Neutral Citation Number: [2014] EWHC 2132 (TCC)

Case No: HT-10-355

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 June 2014

Before :

THE HON MR JUSTICE RAMSEY

- -

Between :

Bluewater Energy Services BV	**Claimant**
- and -	
(1) Mercon Steel Structures BV **(2) Mercon Holding BV** **(3) Mercon Groep BV**	**Defendants**

- -

Adam Constable QC, Camille Slow and Paul Bury (instructed by **Ince & Co LLP**) for the **Claimant**
David Quest QC and Frances Pigott (instructed by **Osborne Clarke**) for the **Defendants**

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Contents

Mr Justice Ramsey :

Introduction

1. These proceedings relate to claims arising under a sub-contract ("the Contract") made between the Claimant ("Bluewater") and the Defendant ("Mercon") for the fabrication of a tower based soft yoke mooring system ("SYMS") for installation as part of the development of the Yuri Korchagin Field in the Caspian Sea.

2. Bluewater was a company in the Bluewater Group. Companies within that group entered into a contract with the Russian oil company, Lukoil, for the design, construction and installation of the SYMS.

3. Mercon in turn sub-contracted parts of the Contract work to a number of companies, including Astrakhan Shipbuilding Production Association LLC ("ASPO"), based in Astrakhan.

The SYMS

4. The SYMS consisted of various components which included the sub-structure which was pre-fabricated by ASPO under its subcontract with Mercon. There was then a Central Column which was a tubular section. This was manufactured by SIF, a subcontractor to Mercon based in Holland. The Central Column was delivered to Mercon for the fitting of stiffeners/trunnions before being transported to Astrakhan where it was integrated with the sub-structure. Together they formed the Jacket. Another component was the piles on which the Jacket was to be installed. These were fabricated by another subcontractor to Mercon, EEW in Rostock, Germany. The piles were also transported to Astrakhan.

5. A further component was the Topsides. These consisted of a number of elements such as the turntable, pig receiver deck, hose connection deck and tower. They were fabricated by Mercon at its yard in Gorinchem. The Topsides were transported in two parts from Gorinchem to ASPO's yard and integrated there. Another component was the Yoke assemblies**,** the principal parts of which were the Yoke End, the Yoke Hinge body or 'casting' and the Yoke Hinge house or 'housing'. These were shipped to Astrakhan together with the Crane Structure.

Brief Chronology

6. After tendering, a Letter of Intent for the work was provided by Bluewater and signed by Mercon in December 2006.

7. The Contract was made on 26 March 2007. It contained various Options, some of which in due course were exercised. Option 5 was exercised on 29 March 2007, immediately after the Contract was made, although it was not formalised into a Variation Order until VO-005 in March 2008. This Option related to the responsibility for transportation of the structure from Gorinchem to Astrakhan and Baku. VO-005 granted Mercon an extension of time to complete certain Milestones. In particular, for Milestone B4 which became Milestones B4.1, B4.2 and B4.3, the date of load out of each of three ships and which attracted Liquidated Damages, Mercon was granted an extension of time between 51 days and 122 days.

8. The Contract provided for part of the work to be paid for on the basis of a lump sum price, part was re-measured and part was reimbursable. There are issues as to how the Contract operates in relation to these elements of work.

9. The design of the SYMS underwent changes following the award of the Contract to Mercon. The most significant of these was a change in the substructure from 4 legs to 5 legs. This change was communicated to Mercon in June 2007. Mercon relies in its claim on the effect of this change. Bluewater, on the other hand says that it had little consequence for the matters in dispute as the main effect was additional steelwork which has been the subject of remeasurement and additional payment to Mercon. Also it says that such time impact as there may have been was included in Mercon's programme when the Baseline Schedule was produced.

10. Initially there were delays by Bluewater in producing drawings to Mercon and Bluewater expressed concern about Mercon's readiness to commence fabrication. Most of the components were, in fact, completed, ready for sailing, prior to the arrival of the ships.

11. From the middle of 2008, there were delays in the transportation of fabricated components to Astrakhan and in the release of components or equipment through the Russian customs processes. In Astrakhan Mercon relied on ASPO for assembly and integration work. There were delays in that work and also disputes between ASPO and Mercon as to payment. There were also issues with the painting of the Central Column when it arrived in Astrakhan. Bluewater notified Mercon that the coating used was rejected but Mercon said it would not remedy the coating unless Bluewater accepted liability for the defects. Bluewater issued a Notice of Default on 31 October 2008 and a Notice of Partial Termination of the Work on 11 November 2008.

12. Lukoil had indicated that the final load out of the structure would not occur until the summer of 2009. Under the Contract the extended date for the structure to be 'ready for load out' was 14 September 2008. There were delays and it was not completed by that date but it was envisaged that it would be ready for load out at the end of December 2008, subject to completion of punch list items. In the event Lukoil did not accept the structure at that date and Bluewater insisted that the structure should be complete. Mercon left the site in Astrakhan on 20 December 2008 and returned on 12 January 2009. There were issues between the parties as to the scope of the work which had to be completed by Mercon and also the extent to which it was possible to carry out certain work in the winter conditions in January 2009. Bluewater served a Notice of Default on Mercon on 23 January 2009 and this was followed by a Notice of Termination on 3 February 2009. Mercon says that Bluewater repudiated the Contract and Mercon accepted that repudiation and terminated the Contract.

Proceedings

13. The Claim Form was issued in the Commercial Court on 3 November 2009 and reissued when the Second and Third Defendants were joined on 24 June 2010 when claims were made under parent company guarantees.

14. There had been Dutch attachment proceedings under which Mercon obtained the equivalent of a freezing order in respect of €24m of Bluewater's assets. Those proceedings were resolved by an agreement under which Bluewater paid €3m into an

escrow account and a further €3m directly to Mercon in return for a "refund" guarantee, which would expire unless proceedings were brought in the English Courts within 9 months.

15. The parties were following the Dispute Resolution Procedure provided for under the Contract, with meetings up to Managing Director/Owner level but were unable to settle matters and Bluewater sent a Letter before Action on 29 October 2009, shortly before commencing these proceedings.

16. After Bluewater had commenced proceedings, Mercon issued the Dutch equivalent of a Statutory Demand in the Dutch courts on the basis that the €3m paid into the escrow account and that the €3m refund sum was immediately due and owing. This triggered a clause in Bluewater's financing arrangements on the basis that Bluewater would be in default if insolvency proceedings were initiated against Bluewater. This led to Bluewater entering a further agreement with Mercon under which €9 million was released in relation to the sums in the escrow amount, the return of the bank guarantee and payment of further sums.

17. The Claim was transferred to the Technology and Construction Court on 29 November 2010. It relates to multiple claims arising on the final account as well as issues relating to termination and extensions of time. The pleadings are voluminous and include long and detailed schedules. The latest version of the Particulars of Claim was served on 31 January 2013, the latest version of the Defence and Counterclaim was served on 7 March 2012, the latest version of the Reply and Defence to Counterclaim was served on 25 May 2012 and a Rejoinder was served on 7 August 2012. Standard directions were given as to disclosure, witness statements and expert evidence leading to trial. The trial bundle contained over 100 lever arch files of hard copy documents and there were in addition electronic copies of over 50 further bundles. The written closing submissions ran to over 850 pages, with some of the detailed claims not being addressed but being dealt with by reference to schedules to the pleadings, witness evidence and expert reports.

18. I am grateful to counsel, Adam Constable QC, Camille Slow and Paul Bury on behalf of Bluewater and David Quest QC and Frances Pigott on behalf of Mercon for their helpful submissions and to the solicitors for providing and updating the well organised bundles.

The Issues

19. There are numerous issues which the parties have been unable to settle. The main factual disputes concern the causes of delay and liability for any delay and the events leading up to termination. There are many financial claims which depend on particular issues of contractual interpretation or fact.

20. The issues are as follows:

(1) **Value of the Lump Sum works:**

Issue 1(a): What abatement is due, if any, for the Lump Sum works not done at all?

Issue 1(b): What abatement is due, if any, for the Lump Sum works not done at all and/or partly not done?

(2) **Value of the Re-Measure Works:**

Issue 2: Was there a binding agreement regarding the signed VO-008, and, if so, in what sum and for which items?

Issue 3: In light of the answer to Issue 2 and/or in any event, what is the recoverable value of the re□measurement portion of the Contract?

Issue 4: Is Bluewater entitled to a discount on VOs? In particular, is Bluewater entitled to a discount on VORs 1 and 8? If so, at what rate and on what sums?

(3) **Value of the Reimbursable Costs at Contract Rates:**

Issue 5: What work is Mercon entitled to claim for on a reimbursable basis, and in what amount?

Issue 7: Is recovery of reimbursable cost dependant on proof of the costs actually being incurred?

Issue 6: How much credit, if any, is to be given for amount paid by Bluewater to ASPO?

Issue 8: On what basis is the percentage uplift to be calculated and upon which sums?

Issue 9: Is Mercon entitled to be paid for 'yard improvement'/mobilisation/ demobilisation?

Issue 10: Is the Defendant claiming for reimbursable works which are in fact or ought to have been compensated for elsewhere (re□measure or lump sum)?

Issue 11: What is the proper valuation of the Reimbursable Cost account?

(4) **Reimbursable costs (Star Rates)/ VOR 259:**

Issue 12: Is Mercon entitled to payment for personnel who worked on integration at Astrakhan at STAR Rates?

Issue 13: If so, for what personnel and in what sums?

(5) **Other Variations**

Issue 14. Did Mercon fail to comply with the notice requirements in clause 14.3 to 14.7 in respect of any claimed variations and, if so, what effect does this have (if any) on its right to payment?

Issue 15: What is the value of the variation account (excluding VOR 8), including discount (if any)?

(6) **Liquidated Damages/Entitlement to an Extension of Time**

Issue 17: Is Mercon entitled to an extension of time to complete any of the Key Dates (and in particular the Key Dates which carry liquidated damages, namely B4.1, B4.2, B4.3, C3, C6 and C9)?

Issue 18: Alternatively, is time at large by reason of acts of prevention on the part of Bluewater and/or a break down in the contract mechanism for extending time?

Issue 19: In light of the answers to Issues 17 and/or 18, is Bluewater entitled to levy liquidated damages and, if so, in what amount (considering what the correct total contract price is for the purposes of the contractual cap)?

(7) **Termination**

Issue 20: Did Bluewater validly terminate the Contract on or about 3 February 2009 or was Bluewater in repudiatory breach for wrongly purporting to terminate the Contract?

(8) **Other Bluewater Claims**

Issue 21: What sums are due, if any, in respect of:

(a) LADs for Key Personnel?
(b) pre-termination damages?
(c) post-termination damages?
(d) NCRs?
(e) other costs to complete?
(f) Residual VAT?

(9) **Other Mercon Claims**

Issue 22: Is Mercon entitled to claim for lost profit (if Bluewater wrongly terminated the contract) and, if so, in what sum?

Factual Evidence

21. Bluewater called a number of witnesses who had submitted one or more witness statements. I heard evidence from Maurice Heij who was employed by Bluewater as a logistics coordinator. He commenced work on the project in February 2008 and his main involvement was in 2008 when the various components for the SYMS were being transported from Gorinchem to Astrakhan and then to Baku. His contact with Mercon was mainly though Martin Hoep who was Mercon's transport manager and also with Mr de Jong. He explained what documents were required to make the shipment and then explained his involvement in the three shipments. He also dealt with the VORs concerning additional costs of transport.

22. I then heard from Raymond Manson who acted as Bluewater's site representative and quality control manager and was based at the ASPO yard in Astrakhan from 20 September until 15 December 2008. His main contacts at Mercon were with Erwin Van Zomeren, a structural supervisor and John Hermans who was carrying out the pipework on site. He also dealt with Jasper Wickerhoff and Timur Umerov. In his two witness statements he dealt with various aspects of welding, paint damage to the Central Column, leak testing and testing the water-tight floor, the pile sleeves, various problems during transit, support trunnions, painting, the bellows, as well as a number of NCRs. He also dealt with the position from 13 December up to and including the meetings of 6 to 7 January and 14 January 2009. He also gave some evidence of matters arising in April and May 2009.

23. Bluewater's main witness was Ronald De Geus who provided four witness statements. He was employed as assistant project manager and contracts engineer by Bluewater and had some 20 years' experience in the offshore sector. He became involved in the current project at around the beginning of September 2006 and gave evidence on all aspects of the project from the time of entering into the Contract through to termination. He responded to many of the matters contained in Mercon's witness statements. He gave evidence over the course of three days during which other evidence was interposed.

24. I heard from David Knibbe who was a construction site representative for Bluewater and became involved in the project in June 2007. After working at Bluewater's head office in the Netherlands and travelling to Gorinchem he became permanently based there from September 2007 until July 2008. From July 2008 he was mainly based at the ASPO yard in Astrakhan and was there until July 2009 with a short period in Baku. He dealt with a number of matters, including sea fastening and items on the outstanding works list.

25. I also heard evidence from Mr Maarten Van Aller who was Bluewater's vice President (Projects) from 2003 until September 2009. He gave evidence by video conference from Singapore and explained his involvement in the project as the line manager for the project managers. I heard from Mr Peter Konijn, a senior engineer who had been employed by Bluewater since December 2006. From that date he became involved in the project and was present in Astrakhan for the load up of the foundation piles and substructure in July 2009. He described a number of features of the work. In particular he gave evidence on weighing. In a third statement which superseded his second statement he dealt with conversations with Mr De Jong around 4 December 2008.

26. I heard evidence from Robert Spelt who, through his own company, acted as an independent welding and materials consultant from April 2007. He travelled out to ASPO's yard for a week per month to carry out inspections and report to Bluewater on the quality of welding. He dealt with all welding matters and with the disputes which have arisen with Mercon in relation to them.

27. Bluewater's final witness was Sergio Herman who was employed as a project engineer on the project between May 2007 and August 2009. He worked with Mr Van Koperen, another of Bluewater's Project Engineers. He dealt with a number of NCRs as well as transportation of the pendulum and surge dampening system.

28. Mercon then called a number of factual witnesses. Their main witness was Mr Ronald De Jong. He is the owner and director of PSJ Contract Support Bv, a Dutch company specialising in project and contract management for construction projects. He was engaged by Mercon in March 2008 to assist them in commercial and contractual matters in relation to this project. In this role he became project manager for Mercon. He dealt with matters from the date he joined Mercon up to and including the period in December to February 2009 leading up to termination. He produced two witness statements and gave evidence over four days with other witnesses being interposed.

