included to extent required	- Included to extent required	
22	Marine spread stand-by costs	- Inc.	US$162,720	US$264,080	
23	Adjustment for repairs not attributable to Allision	(US$82,380)	(US$164,398), already included	(US$164,398), already included	
24	**Platform repairs offshore subtotal**	**US$9,068,120-US$10,264,595**	**US$4,958,166**	**US$7,329,845**	**US$ 4,958,166**
25	Technip Additional Engineering*	US$229,667	US$229,667	US$229,667	US$ 229,667
26	Engineering during construction phase				

Item	Description	Dr Lamport	Mr van Beek (Reduced Scope)	Mr van Beek (Agreed Scope)	Judge's Decision
27	- KJO	US$500,000	Included in no. 29 below	Included in no. 29 below	
28	- Technip	US$425,000	US$554,440	US$665,328	US$ 554,440
29	Owner's management and supervision	US$1,329,000	US$422,400	US$422,400[3]	US$ 422,400
30	Third-party inspection services				
31	- KJO	US$144,255-US$186,300	Included in no. 29 above	Included in no. 29 above	
32	- Technip	US$29,700-US$44,550	US$44,500	US$44,500	US$ 44,500
33	EPC contractor's fee, overhead and profit	Included in other costs	Included in other costs	Included in other costs	
34	Dimensional survey	US$1,876,250-US$1,959,275	Not required	Not required	
35	Adjustment for repairs not attributable to Allision	(US$78,214)	See no. 23 above.	See no. 23 above.	
36	Contingency	US$1,981,760-US$2,182,219	US$54,939 (in addition to weather downtime per no. 22)	US$59,676 (in addition to weather downtime per no. 22)	US$ 310,458
37	Cost to replace J-tube	Not required	Not required	Not required	
38	**Platform Repair Subtotal**	**US$15,505,537-US$17,042,392**	**US$6,264,112**	**US$8,751,416**	**US$ 6,519,631**
Miscellaneous costs					
39	Geotechnical investigation	Not required	Not required	Not required	

[3] Mr van Beek estimated US$422,400 for the Reduced Scope; he did not produce a separate estimate for the Agreed Scope.

Item	Description	Dr Lamport	Mr van Beek (Reduced Scope)	Mr van Beek (Agreed Scope)	Judge's Decision
40	Insurance	US$500,000	US$190,385	US$284,481	US$ 190,385
41	Withholding Tax and VAT	US$788,019—-S$906,222	WHT: US$16,662 VAT: US$0	WHT: US$17,598 VAT: US$0	US$ 16,662
42	Performance bond	Not attributable to Allision	Not attributable to Allision	Not attributable to Allision	0 (not pursued)
43	**Miscellaneous costs subtotal**	**US$1,288,019-US$1,406,222**	**US$207,047**	**US$302,079**	**US$ 207,047**