29. I also heard from Mr Michiel Pors who joined Mercon in March 2008 with responsibility for financial matters. He gave evidence of his involvement in December 2008 and January 2009 as well as on a number of claims. I heard evidence from Mr Peter Van Den Brule who gave evidence by video conference from Singapore. He was the initial project manager on the project but left in 2008. He commented on a number of matters raised by Bluewater's witnesses as well as matters which arose on the project prior to March 2008.

30. I heard evidence from Mr Jasper Wickerhoff who produced four witness statements. He was engaged by Mercon from 1 July 2008 and was initially Mercon's project controller

whose task was to help resolve Variation Order Requests. On about 8 October 2008 he took over the role of Mercon's site construction manager at ASPO's yard in Astrakhan. He gave detailed evidence on progress at ASPO's yard and on the individual items in the Notice of Default. The next witness was Mr Timur Umerov. He was engaged by Mercon as a Project Engineer at ASPO's yard in Astrakhan from early 2008. During January 2009 he was Mercon's site representative and gave evidence of what work was being carried out in January and February 2009. He provided two witness statements.

31. Mr Kees Hoogenboom gave evidence. He is a welding engineer who was engaged by Mercon as the welding engineer for the project. He gave evidence of welding procedures and how Mercon dealt with the welding procedure requirements on this particular project. He produced three witness statements. Mercon's final witness was Mr Cornelis Leenheer. He was a project engineer for Mercon in 2008 and dealt with the issue of the amount of redundant material left over from free issue steel plates provided to Mercon for the project.

32. For the most part the witnesses sought to provide their recollection of the events giving rise to the disputes which I have had to resolve. Because some of the witnesses had been involved in preparing the claims, their evidence tended to focus on the matters which supported the claims and I have therefore had to review contemporaneous documents to obtain a balanced view. I have set out, where relevant, the evidence I have preferred or accepted to be correct.

Expert Evidence

33. There were three areas which were dealt with by expert evidence: welding, delay analysis and quantum.

34. There is a substantial claim in relation to welding procedures and the extent to which those procedures and qualifications should be paid for under the provisions of the Contract. Bluewater instructed Mr Robert A Teale who is a welding consultant based in Texas in the United States and has a number of professional memberships and qualifications. He has some 40 years of experience of welding, inspection and non-destructive testing in the petrochemical and offshore industries worldwide. Mercon instructed Mr Alan Denney of Fairway based in the UK who similarly had some 40 years of experience, with a BSc in metallurgy, and MSc in welding technology. He is a chartered engineer and Fellow of the Welding Institute.

35. They produced a useful Joint Statement in which they reached a large measure of agreement. They served reports and each gave oral evidence. I found that evidence helpful in explaining the general position on welding procedures and qualification.

36. There was a dispute about delay and extensions of time. Bluewater instructed Mr John Illingworth, an Associate Director of Stapleton International and Head of Planning and Forensic Planning. He had some 35 years of experience in the oil, gas, power and energy sectors in planning and management functions before joining Stapleton in 2010. Mercon instructed Mr Lee Cookson who is a Partner in E C Harris LLP. He has some 30 years of construction experience in project management and is a Fellow for the Royal Institution of Chartered Surveyors.

37. They produced two Joint Statements in which they helpfully set out their views on the causes of delay on this project, which they elaborated in their expert reports. They provided and updated a schedule which summarised their positions. Whilst I have been assisted by the as-built information produced by Mr Cookson and have taken account of his views, as I have set out below, my conclusions have differed from his views on certain important aspects of the delay claim where I consider that the conclusions reached by Mr Illingworth better reflect the factual evidence of delay and my analysis of the impact of delayed load out Milestone C9.

38. There were many difficult quantum issues raised by the claims. Bluewater instructed Mr Andrew Mark Dixon, Head of Dispute Solutions at Stapleton International. He has over 30 years of quantity surveying experience on a wide range of projects including the fabrication of offshore oil and gas facilities and is a Fellow for the Royal Institution of Chartered Surveyors. Mercon instructed Mr David Simons who is head of support services at HC QS Limited. He has over 40 years of quantity surveying experience over a range of projects including offshore oil platforms and is also a Fellow for the Royal Institution of Chartered Surveyors.

39. Through a series of Joint Statements the quantum experts were able to narrow many of the disputes which were apparent on the pleadings. Where they were unable to reach complete agreement that was often because of issues of principle which I have had to resolve and, in these cases, they were able to provide a range of agreed figures which applied depending on my findings. They have made my task immensely easier than it might otherwise have been and I am very grateful to them for their hard work and sensible approach. I also had the benefit of hearing from them during a concurrent evidence session when they were able to explain the essence of their differing views on eight particular issues on which they disagreed. I have taken those views into account and specifically referred to some of the evidence on those issues, referred to as Issues A to H.

40. I now proceed to consider the issues in the case. It is convenient to start with the Issue of Termination.

Termination

Issue 20: Did Bluewater validly terminate the Contract on or about 3 February 2009 or was Bluewater in repudiatory breach for wrongly purporting to terminate the Contract?

41. This is one of the main issues in the case. Bluewater says that by 23 January 2009 Mercon was in default and that Bluewater was properly entitled to serve the Notice of Default on that date. It says that Mercon did not then take the necessary action to remedy the default and therefore Bluewater contends that it was entitled to terminate the Contract on 3 February 2009 under Clause 30 of the Contract.

42. Mercon on the other hand says that up until 18 December 2008 both parties had been working towards Milestone C6, the completion of integration of SYMS ready for Load-out on the basis that the SYMS would be completed by that date subject to a punch list. In turn this would then permit Bluewater to hand over the SYMS to Lukoil.

43. Mercon says that Lukoil did not accept the SYMS ready on 18 December 2008 and so Bluewater looked for reasons not to accept the SYMS with a punch list from Mercon. Mercon also says that Bluewater was at this time trying to find reasons for terminating Mercon and had already been in discussion with Mercon's sub-contractor, ASPO, about taking over the sub-contract when Bluewater terminated the Contract with Mercon. Mercon says that much of the work which Bluewater then alleged in the Notice of Default was not work which Mercon had been properly instructed to carry out.

44. Mercon also says that work could not be properly carried out in January 2009 because, first there was the Christmas holiday which lasted until 12 January 2009 and then the winter conditions did not permit work such as painting to be carried out. In response to the Notice of Default, Mercon sent Bluewater a programme on 30 January 2009 which, Mercon says, showed that the necessary work would be carried out between 10 February 2009 and 5 March 2009 and that, in any case, was a satisfactory response to the Notice of Default so that Bluewater was not entitled to terminate the Contract on 3 February 2009. Rather Mercon says that the purported termination was a repudiatory breach of the Contract which, in turn, was accepted by Mercon on 24 February 2009 and the Contract was thereby terminated.

45. In response Bluewater says that in December 2008 Mercon decided to put commercial pressure on Bluewater and therefore adopted an attitude of non-cooperation. When Lukoil refused to take over the SYMS there were in fact major items of work which still had to be carried out on the SYMS and which Mercon should have carried out. Insofar as any instructions were necessary for that work Bluewater says that the instructions were given on 6 January 2009 and Mercon was then required to carry out the work. In fact, Mercon did not carry out that work because, in particular, it had failed to pay ASPO who therefore refused to carry out work until payment was made.

46. Bluewater therefore says that Mercon was in default on 23 January 2009 when Bluewater served the Notice of Default. Bluewater says that the response by Mercon to the Notice of default was merely to produce a programme which was an unsatisfactory response and that, in particular, under Clause 30.2 of the Contract it was a matter for Bluewater to determine whether the response was satisfactory. Bluewater was therefore entitled to terminate the Contract.

47. In reply, Mercon says that there was no lack of co-operation in December 2008 or January 2009. It says that work was in fact being carried out in January 2009 and that ASPO was working. In any case it says that ASPO's performance was, unbeknownst to Mercon, being affected by discussions between ASPO and Bluewater about Bluewater taking over the sub-contract. Further Mercon says that by the end of January 2009 the financial position between Mercon and ASPO had been resolved so that Mercon could have carried out the necessary work in accordance with the programme it submitted. Mercon say that, in any case, with Milestone C9, the load-out of the integrated SYMS, being delayed until 1 June 2009 as Lukoil said it would only provide a barge for load-out at that date, the work did not need to be done sooner and, in fact, when Bluewater took over the work it was only carried out at a later date in 2009, ready for load-out.

48. I shall first set out the contractual provisions as to termination and as to instructions which are relevant to termination and deal with the legal issues raised on those provisions. I shall then set out the chronology of the main events leading up to

termination before dealing in more detail with the particular matters of default relied on by Bluewater as justifying termination.

Termination under Clause 30

49. The relevant termination provision is contained in Clause 30 and provides as follows:

> "*30.1 Bluewater shall have the right by giving notice to terminate all or any part of the WORK or the CONTRACT at such time or times as BLUEWATER may consider necessary for any or all of the following issues:*
> *(a) To suit the convenience of BLUEWATER*
> *(b) Subject only to Clause 30.2 in the event of any default on the part of the CONTRACTOR; or*
> *(c) …*
>
> *30.2 In the event of a default on the part of the CONTACTOR and before the issue by BLUEWATER of an order of termination of all or any part of the WORK of the CONTRACT, BLUEWATER shall give notice of default to the CONTRACTOR giving the details of such default. If the CONTRACTOR upon receipt of such notice does not immediately commence and thereafter continuously proceed with action satisfactory to BLUEWATER to remedy such default BLUEWATER may issue a notice of termination in accordance with the provisions of Clause 30.1.*"

50. It can be seen that where Bluewater seeks to terminate all of the work of the Contract under Clauses 30.1(b) and 30.2 then there were a number of steps to be complied with:
(1) Bluewater must give notice of default to Mercon giving "*details of such default*" ("Notice of Default");
(2) Upon receipt of the notice Mercon must "*immediately commence and thereafter continuously proceed with action… to remedy such default*";
(3) That action to remedy the default must be "satisfactory to BLUEWATER"; and
(4) If Mercon does not take such action, Bluewater "*may issue a notice of termination*" under clause 30.1(b) for default on the part of Mercon ("Notice of Termination").

51. There is an issue between the parties as to the standard to be applied under Clause 30.2 to determine whether or not action taken by Mercon is satisfactory. The phrase used is "*action satisfactory to BLUEWATER*".

52. Bluewater submits that this is a matter which depends on the subjective view taken by Bluewater as to whether that action is satisfactory and that there is no objective reasonableness that need be imported. It submits that it is not for the courts retrospectively to superimpose its own view on what Bluewater may or may not have found to its satisfaction.

53. Mercon submits that the action satisfactory to Bluewater had to be objectively reasonable so that it was not a question of the subjective satisfaction of Bluewater. Insofar as it was a question of subjective satisfaction then reliance was placed on Clause 33.1 of Section 2(a) of the Contract which provides:

"*Both the CONTRACTOR and BLUEWATER shall uphold the highest standards of business ethics in the performance of the CONTRACT. Honesty, fairness and integrity shall be paramount principles in the dealings between the parties.*"

54. Mercon also relies on the Court of Appeal decision in Socimer International Bank Ltd (in liquidation) v Standard Bank London Ltd [2008] EWCA Civ 116 where it was held that a clause of the relevant contract left the valuation of assets entirely in the defendant's hand. In deciding what standard should be applied to the defendant's obligation to value assets, the Court of Appeal reviewed a number of cases where a decision maker was put in that decision. At 66 Rix LJ with whom Lloyd and Laws LJJ agreed said:

"*It is plain from these authorities that a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to Wednesbury unreasonableness, not in the sense in which that expression is used when speaking of the duty to take reasonable care, or when otherwise deploying entirely objective criteria: as for instance when there might be an implication of a term requiring the fixing of a reasonable price, or a reasonable time. In the latter class of case, the concept of reasonableness is intended to be entirely mutual and thus guided by objective criteria. Gloster J was therefore, in my judgment, right to put to Mr Millett in the passage cited at para 57 above the question whether a distinction should be made between the duty to take reasonable care and the duty not to be unreasonable in a Wednesbury sense; and Mr Millett was in my judgment wrong to submit that it made no difference which test was deployed. Laws LJ in the course of argument put the matter accurately, if I may respectfully agree, when he said that pursuant to the Wednesbury rationality test, the decision remains that of the decision-maker, whereas on entirely objective criteria of reasonableness the decision-maker becomes the court itself. A similar distinction was highlighted by Potter LJ in Horkulak* [2005] ICR 402 *, para 51. For the sake of convenience and clarity I will therefore use the expression "rationality" instead of Wednesbury-type reasonableness, and confine "reasonableness" to the situation where the arbiter on entirely objective criteria is the court itself.*"

55. In my judgment, Clause 30.2 which requires that Mercon "continuously proceed with action satisfactory to BLUEWATER to remedy such default" is not one which is required to be construed by reference to an objective standard. The premise is that Mercon is in default and, in those circumstances, the action to be taken by Mercon is to be satisfactory to Bluewater on the basis of a subjective standard. I do not consider that it permits of a review after the event of whether the action was or was not objectively satisfactory. However, I agree with Mercon that there is a limitation on the ability of Bluewater to come to a decision as a decision maker. That limitation, as expressed in Socimer is a limitation by reference to concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. Whilst I do not consider that this limitation depends on the presence of Clause 33.1 of Section 2(a) of the Contract, which in this respect is unpleaded, the implied limitation where a decision is left to the subjective view of one of the parties to

a contract is consistent with that provision of the Contract and, in my judgment, applies in this case.

56. In this case the question of whether the action taken by Mercon was satisfactory to Bluewater is therefore a matter for the subjective view of Bluewater but is subject to the implied limitation summarised by Rix LJ in Socimer at [66].

Instructions under Clause 14

57. There is an issue between the parties in relation to what is needed for there to be a proper instruction under Clause 14 of Section 2(a) of the Contract. I deal below with the further issue as to the requirement under Clauses 14.3, 14.4 and 14.7 for notice to be given by Mercon before it can make a claim to be paid or seek an extension of time.

58. Clause 14.1 "*Right of BLUEWATER to issue instructions*" provides:

> "*(a) BLUEWATER has the right to issue instructions to the CONTRACTOR at any time to do any of the following:*
> *(i) make any revision to the WORK which may include additions…*
> …
> *(b) On receipt of any instruction under Clause 14.1(a), the CONTRACTOR shall proceed immediately as instructed.*"

59. Clause 14.2 deals with "*VARIATIONS generally*" and 14.3 then provides for the "*CONTRACTOR'S Right to Request a VARIATION*". This together with Clauses 14.4 to 14.7 provides a mechanism for Mercon to request that, in relation to instructions under Clause 14.1, Bluewater should issue a Variation. Issues between the parties arising out of this mechanism are dealt with below in relation to Mercon's claims for Variations.

60. Further provisions relating to the need for instructions to be in writing and the effect of an oral instruction are contained in Clause 2 of Section 2(a).

61. Mercon also refers to Clause 9.3 of Section 8 of the Contract, Co-ordination Procedures, which deals with Site Instructions (SI). It states:

> "*Site Instructions shall be submitted on a sequentially numbered SI form as indicated in Attachment 8D. The instruction shall reference the applicable documents and shall have a copy of these documents attached.*
> *Site Instructions shall be endorsed by CONTRACTOR and returned to BLUEWATER within one (1) working day after receipt.*"

62. The Site Instruction Form at Attachment 8D contains the wording "*The CONTRACTOR is hereby instructed by BLUEWATER to comply with the following:*" and provides for boxes to be completed under "*Issued by BLUEWATTER*" and "*Received by CONTRACTOR*".

63. The particular issue between the parties in relation to termination is whether Bluewater's letter of 6 January 2009, responding to Mercon's letter of 23 December 2008, contained instructions under Clause 14(a)(i). Bluewater says that, to the extent that the work in the letter of 6 January 2009 was not already part of the work which

Mercon had to carry out under the Contract, as to which there are issues in any case, then the letter of 6 January 2009 was a sufficient instruction under Clause 14(a)(i).

64. Mercon says that up until 6 January 2009 Bluewater had issued Site Instructions in the form in Attachment 8D where these were necessary under Clause 14(a)(i). It states that during 2008 Bluewater had issued 60 separate site instructions, each one on the contractual form at Attachment 8D and, in particular, it refers to SIs 058, 059 and 060 which were issued on 18 December 2008 for the new deluge nozzle installation instruction, for removal of kick plate on pivoting platform Topsides and for drain tank pump insulation cover. Mercon says that its request in the letter of 23 December 2008 for site instructions for the items which it considered to be out-of-scope and, in particular, the installation of the Yoke Hinge and the load-testing of the winch foundation, was an appropriate request and the letter of 6 January 2009 did not provide the necessary Site Instructions.

65. In my judgment, Clause 14.1(a) provides a general right of Bluewater to give instructions as to the matters set out in sub-clauses (i) to (iv) covering revisions to the Work, revisions to Work already completed, acceleration of the Work or re-programming the Work in accordance with any amendment to the Schedule of Key Dates. I do not consider that revisions to the Work can only be made by way of Site Instructions. Indeed Clause 1.1, the general introductory section to Section 8, shows that the forms are intended to assist the administration and does not indicate that these forms were intended to be mandatory even for Site Instructions.

66. However when the Site Instruction forms were used it would be clear that instructions were being given under Clause 14.1. If that form is not used then I consider that an instruction under Clause 14.1 could still be given but it would then have to be clear from the terms of the document giving the instruction that it was intended to be an instruction under Clause 14.1. The question then becomes one of considering whether the terms of the letter of 6 January 2009 were sufficiently clear to be Clause 14.1 instructions. The test, consistent with the principles to be applied to contracts and unilateral notices is whether, on an objective reading of the document in the light of the circumstances known to the parties at the time, it was sufficiently clear to be a Clause 14.1 instruction.

67. It is necessary to consider the background to the letter of 6 January 2009 and, in doing so, it is convenient to set out the chronology from September 2008 when Milestone C6 was to be completed.

Chronology

68. In an internal Bluewater email dated 13 September 2008 from Mr Koppe to Mr Nijboer he says:

> "*In the beginning of this week we discovered that a number of timesheets were incorrect. Therefor [Bluewater] and [Mercon] refused to sign them.*
> *From that moment came the reaction from ASPO, slowing down the work Supervision of ASPO told their workers that they are unable to pay their workers because Peter vd Brule from [Mercon] is not signing the timesheets.*"

69. In an email from Mr Marisov of ASPO to Mr de Jong dated 2 October 2008 it was stated:

> "*You don't have right to delay the payment of works according to the specified stages because of dissatisfaction with the completeness of any additionally provided information. We consider the deductions of payment of unpaid invoices as the rigid non-fulfilment of contract conditions.*"

70. On 6 October 2008 Mr Marisov wrote again to Mercon stating:

> "*Please explain why Mercon delays in payment of invoices and makes the payment not in full volume. All issues concerning amounts under the contract should have been solved within 10 days since the date of invoice issuing. Voluntary deductions don't conform to the contract. We should inform you that the present situation can negatively influence on the progress chart under the contract. In case you don't fulfil your obligations under the contract we will have the same attitude towards fulfilment of our obligations under the contract, we will decrease the scope of provided services for the amount of your deductions.*"

71. On 9 October 2008 ASPO sent a further email stating:

> "*It is the third time you are requested to effect full payment of invoices otherwise we will have to reduce the services proportionally to payment*"

72. On 10 October 2008 Mr Wickerhoff reported that he had attended a meeting with ASPO to discuss invoices which he writes was "an hour and a half of heated debate." He said in relation to advance payment for welding equipment:

> "*According to ASPO, this was promised by Peter in order to prevent delay. I made it clear that our financial department could not see that stated in the contract and therefore did not pay. The financial man here was able to understand this, but not the project manager because he had made an agreement with Peter. Here I promised to try to convince you to pay this. Herewith, therefore. Indeed, I think that it would be good to pay this invoice because it was promised. It would also be good for me in order to use it to generate a bit of goodwill. Although they were not very happy that I was only going to stand up for this small invoice.*"

73. On 14 October 2008 ASPO sent a list of amounts outstanding on invoices 20-26 totalling €1.5m remaining payable, complaining of a "rigid breach of contract".

74. On 16 October 2008, ASPO wrote to Bluewater to complain that "*starting with September 29, 2008 Mercon Company doesn't fulfil its obligations on payment of invoices for executed works under the contract.*"

75. On 17 October 2008 ASPO disconnected the telephone and the internet lines at Mercon's and Bluewater's site office in Astrakhan on instructions from Mr Marisov. As Mr Pors informed Bluewater's management team:

> "*Our site staff has informed us around 11:30 (NL-time) of the fact that ASPO has disconnected the telephone and internet lines at our and your site offices… So far, rumours are that the none [sic] acceptance of invoices from ASPO, and the resulting refusal to pay, is the cause for the present situation.*"

76. On 31 October 2008 Bluewater issued to Mercon a notice of default and on 11 November 2008 Bluewater issued a notice of partial termination of Mercon's scope of work in respect of the paint failure of the Central Column.

77. From November 2008 Bluewater was in direct discussion with ASPO about the work being carried out by Mercon and the possibility of Bluewater entering into a direct contract with ASPO if the Contract with Mercon were terminated. In an internal Bluewater email sent by Mr van Aller on 21 November 2008 on the subject of "*Action points from Lukoil review*", his first point was "*Investigate options to close out the Mercon contract by full termination or notice of closure.*"

78. The minutes of a conference call between Lukoil and Bluewater on 25 November 2008 indicate that the SYMS components would be accepted by Lukoil on 18 December 2008 and that "formal handover certificates will be strictly as per Annex G of the [Bluewater] contract with… punch list completion items".

79. Bluewater's monthly report to Lukoil for November 2008 stated that Bluewater estimated that "*all SYMS components were close to final completion and could be ready for handover to Lukoil (Ready for load-out at quay-side) on 17th /18th December 2008. However, due to delayed custom clearance of the Yoke Hinge and Crane Structure there will remain a short punch list, defining activities to be completed after customs clearance by Lukoil.*"

80. At the end of November 2008 Bluewater and Mercon began work on finalising a punch list containing items which could be addressed post-handover.

81. On 4 December 2008 Mercon issued eight letters to Bluewater concerning various issues arising out of the Works. In the first letter Mercon made an application for an Extension of Time due to instructions and variations to various elements of the scope of works, including the late supply of AFC drawings. In the second letter concerning delayed load-out, Mercon made an application for an extension of time for grillage, seafastening, load-out and preparation for sail away under Milestone C9. In the third letter Mercon applied for an extension of time for late changes in design and the incorrect free issue seal for the installation of the bellows.

82. The fourth letter contained a request for Bluewater to "*instruct Mercon formally to execute*" the testing of the watertight floor. It stated: "*Please instruct Mercon formally to execute this work confirming compensation of cost and awarded Extension of Time. Mercon will execute the defined test upon your instruction…*". The fifth letter contained an update on progress stating that the piping punchlist was near completion. The sixth letter was a request for an extension of time in respect of the release of materials and components from customs storage. The seventh letter was a request for an extension of time in respect of the Yoke Hinge and the final letter informed Bluewater of delay in the performance of a clash check on the cable runs.

83. Bluewater wrote to Lukoil on 9 December 2008 stating that it would ask for the issue of a certificate of release for transport upon the passing of any final test scheduled for 18 December 2008, noting that the SYMS would then be "*completely, fabricated, finalised and ready for delivery to Lukoil*".

84. On 9 December 2008 Bluewater rejected Mercon's request for an extension of time to Milestone C9.

85. On 10 December 2008 ASPO refused to provide Mercon with photocopy toner without payment in advance and Mr Nagel, Bluewater's commissioning engineer, noted that: "*possible cause, payment problems.*"

86. On 10 December 2008 there was a meeting between the parties (Mr Brouwer, Mr Heij and Mr de Geus for Bluewater, Mr de Jong and Mr Pors for Mercon). The minutes of the meeting taken by Mr Brouwer states: "*Dispute on VO-008: Time Impact: NIL Not acceptable to [Mercon]. [Mercon] threatens discontinuation.*" The note states that the next meeting will be on 17 December 2008.

87. On 13 December 2008 in an internal Bluewater communication Mr Manson wrote to Mr Brouwer attaching an "*action list*" and suggesting that there should be a "*cut off before handover and agree the OWL with Mercon. Then they can plan.*" A number of items were marked "carry over", which was evidently a reference to those items being carried over to be completed after handover.

88. In a position paper dated 16 December 2008 Mr de Geus discussed the options open to Bluewater, and both the preferred and fallback options involved Bluewater signing "*a certificate of release for transport of integrated equipment and work evidencing completion of Key Milestone C6*".

89. On 17 December 2008, in an internal Mercon email Mr Wickerhoff wrote to Mr Leenheer and stated:

> "*Could you send me a copy of the rotation test procedure of the turntable, which Bluewater and RRMS signed off? Bluewater needs this report today in connection with the handover to Lukoil. I understand that previously Mercon had refused to issue this report but I am assuming that this has now been resolved. Before I present the report to Bluewater, I will also liaise with Ron about it.*"

90. On the same day, 17 December 2008, Mr de Jong responded and stated:

> "*Sirs, indeed prepare before handover, i.e. ensure that this document is available, but for the time being there will be NO handover. This means look, look, but not buy and so not get! After the discussions (NL), we will decide whether to hand over. I would therefore like to leave the possibility open of saying, "Regrettably, we are not ready for handover yet.*"

91. Lukoil did not accept the handover on 18 December 2008. On 22 December 2008 Lukoil gave 18 reasons for rejecting the structure. It stated that the "*Certificate of release for transport cannot be executed to date since the following defects were identified during the acceptance of SPM fabrication work in Astrakhan.*" Bluewater responded to this list on 24 December 2008.

92. On 18 December 2008 Bluewater says that there was a meeting attended by Mr De Jong at which Mercon attempted to exert illegitimate commercial pressure on

Bluewater by refusing to carry out works without further payment. Mercon denies that Mr de Jong attended the meeting or that he acted in that way.

93. On 18 December 2008 Mercon produced a list of Outstanding Works to be carried out. This included: complete heat tracings, shotblasting and painting, install safety signs, install tubing between swivel and drain tank, test watertight floor, re-install bellows, install Yoke Hinge, replace bolts sheave, and load test winch.

94. In an internal email of 23 December 2008 to which he attached a draft letter to Bluewater dividing the work into five categories, Mr De Jong said:

> "*Lastly, you must get it into your heads that we are NOT completing. We are only reporting that we have achieved C6. Now we must first obtain EoT and a modification of C9 before they are able to offer to Lukoil.*"

95. The list was circulated internally within Mercon and sent to Bluewater on 23 December 2008 with a letter which identified the following five categories and gave the works in the list the coding of 1 to 5. It then said:

> "*This list is split-up in the following types of activities:*
> *(1) Punch-list items; those elements of the original scope which formed part of the WORK at the time of agreement on the Recovery Schedule submitted in December 2007, and could have been completed on the 18th of December 2008.*
> *(2) Bluewater delayed activities; those elements of the original scope which formed part of the WORK at the time of agreement on the Recovery Schedule submitted in December 2007, and which could not be completed on the 18th of December 2008 due to unavailability of required materials or information to be provided by Bluewater.*
> *(3) Storage activities; those activities required to allow due care & custody during the storage period as instructed per Bluewater letter 1-0445-0-S001-BES-MSSL- 396, dated the 29th of August 2008.*
> *(4) Late instructed activities; those activities which were instructed after agreement on the Recovery Schedule submitted in December 2007, which are not completed on the 18th of December 2008, and for which no Extension of Time has been received per the 18th of December 2008.*
> (5) *Not instructed activities; those activities of which Mercon was made aware by the Bluewater site team, which are not completed on the 18th of December 2008, and which have not been instructed per the 18th of December 2008.*"

96. The five items in category 5 were painting of inside of buckets on top of centre column; installation of the Yoke Hinge; load testing the winch; solving the cable tray clash and painting the door of the pig receiver.

97. Mercon planned to and did shut down the site in Astrakhan from 20 December 2008 until 12 January 2009.

98. On 22 December 2008, Mr Brouwer sent an internal email noting that "*the punch list has been prepared in anticipation of a formal handover that most likely will take place*

in January 2009… The punch list established between [Bluewater] and [Mercon] contains a list of items, presenting work that will take 6 to 8 weeks until completion…"

99. In its report to Lukoil for December 2008, Bluewater said:

> "*Fabrication of all components in the Netherlands has been completed as well as fabrication of all components as ASPO. Only equipment delayed by the customs clearance of Lukoil still needs to be fitted and tested where required.*
> …
> *[Bluewater] invited Lukoil to attend the delivery of the EQUIPMENT (SYMS Components) at ASPO in Astrakhan and sign a CERTIFICATE OF RELEASE FOR TRANSPORT (ready for Load Out) with a small punch list. Lukoil refused to do so.*"

100. Mr Brouwer said in his contemporaneous internal report to Mr van Aller for week 3 of 2009 that Lukoil had refused to sign the certificate of release for transport "*because of the existence of a minor punch list*". He also noted that "*6 weeks duration is required to finish the works*".

101. On 29 December 2008, Mercon submitted a request for a Certificate of Release for Transport of the SYMS (Topsides, Crane Structure, Jacket, Plies and Yoke Hinge) to achieve Milestone C6, subject to the subsequent clearance of the specified punch list items.

102. On 6 January 2009 Bluewater sent a letter to Mercon responding to Mercon's outstanding work list to complete the project. Bluewater sent a marked up list, adding items to Mercon's list of 23 December 2008 and the request on 29 December 2008 for a certificate for Milestone C6. In particular the letter noted that Milestone C3 (Jacket and Pile pre-fabrication and pre-assembly complete) had not been completed and some items on the list related to Milestone C3. It then said:

> "*MERCON have neither executed nor completed major elements of the Scope of WORK related to Key Milestone C6, such as:*
> *1. Weighing of the SPM SYSTEM in accordance with the provisions of the Contract;*
> *2. Preservation of the SPM SYSTEM;*
> *3. Testing of the watertight floor;*
> *4. SAT-testing of the winch foundations;*
> *5. Follow up and execution of several NCR's as issued by BLUEWATER.*
>
> *BLUEWATER consider that these major elements of the Scope of Work, whether completed or not, can not be regarded as Punch List items.*"

103. Bluewater also crossed out the numbering into the various categories by Mercon and said at point 4 of the letter:

> "*Furthermore, BLUEWATER remark that BLUEWATER cannot accept the differentiation as applied by MERCON in their letter –L-314. Instead, BLUEWATER request that MERCON duly complete the WORK without differentiation.*"

104. On 7 January 2009 there was a meeting between Mr de Jong and Mr Pors of Mercon and Mr Brouwer, Mr de Geus and Mr Ronald van Vugt of Bluewater. The notes record that:

> "*Key Milestone C6 Ready Load Out*
> *>Weighing*
> *1. [Mercon] first agreement about the work >compensation/time agreement before continuing*
> *> [Bluewater] not further to LUKOIL*
> *2. Recap after interruption: proposal Grace Period*
> *15 SEP 2008 > 01 JUN 2009*

105. A second set of notes also record a discussion about weighing, which is "*Weighing Prices in "VOLGAR" - according [Mercon]*" and notes that the C6 "*punchlist ([Mercon]). Will be executed*".

106. On 8 January 2009 Mercon sent a letter to Bluewater stating:

> "*Mercon requires confirmation of addition of these elements of work to the scope, confirmation of entitlement to financial compensation, entitlement of extension of time for key date C6 and agreement on the value of the referred activities, before the referred activities can be executed.*"

107. On 13 January 2009, Mr Umerov reported that ASPO was refusing to provide Bluewater with passes to access the site. Mr Umerov's email sets out two matters arising from his conversation with Mr Ryzkov of ASPO:

> "*1) He cannot permit to [Bluewater] [guys] to be in ASPO and all [Bluewater] passes will be blocked until decision from Mr Marisov…*
> *2) Sea fastening suggestion for the steel plates not under translation and during today Vlad will send to us, but without invoice, as [said] to me Ryzkov agreement between Bank and ASPO concerning Mercon payments been finished in the end of last year, when your main contract been finished and for the prolongation of this agreement Bank need to have signed additional agreement between ASPO and [Mercon]. ASPO tomorrow will send concept of this agreement to [Mercon] for signing, and asked to send back as soon as possible.*"

108. At a meeting on 14 January 2009 between Mr Brouwer, Mr Manson, Mr Knibbe and Mr de Geus for Bluewater and Mr de Jong and Mr Pors for Mercon the outstanding works were discussed. Mr de Geus' notes record:

> "*[Mercon] first wants to see money and time before they carry on with the yoke hinge and other items, which, as far as they are concerned, do not fall under [Scope of Work], such as yoke hinge/paint/preservation.*"

109. Mr Brouwer's notes of a meeting on 14 January 2009 record: "*Outstanding payments with ASPO: solved.*"

110. On 14 January 2009 in an email from ASPO to Mr Wickerhoff it was stated:

"*This additional agreement is needed for bank in order to prolong transaction certificate of this contract, otherwise we are not able to act under the terms of the contract without this agreement.*"

111. By letter dated 15 January 2009 Bluewater stated that the discussions during the meeting on 14 January 2009 "shall prevail" concerning:

"*1. Completion Key Milestone C3 before completion of Key Milestone C6;*

2. Completion of Key Milestone C6:
2.1 Outstanding WORK (Weighing, Preservation, Testing Watertight Floor, SAT Testing Winch Foundations, Execution of NCR's, Yoke Hinge);
2.2 *Punch List Items.*"

112. On 16 January 2009 ASPO told Bluewater that Mercon had not been paying its invoices. ASPO sent Bluewater a further list of the invoices that Mercon had not paid showing invoices in a total sum of €2.2m, some of which went back as far as 5 September 2008.

113. By letter dated 19 January 2009 Mercon referred to contractual scope and attached a list designating items as "1", "2" or "3". In relation to "1" Mercon acknowledged that works were within contract scope; "2" was designated "instruction without agreed compensation" and "3" was 'instruction required'. Included in category 2 was "install Yoke Hinge" and "load test the winch support".

114. On 19 January 2009, in an internal email Mr Umerov stated that:

"*Today morning Mr Marisov invited me to his office and asked about payments news, I told, that Jasper is working on it in Holland and after that he said that he want to have today a speakerphone meeting with Ron de Jong and Willem Griffioen regarding payments. Can you please find out, this is possible or not, and if possible at what time*"

115. On 20 January 2009 Mercon sent a letter relating to Site Instructions issued in Astrakhan. The letter stated that:

"*We ask your confirmation that the referred instructions entitle [Mercon] to financial compensation and extra time for the related activities. Mercon will detail the referred cost and durations when available. The extended or additional durations will be incorporated in the Master Schedule where after our entitlement for Extension of Time will be determined.*
We request your confirmation in order to allow preparation and scheduling of the associated activities."

116. At a meeting on 20 January 2009 Mr de Geus noted that, in relation to each of the Yoke Hinge, the watertight floor, and the testing of the winch foundation, Mercon stated that this work was to be executed "*if agreed that this is the extra work, how much and when.*"

117. The evidence shows that apart from work to weld beads and scaffolding and, it appears, some painting, no work was being carried out in Astrakhan following the letter of 6 January 2009.

118. On 21 January 2009, ASPO told Bluewater that the unpaid invoices amounted to €2,600,000 and at a meeting with Bluewater on 22 January 2009 ASPO stated that, of the outstanding €2.6m, it had been paid €870,000 by Mercon.

119. On 23 January 2009 Bluewater sent Mercon a Notice of Default under Clause 30.2 of the Contract. It stated that:

> "*It is considered that MERCON is in default of its obligations under the Agreement by reason both of its failure to complete the work items identified on the OUTSTANDING WORK LIST (as amplified in the list at Annex 1, which includes work items related to key date C3 which remain to be completed notwithstanding the confirmation given by Michiel Pors and in respect of which MERCON is also in default), and by reason of its non-contractual and unjustified refusal to do so unless BLUEWATER agrees additional compensation and extra time.*"

120. The letter contained a table identifying a number of items of Work in the Outstanding Works List for which it is said that Mercon is in default, and then stated:

> "*This identification is to be read together with the updated list at Annex 1 and the C3 and C6 items included therein are deemed included in the identification of the items in respect of which MERCON is in default.*
> *This letter is intended to take effect as a Formal Notice of Default given under and in accordance with Clause 30.2 of the Agreement.*
> *If MERCON does not immediately commence and thereafter continuously proceed with actions satisfactory to BLUEWATER to remedy the identified defaults BLUEWATER will be entitled to issue a Notice of Termination in accordance with the provisions of Clause 30.1 of the Agreement, and it will issue such a Notice if within 7 days of the date hereof MERCON has not remedied its default by completing to the satisfaction of BLUEWATER all work items related to key date C6 as set out above and as those are amplified in the updated list at Annex 1.*"

121. There was no daily report from Mercon recording what was going on on-site and Mr Wickerhoff was in Gorinchem during this period. Mr Umerov was present at ASPO and Mr van Zomeren and Mr Van Den Oever of Mercon were on site on 24 January 2009 and then left on 25 or 26 January 2009. Mr Knibbe's reports show some pile bead welding being carried out but this ceased on 2 February 2009.

122. Bluewater says that effectively nothing on site changed between 23 January 2009 and 3 February 2009 following the issue of the Notice of Default.

123. Mercon replied to the Notice of Default on 26 January 2009 stating that: "*In fact today, the 25th of January we continue the completion of work in Astrakhan.*" Mercon then sent a further response on 28 January 2009 and said that much of the work set out in the Notice of Default was not within Mercon's contractual scope.

124. On 28 January 2009 ASPO stated in a conference call with Bluewater that it had ceased all work for Mercon as a result of Mercon's failure to pay ASPO and in a letter from Bluewater to ASPO of the same date it was stated:

> "*Bluewater have come to know that ASPO ceased all WORK with [Mercon] due to the fact that in contradiction with an agreement reached between ASPO and [Mercon] on 23 JAN 2009, as of 26th January 2009 [Mercon] have neither issued payment nor any proof of such a transaction confirming that outstanding invoices including RFVAT, up to and including December 2008 had been paid (approx.. 2.6Mio).*"

125. On 29 January 2009, Mr Knibbe records in his daily report: "*Checked why still not more work is done by ASPO, according to [Mercon] Timur, they first need to receive outstanding payments.*"

126. On 30 January 2009 Mercon sent Bluewater a Schedule of Completion. The covering letter said that the works would be completed within "approximately three weeks" but would not be able to start until 10 February 2009 due to issues with getting the necessary materials and manpower. The Schedule did not include the weighing of the structure.

127. On 3 February 2009 Bluewater issued the Notice of Termination under Clause 30.

128. On 11 February 2009 ASPO stated that Mercon's debt was still at €2.6m, subject only to the payment on 3 February 2009 of approx €130,000.

129. On 24 February 2009 Osborne Clarke acting on behalf of Mercon wrote to Ince & Co acting on behalf of Bluewater, notifying them that Mercon had accepted Bluewater's repudiation of the Contract.

130. On the basis of that chronology it is now necessary to consider whether Bluewater was entitled to terminate the Contract based on the various items of work which were referred to in the Notice of Default on 23 January 2009 and which Bluewater relies on to justify the Notice of Termination on 3 February 2009.

131. There is a preliminary matter which I must determine before I consider the individual matters. Bluewater submits that if Mercon is in default in relation to one of the items in the Notice of Default then that is sufficient to justify the termination under Clause 30. Mercon does not agree with this and submits that the relevant obligation is the obligation to deliver Milestone C6 (or C3) by a particular date and the default would be a failure to deliver that Milestone by the relevant date. If, Mercon says, the reason why the Milestone is incomplete is because it was prevented from completing Milestone C6 by a matter which was Bluewater's obligation then it would not be in default. Mercon refers to the Notice of Default and, in particular to the passage where it says "*MERCON is in default of its obligations under the Agreement by reason … of its failure to complete the work items identified on the OUTSTANDING WORK LIST (as amplified in the list at Annex 1…*" Mercon submits that the default is a failure to complete Milestone C3 and C6 items.

132. Mercon also refers to this further passage in the Notice of Default:

> "*If MERCON does not immediately commence and thereafter continuously proceed with actions satisfactory to BLUEWATER to remedy the identified defaults BLUEWATER will be entitled to issue a Notice of Termination… if … MERCON has not remedied its default by completing to the satisfaction of BLUEWATER all work items related to key date C6 as set out above and as those are amplified in the updated list at Annex 1.*"

133. Mercon says that this makes it clear that it is a failure to have completed Milestone C6 which is a package of items not individual items.

134. Bluewater submits that this is not correct and that Mercon's obligation is to complete individual items not just to complete packages of items. It refers to Clause 2 of Section 3 of the Contract which provides as follows:

> "*CONTRACTOR shall safely and with due diligence perform Work as set forth herein on a continuous basis until completion and acceptance by BLUEWATER.*"

135. On this basis Bluewater submits that Mercon would be in default if it failed to act in relation to the individual items rather than complete all of the items in Milestone C6.

136. I consider that Bluewater is correct in its submissions. If, as here, the Notice of Default was given in respect of a number of items then Mercon was obliged to commence immediately and continuously proceed with actions satisfactory to Bluewater. If it failed to do so then that would give the grounds for a termination under Clause 30. The obligation is not simply an obligation to complete the whole package of items of work within a particular Milestone. It follows that a failure in respect of one item may be sufficient to justify termination.

137. One other point on the Notice of Default is the reference to Bluewater issuing a Notice of Termination "*if within 7 days of the date hereof MERCON has not remedied its default by completing to the satisfaction of BLUEWATER all work items related to key date C6 as set out above and as those are amplified in the updated list at Annex 1.*" The 7 day limit is not one contained within the Contract and, if Bluewater had relied on a failure to complete all the items within 7 days then that could not, in itself, form a basis for termination. However, Bluewater did not seek to impose that limit and I do not consider that the inclusion of that provision affects either the validity of the Notice of Default or the Notice of Termination.

Allegations of Default

138. On that basis it is now necessary to consider the individual items which form the basis of Bluewater's case that it was entitled to terminate under Clause 30. The parties have concentrated on certain main items but referred to other items. I shall deal with the following items:

    (1) Weighing;
    (2) Painting and Shotblasting;
    (3) Fitting of the Yoke Hinge;
    (4) Load testing of the winch foundations;

(5) Installation of flame and gas detectors;
(6) Other items.

Weighing

139. Bluewater contends that Mercon was contractually obliged to weigh the Central Column and substructure at Astrakhan using load cells and jacks and that it had failed to do so by the date of the Notice of Default. Bluewater then says that Mercon was required to carry out the weighing by the Notice of Default but failed to take the necessary action by the date of the Notice of Termination, thereby justifying the termination.

140. Mercon contends that any weighing obligation was varied so as to be an obligation to weigh using a crane and load cells and that any such obligation was part of the work at load-out in C9 and not in C6. Mercon also says that by January 2009 weighing was not required and that Bluewater only insisted on it so as to create a default which could lead to termination.

141. It is therefore necessary to consider a number of issues. First, what was Mercon's weighing obligation under the Contract with Bluewater? Secondly, whether Mercon's obligation was subsequently varied. Thirdly what was the effect of any discussions as to weighing prior to 6 January 2009? Fourthly what was the effect of weighing being included in the list of 6 January 2009? Fifthly, whether Mercon was in default on 23 January 2009. Sixthly, whether this was a valid ground for termination.

The contractual obligation

142. Clause 5.13 of Section 3 of the Contract, Scope of Work, referred to "Weight Control" and stated:

> "*The weights of all components are critical for early assessment of the SYMS during the installation phase and reliable and accurate weight reporting, taking account of items such as weld volume and paint, is therefore essential.*
> …
> *(1) The final weight and centre of gravity (COG) shall be confirmed from the results of the physical weighing.*
>
> *CONTRACTOR shall comply with the requirements of the SYMS Weighing Specification, Doc No. RUSA-JBE-N1-JS-64900-4014.*"

143. Clause 8.1 of Section 3 of the Contract provided: "*CONTRACTOR shall carry out weighing of those parts/components in accordance with the requirements of the SYMS Specification Weighing.*"

144. Clause 8.3 of Section 3 of the Contract provided that "*CONTRACTOR shall have available, prior to load-out, a detailed weight report and centre of gravity calculation for each component.*"

145. Section 6, Specifications at Attachment 6B of the Contract stated that Doc No. RUSA-JBE-N1-JS-64900-4014 was the "*LUKOIL Weighing Specification*" as part of the Client and Authority requirements, reports, procedures and specifications. Those took

precedent over the Bluewater requirements, reports, procedures and specifications which included specification BWS-S-100-SP-9903 "*BLUEWATER Specification for Weight Control of Fabrications".*

146. The Lukoil Weighing Specification provided:

(1) By Section 2.5 that:
"*The number of weighings for each assembly shall be two (2), as follows:*
1. When the structural steelwork has been erected or when the assembly is structurally stable.
2. Immediately before load-out."

(2) By Section 2.11, Load Cells, that:
"*The weighing system shall consist of electronic strain gauge load cells. Other types of load cells may be used if approved by COMPANY.*
The load cells shall be equipped with a spherical seating, or equivalent, in order to minimize horizontal forces."

(3) By Section 2.13 that:
"*The jacking system employed in the weighing must produce uniform vertical movement at all weighing points.*
The jack shall be double acting. For assemblies below 500 tonnes a single acting jack may be used.
The assembly weight must be directly applied to the load cells, either by jacking up and lowering onto the load cells (load cells adjacent to jacks) or by jacking the load cells up to the assembly and then lifting (load cells on top of the jack or inside the hollow of the jacks).
When the load cells are positioned adjacent to the jacks the assembly must be lowered smoothly and uniformly onto the load cells. This method of jacking/weighing shall be used only for smaller assemblies below 500 tonnes."

(4) By Section 2.14 that: "*Each individual load cell shall have a measurement uncertainty better than ± 0.5% of rated capacity. The measurement uncertainty of the weighing system as a whole shall be within ± 1.0% of actual weighed weight.*"

(5) By Section 2.19 that "*For each weighing operation a minimum of three (3) lifts/weighings/readings are required.*"

147. Bluewater contends that under the Contract, Mercon was obliged to carry out the weighing to comply with the Lukoil Specification and relies on the acceptance of this by Mr de Jong in evidence. This specification required Mercon to weigh with jacks and although there was no obligation to weigh with jacks under the Bluewater specification for weighing (BWS-S-100-SP-9903), Bluewater relies on the express provision of the Contract that Lukoil requirements take precedence over Bluewater requirements.

148. Mercon submits that weighing of the structure prior to load-out is not specifically required to be carried out by reference to the RUSA document under the Contract, but instead Clause 8.1 of Section 3 of the Contract refers to the "SYMS Specification Weighing". Mercon says that in Bluewater's memorandum dated 14 February 2008 this reference was replaced by the words "Bluewater Specification" and that this envisaged

weighing by crane. Mercon says that there was no further discussion between the parties about weighing after February 2008 until the issue was raised by Bluewater in January 2009 as a major default and that, not unreasonably, Mercon proceeded from February 2008 on the assumption that the substructure and other components could be weighed using a load-cell in the crane, as indicated in Bluewater's February 2008 Weight Report and that the foundations of the substructure at the ASPO yard were constructed accordingly.

149. As a result Mercon submits that at least until 6 January 2009, there was no contractual obligation to weigh with jacks and that even if Bluewater's letter dated 6 January 2009 was a valid contractual instruction making it Mercon's obligation to weigh with load-cells and jacks, it cannot be said that Mercon's failure to have carried out the weighing by 23 January 2009 constituted a default. It submits that the period between, in reality, 12 January 2009 when the site was planned to be re-opened and 23 January 2009 was not an adequate period to allow the work to be done and so Mercon was not therefore in default.

150. Mercon says that weighing was a task that Bluewater did not need to be carried out at all but insisted on anyway and in this way contrived a default. Mercon says that by the end of 2008, Bluewater had decided that it did not need, did not want, and did not intend to have the substructure weighed, either with jacks or at all.

151. Whilst Mercon accepts that jacks would theoretically be necessary in order to determine the centre of gravity by a physical weighing because the substructure was not symmetrical, it says that by September 2008 the centre of gravity had been accurately calculated and none of Bluewater's personnel involved in the discussion in September 2008 indicated that weighing was necessary, nor was that issue raised at any point after September 2008 and before 6 January 2009, nor was there any mention of jacks.

152. Mercon also submits that, in any event, the final weighing was an activity under Milestone C9, and not Milestone C6. It refers to Clause 8.3 which provides that it should have available a "detailed weight report and centre of gravity calculation" for each SYMS component "prior to load-out" and to Clause 2.5 of the Lukoil Specification which provides that final weighing shall take place "immediately before load-out". Mercon says that, while weighing may be a condition to completion of C9 (load-out), it was not part of Milestone C6, which relates only to integration of the centre column into the substructure. It points out that final weighing requires weighing of all components, including the Topsides and yoke system which are not relevant to C6 and so could not be part of that Milestone. Further Mercon says that any failure to weigh was not a default but an anticipatory breach.

153. Mercon relies on bad faith by Bluewater. It says that it ordered the weighing despite knowing that the area in ASPO's yard where the work was being carried out, known as "Little Holland II", had not been constructed to allow weighing by jacks and load cells. It also says that bad faith is demonstrated by the way in which Bluewater handled weighing post-termination by including weighing as a work activity for ASPO with a specific instruction that "*the weighing of the SPM system shall be performed using calibrated load cells and jacks, unless otherwise agreed*" despite the fact that, by then, ASPO already knew or believed according to Mr de Geus that it had become "impossible to weigh with load cells and jacks" because of the lack of sufficient

foundations when the yard work had been done in early 2008. Mercon also contends that the Work Contract with ASPO and other documents were prepared to help support Bluewater's case on termination.

154. Bluewater says that the requirements of Clause 5.13 in respect of "Weight Control" apply to all references to weight control in the Contract and that there is nothing in the terms of Clauses 8.1 or 8.3 to show that the provisions of Clause 5.13 would not apply to the weighing referred to in those clauses. Clause 5.13 refers to the SYMS Weighing Specification as being the Lukoil specification and Clause 8.1 refers to the SYMS Specification Weighing. Bluewater submits that Mercon was required to comply with the Lukoil Specification and that this required weighing by jacks and load cells. Bluewater says that the contention by Mercon that the Lukoil specification was not provided is not made out by the evidence but, in any case, does not assist Mercon who undertook the relevant obligation and were aware from the Bluewater specification of the need to use load cells.

155. In respect of whether weighing was part of C9 or C6, Bluewater says that weighing the structure three times with jacks and load cells could not be carried out in less than a day and would have to have been done before load out and not as part of the load out. As Key Milestones C6 and C9 were scheduled to be only one day apart, Bluewater submits that Mercon would have to weigh under Key Milestone C6 as the structure would not be 'ready for load out' until it had been weighed. In any event, Bluewater says that the instruction on 6 January 2009 was an instruction to carry out the weighing pursuant to C6 and from then onwards Mercon could not wait until C9 to carry out weighing.

156. Bluewater submits that Mercon's default in not weighing was not an anticipatory breach at 23 January 2009 as Mercon was in default in respect of its contractual obligation to weigh by load cells and jacks and could not comply with the instruction to weigh with jacks without very significant work given the preparation work carried out at Little Holland II.

157. Bluewater rejects any suggestion of bad faith on its part and says that it properly included the failure to carry out weighing in the Notice of Default. Bluewater says that Mercon did not take any steps to carry out weighing in the time before or after the Notice of Default. No investigations were carried out as to the feasibility of weighing with jacks, no equipment was procured and no quotes were obtained. Weighing was not included in the Schedule issued on 30 January 2009. As a result Bluewater says that this item was correctly included on the Notice of Default and was a valid ground for termination.

158. It is convenient first to consider the chronology in relation to weighing.

Chronology

159. In September 2007 when the design was amended to include the 5th leg then, as shown by an attachment to an email of 11 September 2007, it was envisaged that Mercon would weigh with load cells and jacks. A sum of €79,718.80 plus labour was indicated for the price of the additional weighing of the 5 leg structure and it was noted:
"Originally [Mercon] has anticipated to weigh the substructure with the weighing system of the Crane "Volgar" at Load out. Together with a weight control report with theoretical weights and COG this was considered sufficient. With the current 800T mooring load design the COG

will not be in line with the central column due to the fifth leg. To determine the COG 5 individual load cells are required and weighing with crane Volgar is not possible any more."

160. On 5 December 2007 in an internal Mercon email Mr van Daele asked Mr Michel Lammens to sort out how "*weighing of the substructure by load cells can be done in Astrakhan*" as he was concerned about the availability of load cells there.

161. On 6 December 2007 Mercon was in contact with Mammoet about load cells and jacks and where they would be located in relation to the revised 5 leg substructure.

162. There was a discussion between the parties as part of the negotiations for VOR-004 about the need for the changes to weighing in order to establish the centre of gravity as part of the variation. Those discussions were recorded in a worksheet prepared, it seems, soon after 10 January 2008. It summarised Mercon's position as set out on 17 December 2007 where it required €79,718.80 and Bluewater's position that an acceptable figure was €8,652.96, as set out on 10 January 2008. Bluewater said it could "*accept 1 extra Jack and Load cell and 1 additional labour*" and it was noted that Mercon was to check contents of Clause 8 of Section 3 of the Contract and the Lukoil and Bluewater Weighing Specifications. VOR-004 was not agreed and remains in dispute in the present proceedings.

163. Bluewater issued a weekly progress report to Lukoil dated 18 January 2008 in which it stated under Fabrication Engineering relating to Mercon: "*Weight Control report issued by [Bluewater]….[Bluewater] Weight Control procedure and Weighing Spec. (RUSA-JBE-N1-JS-64900-4014) still missing (section 3 – item 5.13).*" This reproduces Mercon's weekly report with a cut-off date of 20 January 2008 for "*[Bluewater] to take action.*"

164. On 11 February 2008, Bluewater issued the document with the title "Calculations - SYMS Weight Report". That document contained details of weight and centre of gravity as calculated based on the design and it attached those calculations. It stated contingencies which were to be applied to calculated weights but noted at para 4.2 that "*In later project stages, weights may be established by weighing with a crane or even by load cells.*" The contingency was 5% for weighing by crane and 2% for weighing by load cell.

165. Mr de Geus prepared a memorandum on 14 February 2008 with the purpose of providing all parties, including Mercon, with "a summary of requirements and obligations" in relation to weighing, among other things. It included reference to Clauses 5.13 and 8.1 of Section 3 of the Contract and stated "*Final Weight(s) and Centre(s) of Gravity shall be performed from the results of physical weighing as per BLUEWATER specifications.*"

166. In March 2008 Mr de Jong noted under the heading of a discussion with Mercon directors "*now weighing on load cells*" and "*To what extent is weighing on load cells according to the Contract?*" Mr de Jong said that Mr van Daele had told him that weighing with load cells was originally required with a four leg structure and that he was to investigate what the Contract required.

167. In an email of 19 March 2008 Mercon confirmed to ASPO the outcome of a discussion as to the site preparation of the erection area in ASPO's yard known as "Little Holland II". An agreed contribution from Mercon of €390,000 is mentioned and that price is noted in manuscript on an attached pricing document which also notes: "*not included concrete for weighing*".

168. In response on 27 March 2008 ASPO stated:

> "*At the same time I would like to draw your attention to the fact that the construction of the fabricated support foundation does not provide installation and usage of the equipment needed for weighing of SYMS construction. At our meeting with [Mercon] Representatives on 20.11.2007 it was pointed out that weighing with the equipment of f/c Volgar is not acceptable for [Mercon] and [Mercon] was to provide information of weighing method to ASPO, though ASPO has not received that yet.*"

169. The yard preparation did not therefore include sufficient concrete to allow for weighing with jacks.

170. On 15 September 2008 Mr Brouwer emailed Mr de Geus saying that he wanted "*to aim that the weighing at ASPO will not be executed in order to safe time for completion and of course cost*". Mr Brouwer said that he thought that the Lukoil/Bluewater contract did not specify any weighing requirements. He also asked whether Bluewater could get money back from Mercon if it did not weigh.

171. In response by email on the same day, 15 September 2008, Mr van Koperen said he could not find anything in the Lukoil/Bluewater contract or in the RMRS or DNV requirements and suggested calling LOC, the marine warranty surveyors, noting "*probably no weighing required*". Mr van Koperen explained that weight contingencies would be higher if there was no weighing (8% rather than 3%) but that "*if this percentage doesn't matter for the crane then skip weighing*." Mr Konijn indicated that McDermott, the contractor responsible for offshore installation assumed that the structure would be weighed and would require Lukoil to weigh it. Mr Konijn also said that if the load-out contractor CMC Heavy Lifting did not see the need for weighing then "*Lukoil can use the Volgar crane as weighing*". He also asked "*Do we inform McDermott that we will not weigh the substructure?*"

172. On 15 September 2008 Mr de Geus also entered into his spreadsheet of claims against Mercon a claim for a refund in relation to weighing.

173. On 27 November 2008, Mr Manson asked Mr van Koperen if anything had been decided about weighing requirements. Mr van Koperen replied the same day saying initially "*We are not going to do any weighing, it is not in our scope.*" Later that day he said that weighing was required under the Contract with Mercon "*But it is no[t] required with our contract with Lukoil. If Lukoil doesn't want weighing we get money back from [Mercon].*"

174. On 3 December 2008 there was a meeting between McDermott, Lukoil and Bluewater at which it was noted at item 8.3 under Weighing of structure that "*Bluewater is not planning on weighing the structure. McDermott to confirm this is acceptable*".

175. On 4 December 2008 Mercon wrote to Bluewater to say that it had understood from Mr Konijn after the meeting that "*Lukoil, McDermott nor Bluewater require weighing of the structures.*" In reply on the same day, 4 December 2008, Bluewater stated:

> "*At no occasion have BLUEWATER formally waived the requirement, as stipulated in the Contract, that weighing of the SPM SYSTEM is no longer required. The statement of MERCON is therefore considered incorrect.*"

176. Weighing was not included on any of the lists of outstanding work prepared by either Bluewater or Mercon during December 2008.

177. In a Bluewater internal manuscript note prepared on 6 January 2009 it states "*Weighing is in [Mercon] scope. But is this required? Put on list with [Mercon].*"

178. In the letter of 6 January 2009 Bluewater said that:
"*MERCON have neither executed nor completed major elements of the scope of WORK related to Key Milestone C6, such as:*
(a) *Weighing of the SPM SYSTEM in accordance with the provisions of the Contract;…*"

179. By a letter to Bluewater dated 8 January 2009 Mercon stated:

> "*The weighing of the structures in Astrakhan before load-out, has been proposed during our tender and included in our contract to be executed during load-out with the 'Volgar' by using the load-cells in the system of this crane vessel. The delayed load-out forces us to execute this scope element in June 2009 when completing milestone C9. We conclude that this scope element cannot form part of the milestone C6 scope.*"

180. On 23 January 2009 in the Notice of Default Bluewater identified a failure to complete the items on the Outstanding Works List, as amplified in the list at Annex 1 to the letter. In relation to Structural Works, Weighing was identified in Annex 1.

181. Mercon informed Bluewater on 28 January 2009 in response to the Notice of Default that weighing by crane during Load Out did not form part of Milestones C3 or C6, although part of the original scope and scheduled to be executed and stated it was "*subject to Keydate C9 scope.*"

182. On 30 January 2009 Mercon sent Bluewater the schedule of completion which did not include weighing.

183. On 3 February 2009 Bluewater issued the Notice of Termination.

184. On 3 April 2009 Bluewater sent a project query which attached page from the Weight Report of 11 February 2008 and a drawing and requested that LOC confirm that weighing of the substructure was not required for Lift FOB McDermott Barge. On 6 April 2009 LOC responded that "*weighing of the substructure not required for above purpose.*"

Analysis

185. On the basis of the provisions of Clauses 5.13, 8.1 and 8.3 of section 3 of the Contract Mercon had the obligation to weigh the substructure using jacks and load cells as part of the requirements of the Lukoil specification. It was that specification which took precedence over the Bluewater specification. The provisions of the Lukoil specification are clear as to the use of jacks and load cells. It is far from clear that the references in the weekly reports of both Bluewater and Mercon in January 2008 to the Lukoil specification being missing had any impact at all. There was no further reference to the lack of that specification and it can be seen that Mercon were in no doubt of what was required as shown by the internal exchanges and involvement with Mammoet in December 2007. I therefore reject the contention by Mercon that it was not under an obligation under the Contract to carry out weighing using jacks and load cells either because of the provisions of the Contract or a failure to supply the Lukoil specification.

186. I do not read the document produced by Mr de Geus on 14 February 2008 as altering any obligation under the Contract. It recites the contractual provisions and refers to Bluewater specifications, clearly as a general reference to the specifications and not intending to supplant the Lukoil specification by the "Bluewater specification". When Mr de Jong became involved in March 2008 there were evidently internal discussions in Mercon as to whether weighing with jacks and load cells was part of Mercon's obligation under the Contract. Mr van Daele's communications in December 2007 appear to be clear that such weighing was required and it may be that Mr de Jong either misunderstood what he was told at the time or did not properly interpret the contractual obligations. That had the consequence that Mercon appear not to have allowed for the proper preparation of the area of the ASPO yard known as Little Holland II. It seems that this may have been driven by a commercial decision to save money and it may be that Mr de Jong's misunderstanding of the position led to the position where the necessary foundations were not in place to allow weighing using jacks and load cells.

187. In September 2008 there was obviously internal consideration by Bluewater both as to the need to carry out the weighing and also whether it was required under the contract with Lukoil. It was appreciated that it would save time and money if it were not required. This developed so that by late November and early December 2008 Bluewater had decided not to carry out weighing and had agreed this with McDermott and Lukoil. This was then communicated by Mr Konijn to Mr de Jong, as recorded in Mercon's letter of 4 December 2008. Mr Konijn's evidence in his third witness statement confirmed that this was the position, contrary to his previous evidence. However it is clear from Bluewater's reply of 4 December 2008 that Bluewater was not removing weighing from Mercon's workscope. Therefore weighing remained an obligation of Mercon under the Contract.

188. In December 2008 work was continuing with a view to Lukoil accepting the integrated structure and to Mercon therefore achieving Milestone C6. Weighing does not seem to have featured in the lead up to 18 December 2008 when it became clear that Lukoil would not accept the substructure. This led to Bluewater taking a much stricter approach to the work needed to complete Milestone C6. Whilst, in anticipation of Lukoil accepting the integrated structure subject to a punch list, Bluewater took the same approach with Mercon, there was clearly a change in that approach in late December 2008 and early January 2009.

189. Weighing remained an obligation for Mercon under the Contract. The purpose of weighing was to confirm the actual weight and Centre of Gravity of the integrated structure which had been the subject of calculations based on the design. I consider that Bluewater is correct in its submission that the weighing activity would fall within Milestone C6 which required the integrated structure to be "*ready for load out*". It was part of the preparation to allow load out to take place to achieve Milestone C9 rather than an activity which formed part of the load out Milestone itself.

190. In any case, if there had been any uncertainty about when the weighing was to be carried out then the letter of 6 January 2009 made it clear that Mercon had to carry out the weighing as part of Milestone C6. That would have been a sufficient instruction if the work had not already formed part of the work required to achieve Milestone C6.

191. By its response on 8 January 2009 Mercon indicated that its contractual obligation was to carry out weighing using the load cells of the crane Volgar and that it intended to do this as part of load out under Milestone C9. For the reasons set out above its obligation was to carry out weighing using jacks and load cells and not the crane and load cells. Further Mercon's response in that letter amounted to a refusal to carry out the weighing in accordance with the Contract as part of Milestone C6 and as required by the letter of 6 January 2009.

192. There followed meetings on 14 January 2009 between Mercon and Bluewater at which the contents of the schedule attached to the letter of 6 January 2009 was discussed and whilst weighing was mentioned, Mercon repeated that it would carry it out using the crane. After these meetings Mercon wrote three letters (Ref 321, 322 and 323) to Bluewater on 19 and 20 January 2009 dealing with matters in that schedule. Those letters did not deal with weighing. At a meeting on 20 January 2009 Mercon stated that it wanted to discuss weighing at the next meeting and repeated that they did not consider it as part of the work scope other than with the crane as part of Milestone C9.

193. There appears to have been no discussion by the time of the Notice of Default on 23 January 2009 when weighing was again included on the list of outstanding work as amplified in Annex 1. In its letter of 28 January 2009 responding to the Notice of Default Mercon repeated its position that "*Weighing by crane during Load Out; subject of the Keydate C9 scope.*"

194. On 30 January 2009 Mercon sent Bluewater its schedule for completion of all outstanding work. There was no reference to weighing on that list. On 3 February 2009 Bluewater then issued the Notice of Termination in respect of all remaining work under the Contract.

195. It can therefore be seen that Mercon had an obligation under the Contract to carry out weighing as part of Milestone C6. It was instructed to carry out that in the letter of 6 January 2009 and in the Notice of Default. It held to its position that it did not need to carry out weighing with jacks and load cells as part of Milestone C6 and that its only obligation was to carry it out with a crane as part of Milestone C9. It therefore did nothing in relation to weighing and did not even include it in the schedule submitted on 30 January 2009. In those circumstances, prima facie, Mercon did not upon receipt of the Notice of Default "*immediately commence and thereafter continuously proceed with action satisfactory to BLUEWATER to remedy such default*" and so Bluewater was

entitled to issue a notice of termination in accordance with Clause 30.1 of the Contract. Whether the action has to be objectively or subjectively satisfactory to Bluewater, the fact that Mercon wrongly refused to carry out weighing by jacks and load cells and refused to carry it out as part of Milestone C6 and so had done nothing in response to the Notice of Default cannot possibly amount to commencing and continuously proceeding with satisfactory action.

196. Mercon refers to the fact that, as I have found, in early December 2008 it had been told by Mr Konijn that McDermott, Lukoil and Bluewater did not require weighing. However, Bluewater's letter of 4 December 2008 made it clear that it had not waived the requirement for weighing. In addition, as the correspondence shows, Mercon was not saying in January 2009 that weighing did not need to be carried out but rather that it would carry it out using a crane as part of Milestone C9.

197. Mercon relies on bad faith by Bluewater. Whilst on the basis of Mr Konijn's evidence it seems likely that some people in Bluewater were aware that weighing with jacks and load cells could not be carried out because of the way in which Little Holland II had been constructed I do not consider that there is any evidence that this formed any part of Bluewater's decision to include weighing in the letter of 6 January 2009 or the Notice of Default. Mercon's satisfactory action in response to the Notice of Default would have needed it to have taken into account the requirement to prepare foundations for the jacks and load cells but Mercon took no action at all. I also reject the assertion that post-termination Bluewater contrived to include weighing using load cells and jacks as a work activity for ASPO and dealt with other documentation in such a way as to assist its case on termination. Whilst in April 2009 it was confirmed by LOC that weighing was not required, I consider that it was appropriate for Bluewater to continue to include an obligation to carry out weighing in the contract with ASPO. Equally, whilst some in Bluewater may have been aware of the difficulty with the foundations at Little Holland II in December 2008, I accept that the difficulty posed only became clear to some in Bluewater at a later date. The need for everyone to be involved in the decision to use calculated weights and centre of gravity instead of actual figures required some co-ordination but I think Mr de Geus exaggerated the difficulty of this in his evidence.

198. As a result, I find that on 3 February 2009 Bluewater was entitled to issue the Notice of Termination based on Mercon's failure to take steps in respect of its default in its obligation as to weighing under the Contract. Bluewater's subjective view that the action taken by Mercon was not satisfactory is not affected by anything which comes within the limitations on the exercise of that discretion.

Painting and Shotblasting

199. Bluewater says that, although Bluewater issued a Notice of Partial Termination of coating repair work to the Central Column on 11 November 2008, there was a considerable amount of painting and shotblasting work which Mercon had to carry out as at January 2009. In particular it refers to the following items included in the list attached to the letter of 6 January 2009 and included in the Notice of Default:
    (1) PL CC4.1, painting on piping integration welds;
    (2) PL CC4.2, general touch up sub-structure, including Central Column;
    (3) PL CC4.2 NDT surfaces and drain put inside Central Column above watertight floor;

(4) OWL TS4.2 General touch-up Top Side;
(5) OWL TS4.3 Paint door of Pig Receiver;
(6) OWL TS4.4 Touch up modified grating panel on PRD; and
(7) PL TS 4.1 Four Integration welds columns Top Side (applying the top coat).

200. Bluewater says that when Mercon produced its schedule for completion of all outstanding work on 30 January 2009 there was a substantial amount of work, which was shown to take some two weeks in that programme.

201. Bluewater submits that Mercon was not progressing the shotblasting and painting works in January or February 2009, and that this was primarily due to Mercon's difficulties with ASPO. Mercon says that it was carrying out some painting work but was prevented from doing more by the weather conditions. Bluewater says, in response, that this shows that work could be carried out but that Mercon had to make the necessary arrangements in terms of heaters and habitats to do so.

202. Mercon says that it was not until the 6 January 2009 that Bluewater made it clear that it wanted painting to be progressed during January 2009 as, prior to that, it says that the work was to be treated as a punch list item and, in any case, the works were not due to restart after the Christmas break until 12 January 2009. In those circumstances Mercon submits that the failure to complete the painting by 23 January 2009 cannot be regarded as a default. In addition Mercon says that its schedule for completion issued on 30 January 2009 indicated completion of the painting between 17 February and 2 March 2009, a duration of 13 days. That timing, it submits, would have allowed some improvement in the weather and for the commercial issues between Mercon and ASPO to be resolved and for any outstanding amounts to be paid.

203. I therefore have to consider what painting work should have been carried out up to 23 January 2009 and whether Mercon was in default in the period up to the Notice of Termination on 3 February 2009.

204. In December 2008 Mercon and Bluewater were working on the basis that the integrated structure would be accepted by Lukoil and there would be a punch list containing items of work which would be completed after acceptance. Some items of painting would have been included on that list. However, after it became clear that Lukoil would not accept the substructure on 18 December 2008, it is evident that Mercon would have to continue with the necessary painting work to achieve Milestone C6. Mercon was aware of this and Mr Wickerhoff's evidence, which I accept, was that before returning to Holland for the Christmas Break, he had left instructions for ASPO to complete the painting work in relation to all of the items except OWL TS4.2 (General touch-up Top Side) and OWL TS4.4 (Touch up modified grating panel on PRD).

205. ASPO timesheets completed in Russian, as interpreted by Mr Umerov, show 8 workers painting on 4 January 2009, 3 workers painting on 5 January 2009 and 4 workers painting on 6 January 2009. The Russian Orthodox Christmas is then celebrated on 7 January. The timesheets show work relating to pile sleeves being carried out on 11, 13, 18, 19, 20, 21, 22 and 23 January 2009. Scaffolding work was carried out on 12, 13, 14, 15, 16, 17, 19, 20, 21 and 22 January 2009. There is also reference to some touch up painting on 19 January 2009.

206. Other records, including those prepared by Mr Knibbe of Bluewater, appear to show that no work was carried out at the ASPO yard until Tuesday 20 January 2009 when work started on QA/QC of the weld beads on the pile sleeves. It continued on 21 and 22 January with a report being received on Friday 23 January and work being said to be complete by Saturday 24 January 2009. Mr van Zomeren and Mr van den Oever of Mercon were present on site for that period but left on Sunday 25 January 2009. On 21 January work was carried out to the cable trays on the turntable. There was also some scaffolding work shown. An outstanding work list shows that a number of items had been completed by 24 January 2009.

207. If the ASPO timesheets are correct and have been correctly interpreted by Mr Umerov then painting work was carried out in early January 2009 when the maximum temperatures were -6 degrees (4 January 2009), -5 degrees (5 January 2009) and -10 degrees (6 January 2009). However no painting work was carried out on days when the temperatures were higher. On 16 January 2009 it was +3 degrees, on 18 January 2009 it was +3 degrees, on 22 January 2009 and on 24 January 2009 it was +5 degrees. There was evidence in an email dated 26 January 2009 from Mr Umerov that Mr Valerie Kramykhr, the Paint Manufacturers' representative, had said that "*we can't put finish paint layer when temperature was below 0 deg C.*"

208. Whilst Mr Wickerhoff raised an issue in his evidence about the relevance of the dew point, he said it would be a matter for an expert and there appears no reference to dew point in the documents. The Contract specification at para 11.2 provides that: "*painting shall not be completed in the open air during periods of rain, snow, fog or mist and also shall not be attempted when the weather conditions may cause condensation and flash rusting*". It also stated that paint application might be suspended by Bluewater or the Paint Manufacturers' representative.

209. Further there was nothing to prevent Mercon from carrying out painting work using habitats and heaters, although as Mr Manson said it would be difficult but achievable. His manuscript comments on the schedule attached to Bluewater's letter of 6 January 2009 also refer to the use of heaters. In an email of 15 December 2008 Mr Wickerhoff had said that the painting works had been delayed because of adverse weather and lack of sufficient heating and on 30 January 2009 he said in an email to Mr Umerov that "*Painting inside the Central Column should not be a problem with a heater and a cover on the middle floor.*" All this confirms that after 6 January 2009 and making an allowance for the Russian Christmas period, Mercon could have been progressing painting work. This is also supported if in fact, as Mr Umerov suggests based on ASPO timesheets, that painting work was carried out in early January.

210. Except, it seems for some painting in early January 2009 and possibly some touch-up painting on 19 January 2009, no painting work was carried out between 6 and 23 January 2009 or between 23 January and 3 February 2009. Mr Umerov refers to a note by Mr Knibbe on 28 January 2009 saying that "*according painting contractor they will continue painting in March or April, agreed with [Mercon].*" This would seem to confirm that Mercon was not intending to carry out painting work in response to the Notice of Default.

211. I consider that the real reason why Mercon was not progressing painting in January 2009 was the poor commercial relationship between Mercon and ASPO at this time.

The key pieces of evidence in this respect are the emails of 29 January 2009 and 2 February 2009 from Mr Umerov to Mr Wickerhoff.

212. In the first he records a discussion with Mr Ryzhov of ASPO about the remaining work which Mercon needed to finish as soon as possible. Mr Umerov reported that Mr Ryzhov said:

> "*I spoke with Ryzkov today morning concerning it, and showed him excel sheet with all remaining paint work, which we need to finish as soon as possible. But he said, that we can not make any plannings concerning works, which are not in the main contract before receiving all debts from [Mercon] and signing additional agreement. He said also, that is Marisov decision and we can not change it, we must to close main contract, to sign additional agreement, to receive depts. And only after that we will make plan for painting and for other additional works.*"

213. In the second he states

> "*I spoke with Ryzkov again about Additional Agreement, and he said, that he red this letter today together with Marisov, and during today ASPO will send response (as he told me, for Marisov this letter is not enough, he want to receive signed agreement, which ASPO sent to [Mercon])*
> *He also said that he cannot permit final painting before receiving payment for the main painting from [Mercon].*"

214. Mr Umerov's evidence on this was unsatisfactory. He sought to avoid the clear effect of this evidence. In fact the truth was that until the financial position between ASPO and Mercon was resolved then ASPO would not be carrying out further painting work.

215. Whilst Mercon accepts that progress was hampered by the deterioration of the commercial relationship between Mercon and ASPO, it says that, by the beginning of February 2009, that situation was under control because on 30 January 2009 it made a payment to ASPO which was intended to settle all due invoices, leaving unpaid only disputed invoices and those not yet due for payment. On 3 February 2009 Mercon discovered that, as a result of an error by its financial head, it had not in fact paid ASPO for invoice No.56 dated 19 November 2008 which was for painting and had been due for payment within 30 days.

216. I consider that the real reason why Mercon did not carry out painting work from 6 January to 3 February 2009 was because of the dispute and the failure by Mercon to make payment to ASPO. Whilst the further payment on 30 January may have meant that ASPO would start work, no work was carried out up to 3 February 2009. As a result, I do not consider that this late payment affects the position in relation to either the Notice of Default or the Notice of Termination.

217. Mercon seeks to rely on the discussions which had taken place since late 2008 between ASPO and Bluewater to say that this affected the commercial position between ASPO and Mercon. It says that, unknown to it, ASPO had by then already been told that Bluewater intended to terminate the Contract, engage ASPO directly and pay ASPO's invoices from money due from Bluewater to Mercon. Mercon says that it was hardly

surprising that ASPO took an uncooperative line with Mercon during January 2009 as it was clear to ASPO that Mercon would soon be ejected from the project and that, if that happened, Bluewater would pay ASPO's invoices in full and without question.

218. I do not consider that there is anything in this situation which can assist Mercon. Mercon was in dispute with ASPO and had failed to pay invoices. That was the real reason why ASPO was not carrying out the work. If anything, the knowledge that ASPO would be paid by Bluewater what was owed by Mercon would have been just as likely to encourage ASPO to carry out work on the basis that it was going to be paid. This suggests that it is not how ASPO saw the position. I therefore do not consider that the fact that Bluewater, as is usual in these circumstances, started a dialogue with ASPO about a possible contract if the Contract was terminated, affected the position or, in some way makes Bluewater responsible for the failure of ASPO to carry out the work for Mercon.

219. As a result I consider that the relevant items of painting and shotblasting which were properly the subject of default at 23 January 2009 were PL CC4.1 (painting on piping integration welds), PL CC4.2 (general touch up sub-structure, including Central Column), PL CC4.2 NDT (surfaces and drain put inside Central Column above watertight floor), OWL TS4.3 (Paint door of Pig Receiver) and PL TS 4.1 (Four Integration welds columns Top Side - applying the top coat). In the pleadings Bluewater accepts that the touching up of the Topsides (OWL TS4.2) was to be left until closer to Load Out and, on the evidence, it seems that touching-up the modified grating panel on PRD (OWL TS4.4) may have had to await other work which had not been carried out.

220. Whilst Mercon did not carry out any painting in the period after the Notice of Default up to the Notice of Termination, on 30 January 2009 it did submit a programme which showed the outstanding works including the relevant items of painting and shotblasting being carried out from mid-February for about two weeks. Mercon says that the start date would have allowed for some improvement in the weather and for the commercial issues between Mercon and ASPO to be resolved and for any outstanding amounts to be paid.

221. Mercon also says that Bluewater had no need or desire for the painting to be completed in any shorter period. It refers to the fact that Bluewater had told Lukoil that the painting would be done in April 2009 when the weather was better. It also refers to the draft contract handed over to ASPO on 20 January 2009, where the key date for completion of the works, including painting, was 25 March 2009, except for the coating on the Central Column, for which the date was 1 June 2009 and the fact that, in the event, the work was carried out at the beginning of April 2009.

222. I do not consider that on the basis of the outstanding painting items which Mercon had failed to carry out by 23 January 2009, action consisting solely of a programme produced after 7 days could amount to compliance with the obligation that it should "*immediately commence and thereafter continuously proceed with action satisfactory to BLUEWATER to remedy such default.*" The painting work could and should have been commenced and been continued prior to 23 January 2009 and certainly between 23 January 2009 and 3 February 2009 for there to be satisfactory action even on an objective basis. The production of a programme with a starting date in mid-February

2009 was not satisfactory action for a default notified on 23 January 2009 whether viewed subjectively or objectively and does not come near the limitations imposed on Bluewater's exercise of its discretion.

223. The fact that Bluewater was seeking to agree a programme with ASPO which showed later dates should the Contract be terminated or the fact that, in the event, the painting work was completed in April 2009, does not, in my judgment, determine or form a basis for establishing what was satisfactory action for Mercon who was under an existing obligation to carry out the painting work, was in default of that obligation and was under a Notice of Default requiring action under Clause 30. Nor is the fact that Bluewater was protecting its position by telling Lukoil that the painting work would be carried out in April 2009 determine or establish satisfactory action by Mercon.

224. I therefore consider that the items of painting and shotblasting were properly included in the Notice of Default and, as Mercon did not commence or continue action satisfactory to Bluewater, Bluewater was entitled to issue the Notice of Termination under Clause 30 on the ground of this default. Bluewater's subjective view that the action taken by Mercon was not satisfactory is not affected by anything which comes within the limitations on the exercise of that discretion.

Fitting of the Yoke Hinge

225. Originally the Yoke Hinge was to be delivered as part of the Topsides but this did not happen. As a result, the work to fit the Yoke Hinge to the Topsides had to be carried out in Astrakhan. The Yoke Hinge was shipped on Ship 3. Although that ship finished discharging on 12 November 2008 and departed from Astrakhan on 13 November 2008, the Yoke Hinge remained in the Astrakhan customs area (ACCP) and not at the ASPO yard due to the problems with the documentation. It was released from ACCP on about 17 December 2008 and placed on the quayside at ASPO's yard by the crane Bogatyr on about 18 December 2008.

226. There is a dispute as to whether the work to install the Yoke Hinge on the Topsides formed part of Mercon's scope of works. Bluewater says that it was part of Mercon's scope of work to install the Yoke Hinge on the Topsides so it was ready for load out. It refers to drawing LUK-S-A43-DG-4303 001 dated 14 March 2008 which is not an installation drawing but a barge transportation drawing. Bluewater says that Mercon did not require any additional site instruction to have to install the Yoke Hinge.

227. Mercon says that the installation of the Yoke Hinge did not form part of Mercon's scope of work. It refers to Bluewater's pleaded case that Mercon refused to install the Yoke Hinge "*although this was clearly required by clause 7.27 of section 3*." Mercon says that although it was not responsible for the final fitting of the Yoke system to the Topsides, it was originally required, under section 3, clause 7.27, to trial-fit the Yoke Arm at Astrakhan by performing "*a rotation test of each complete and installed Yoke Arm to ensure free movement of the arms within the support hinges of the Mooring Turntable.*"

228. Mercon says that the Yoke system was originally designed to be detached from the SYMS to allow unmooring of the storage vessel at the joint between the Yoke Hinge and the Topsides. On this basis it says that the Yoke Hinge was a relatively simple device which was to be provided to Mercon as "free issue" ready for welding to the

yoke end with a field weld. The original scope of the Work required Mercon to fabricate the Yoke Arm in Gorinchem as part of Milestone B3, ship the components to Astrakhan under Milestone B4, integrate the components and load the Yoke Arm onto a barge in Astrakhan ready for sail away to Baku under Milestones C10 to C12 where another contractor would fit the Yoke Arm to the storage vessel. The storage vessel with attached yoke system would then be fitted to the Topsides as part of final assembly of the SYMS offshore. Mercon refers to drawing PR-G-800-DR-1261 001 Rev B which formed part of Attachment 6A to the Contract.

229. Mercon says that, by January 2009, the scope of works in relation to the Yoke system had changed in that the Yoke Hinge had become more complex and Bluewater had instructed Mercon to fabricate and machine it. Secondly, Mercon says that the point of detachment of the Yoke system had changed from the joint between the Yoke Hinge and Topsides to the joint between the Yoke End and the Yoke Hinge so that the Yoke Hinge would stay attached to the Topsides and the rest of the Yoke system would leave with the storage vessel. Thirdly, the Yoke system was not to be assembled in Astrakhan but, instead, the ballast tank, Yoke Arms and Yoke End were to be transported from Gorinchem directly to Baku for assembly there, with only the Yoke Hinge sent to Astrakhan. This meant that Milestones C10 to C12 no longer applied. Mercon says that because the Yoke system was no longer being assembled in Astrakhan, no trial-fit of the "Yoke Arms" which described the previous version of the Yoke system, could take place there and so clause 7.27 became redundant. Bluewater seeks a rebate for that in these proceedings and I deal with this below.

230. Mercon says that Bluewater asked it to fit the redesigned Yoke Hinge to the Mooring Turntable on the Topsides and that this was an entirely new task, not contemplated by the Contract because the joint with the Topsides was originally intended to be the point of detachment. Mercon says that this work required a site instruction and was included in the punch list and in Mercon's letter dated 23 December 2008 on the basis that it was subject to an instruction being given.

231. It is evident that the scope of the work to be carried out by Mercon originally included the Yoke Arm being installed to the Topsides. The design of the Yoke Arm changed so that instead of the Yoke Arm being attached to the Yoke Hinge at the Topsides, the Yoke Hinge now included part of the Yoke Arm and the other part of the Yoke Arm became known as the Yoke End. The scope of the work changed because of this but essentially Mercon's work originally included attaching the Yoke Arm to the Topsides (as shown on the drawing relied upon by Mercon) so that it could be loaded out (as shown on the drawing relied upon by Bluewater) but now involved the attachment of the Yoke Hinge part of the Yoke Arm to the Topsides.

232. Bluewater's pleaded case relying on Clause 7.27 of Section 3 of the Contract relating to trial fitting of the Yoke Arm is not directly relevant to the question of the obligation to carry out the final installation of the Yoke Hinge. I therefore accept that it is not clear how the change in the design of the Yoke Arm and the necessary change in installation was documented but it was clear that, by December 2008, the relevant change in the work had been made because Mercon had carried out the necessary machining of the Yoke Hinge which evidently had to be installed. Equally, the fact that Mercon included installation of the Yoke Hinge on the Outstanding Work List attached to its letter of 23 December 2008 as being something which "*Mercon was made aware by the Bluewater*

site team", albeit in category 5 (not instructed activities), shows that it is work which had to be carried out by Mercon to complete the relevant Milestone. Indeed the concern expressed at the time of delivery to Astrakhan was not that it did not form part of Mercon's work but rather that it had been delivered to the wrong place.

233. However, on the evidence referred to, I consider that no clear instruction by Bluewater to Mercon to install the Yoke Hinge has been identified by Bluewater, prior to Bluewater's letter of 6 January 2009 by which they made it clear to Mercon that it should complete the work, including "*install yoke hinge*".

234. Mercon says that the Yoke Hinge was then off-loaded from ACCP to an area not agreed by Bluewater and Mercon. As a result on 19 December 2008 Mercon did not sign the certificate for transfer of the Yoke Hinge so as to accept custody following its release from customs, as explained in Mercon's letter of 24 December 2008. Mercon says that it could not install the Yoke Hinge as it was not in its possession.

235. Mercon says that because the cargo was shipped DDU it was Bluewater's and not Mercon's responsibility to unload the Yoke Hinge but that, after release from customs, the unloading was carried out using the crane barge "Bogatyr". Mercon says it agreed an unloading plan using the Bogatyr on 15 December 2008 as shown on a drawing signed on that date which showed the Yoke Hinge being placed in ASPO's yard close to the substructure in Little Holland II so that it could be conveniently lifted directly onto the Topsides. Mercon says that the Yoke Hinge was a critical item in the SYMS and was very heavy and easily damaged and could not be easily moved and any move would involve an additional element of risk. Mercon says it was therefore entitled to take the position that it was not contractually obliged to carry out further work on the Yoke Hinge until it was instructed to move it and it says that Bluewater never gave an instruction to that effect.

236. Bluewater says that following the release from customs there was no reason why Mercon did not accept custody of the Yoke Hinge. In relation to the location of the Yoke Hinge, Bluewater says that there was no agreement between Bluewater and Mercon as to the location and that the plan relied on by Mercon of where the Yoke Hinge should be placed was not signed by any Bluewater representative and does not bind it. It says that, as confirmed by Mr de Jong in evidence, there was nothing in the Contract or in VO-005, which stated that Bluewater was required to deliver the Yoke Hinge to any particular location in ASPO's yard.

237. The responsibility for the arrangements by which the Yoke Hinge and the Crane Structure were transported from the ACCP to the quay of ASPO's yard is not clear but the drawings relied on by Mercon make it clear that the unloading was something which was being organised by ASPO using the Bogatyr. It is also apparent that the Yoke Hinge could not be unloaded onto the quay at Little Holland II because the Volgar crane was at that location. The transfer documentation which Bluewater presented to Mercon on 18 December 2008 but which Mercon refused to sign strongly suggests that until that was signed it was Bluewater who bore the risk of the Yoke Hinge and that would also mean that Bluewater would in fact be likely to be responsible for that element of transport. It certainly does not seem that it was Mercon's responsibility under DDU terms.

238. However, once it was delivered back to Mercon at ASPO's yard, in the absence of any agreed location, then the responsibility for transporting the Yoke Hinge to the worksite would necessarily form part of the work required to install the Yoke Hinge. On the basis set out above, I consider therefore that by 6 January 2009 Mercon had a clear instruction to install the Yoke Hinge and this would include the necessary transportation from one location in its sub-contractor's yard to the working area in Little Holland II.

239. In those circumstances, given that there was the Russian Orthodox Christmas holiday break until 12 January 2009, this was work which Mercon should have carried out at least from that date. There was nothing to prevent Mercon from moving and installing the Yoke Hinge either before 23 January 2009 or between 23 January and 3 February 2009.

240. It follows that this work was outstanding on 23 January 2009 but as discussed at the meeting on 19 January 2009 and as set out in the list attached to Mercon's letter 322 of 20 January 2009, whilst Mercon accepted that it had been instructed to carry out the work, it wanted confirmation of entitlement to compensation and extra time to allow preparation and scheduling of the associated activities. In other words whilst Mercon had an instruction it was refusing to undertake the necessary preparatory and scheduling work without confirmation of payment and additional time. I consider that on that basis Mercon was in default in relation to the work to carry out the installation of the Yoke Hinge when the Notice of Default was given on 23 January 2009.

241. Mercon says that in its 30 January 2009 schedule of completion it proposed to complete the fitting of the Yoke Hinge over five days beginning 18 February 2009 so that, if Mercon was in default, that was satisfactory remedial action. It says that the Yoke Hinge was a punch list item and was not one of the items identified in Bluewater's letter of 6 January 2009 as a "major element" of incomplete work so there was no urgency for the work, which could have been done at any time prior to load-out.

242. Mercon also says that after terminating the Contract, Bluewater told ASPO that it was content for the Yoke Hinge to be installed "*when temperatures are well above 0˚C, say beginning of April*" and that the work did not appear to have been done until May 2009.

243. Whatever was the position before 6 January 2009, it is clear that from that date Mercon had an instruction to install the Yoke Hinge and that would include making arrangements to move the Yoke Hinge. By 23 January 2009 Mercon had done nothing and indicated they would not plan or schedule the work without confirmation of entitlement to compensation and additional time. The only action taken after the notice of default was to put in a programme to say that they would commence the work on 18 February 2009 and carry it out over 5 days. I do not consider that, given the need to move the Yoke Hinge, leaving any action on the Yoke Hinge for a further 18 days can, even on an objective basis, be said to amount to compliance with the obligation that it should "*immediately commence and thereafter continuously proceed with action satisfactory to BLUEWATER to remedy such default.*" Mercon clearly had an obligation to install the Yoke Hinge without prior confirmation of entitlement to compensation or additional time and the commencement of the moving and installation only on 18 February was not the commencement of satisfactory action to Bluewater and that

decision was not outside the limitations on its discretion. In any event I do not consider that it was satisfactory on an objective basis.

244. I therefore consider that the installation of the Yoke Hinge was properly included in the Notice of Default and, as Mercon did not commence or continue action satisfactory to Bluewater, Bluewater was entitled to issue the Notice of Termination under Clause 30 on the ground of this default. Bluewater's subjective view that the action taken by Mercon was not satisfactory is not affected by anything which comes within the limitations on the exercise of that discretion.

Load testing of the winch foundations

245. Bluewater says that Mercon was obliged to load test the winch supports which were provided free-issue to Mercon by Bluewater. It says that once Mercon had installed the winches onto the support, the winches and the supports had to be tested again as part of the contractual requirement to load test under Clause 7.22 of Section 3 of the Contract. In any case it says that it was the subject of the instruction on 6 January 2009.

246. Mercon says that load testing of the winch foundations was not within its scope of work and relies on Attachment 5B to the Contract which states "*Supply and install [winch] support… No Scope.*". It says that this item started as a requirement to carry out a "winch function test" for the winch on the Topsides and that it was only in the letter of 6 January 2009 that Bluewater indicated the need for "SAT-testing of the winch foundations" but gave no details of what was required.

247. The provision relied on by Bluewater in Clause 7.22 of section 3 of the Contract states:
"*Winch Function Test*
CONTRACTOR shall perform a winch function test in which the winch wire shall be routed through the various rigging arrangements. CONTRACTOR shall submit the winch function test procedure to BLUEWATER Representative for approval a minimum of eight (8) weeks prior to execution of the test."

248. I do not consider that Bluewater is correct in saying that this winch function test is related to load testing of the winch foundations or that a winch function test would necessarily include an appropriate test for the foundations. It is to be noted that there is no complaint of a failure to carry out a winch function test. I accept that, as Mercon submits, the Contract did not include any scope in terms of the supply and installation of the winch support and there is therefore no obligation for testing the support.

249. It is not clear how this item arose. Bluewater's manuscript note of a meeting on 6 January 2009 refers to a "winch load test" but that became "*(d) SAT-Testing of the winch foundations*" in the letter of 6 January 2009 whilst the sheet attached to that letter referred to "*Load Test Winch, 1.5 x Load…SAT*".

250. Mercon replied on 8 January 2009 and stated "*Testing of the winch or its foundation does not form part of the present Mercon scope of work. Bluewater is requested to refer to Section 3 of our contract and define the scope element.*

251. The question of the foundation load test was raised but does not seem to have been taken further at the meeting on 14 January 2009. In Mercon's letter of 20 January 2009 the list of outstanding work, for which it sought confirmation of compensation and

additional time, it included as item OWL TS 1.7 "*Load Test Winch Supports, 1.5 x Load.*"

252. That item then appeared in Annex 1 to the Notice of Default on 23 January 2009. In Mercon's schedule for completion of all outstanding works on 30 January 2009 it included this item as taking 1 day on 10 to 11 February 2009.

253. Bluewater says that no work was carried out on this issue following the Notice of Default and as it was correctly included in that notice submits that it was a valid ground for termination.

254. Mercon says that, given that this was not a significant item in the context of the project, there was no reasonable or rational basis for Bluewater to regard the remedial action proposed by Mercon on 30 January 2009 as unsatisfactory and the test was, in the event, not carried out by ASPO until 12 March 2009. Mercon also says that, on the basis of Mr de Geus's evidence, Bluewater wrongly proceeded on the basis that Mercon had omitted winch testing from the programme attached to the letter of 30 January 2009.

255. There was uncertainty about the nature of the test which Bluewater was requiring and it was only on 6 January 2009 that a foundation or support test came into Mercon's work scope. It was then only on 20 January 2009 that it became the finally required item of "*Load Test Winch Supports, 1.5 x Load*". However in its letter of 20 January 2009 Mercon were refusing to carry it out and I consider that this amounted to a default given that they had by then been instructed to carry it out. It was therefore properly included in the Notice of Default.

256. However, Mercon then programmed the work to start on 10 February 2009 but Bluewater seems to have been under the impression that Mercon had not included the test. I consider that on any sensible basis Mercon had complied with the obligation that it should "*immediately commence and thereafter continuously proceed with action satisfactory to BLUEWATER to remedy such default.*" In order to carry out the work by 10 February 2009 there would need to be an approved testing regime. So far as Bluewater's subjective assessment is concerned, on the evidence, I am satisfied that it was reached on a basis which was outside the limitations and that it was reached it on an erroneous basis that Mercon had not included it in the programme attached to the letter of 30 January 2009. I therefore do not consider that this is a matter that justified termination. However that does not affect the correctness of the termination if it was justified on other grounds.

Installation of flame and gas detectors

257. There were two items of outstanding work (items OWL-CC3.2, OWL-CS2.2) which related to the installation of flame and gas detectors. These items arrived in Astrakhan on Ship 3 which finished discharging on 12 November 2008 and departed from Astrakhan on 13 November 2008. However these items were retained in the Astrakhan customs area (ACCP) and at the date of termination they were still held there. The issue is therefore who was responsible for the fact that the flame and gas detectors were retained in the customs area.

258. Bluewater says that the reason that the gas and flame detectors were detained in customs was due to Mercon's errors in preparing the paperwork and packing the items which were shipped and had Mercon not made these errors, the flame and gas detectors would have been available. It therefore contends that at 23 January 2009 Mercon was in default in relation to the installation of these items and had not done anything by the date of termination so that it was entitled to terminate on this ground.

259. In the schedule for completion of all outstanding work submitted by Mercon on 30 January 2009, the gas detectors to the Central Column are shown as being installed over 1 day between 10 and 11 February 2009 and the flame detectors on the Crane Structure are shown as being installed on 1 day between 20 and 21 February 2009.

260. Mercon says that the delay in the release from customs of the gas and flame detectors shipped on the third vessel was caused by Bluewater's actions and was not Mercon's fault and therefore it was not possible to fit them by 23 January 2009. As a result Mercon says it was not in default and cannot be blamed for not having fitted the gas and flame detectors by 23 January 2009 or 3 February 2009.

261. On 15 August 2008 Mr Hoep sent Mr Heij revised documents for Ship 2. Mr Heij responded later that same day and said this in relation to the fire and gas detectors:

> "*1) Proforma Invoices*
> …
> *As already discussed only the fire and gas detectors have been imported on a temp. basis the value for this cargo should be the same as at the time [of] import as well as description [etc]*
> …
> *3) BOL*
> *Because the Gas and fire detectors are mounted on the structure you will not be able to issue a separate BOL for this. In fact there is no requirement to issue a BOL for this.* …"

262. Mr Hoep checked this information with Mr van Dijk of Flinter on 18 August 2008 who confirmed the position to Mr Hoep the same day.

263. On 19 August 2008 Mr Hoep sent revised transport documents to Mr Heij who responded to say that the detector equipment should form an integral part of structure on which it is mounted in order to avoid problems and if it were listed separately it would cause problems at customs. He asked for documents to be revised.

264. Mr Hoep then sent Mr Heij an email with revised documents, confirming that the flame and gas detectors were added to the Astrakhan Bill of Lading and Proforma Invoice. However, the flame and gas detectors were not loaded onto Ship 2 although they were included on the packing list.

265. Ship 2 then arrived in St Petersburg on 1 September 2008 and after various issues with the shipping information, Ship 2 cleared customs in St Petersburg on 5 September 2008.

266. On 11 September 2008 Mr Heij learned that the 2 flame/gas detectors which were supposed to be shipped on board Ship 2 had in fact been loaded on the crane structure to go on Ship 3. He said that Mercon had therefore misdeclared the items shipped so that there would be a difference in weights and values between those entering St Petersburg and arrival in Astrakhan. He said as follows:

> "*In our opinion there are 2 options i.e*
> *1*
> *Inform Lukoil about this matter, issue new documents and hope that the situation can/will be corrected. Most probably Lukoil will use this as an argument to pass on any delays on to us and create a lot of problems.*
> *2*
> *On paper load the detectors in a container, keep the documents as submitted, pretend nothing has happened and hope for the best. If at a later stage the detectors are not found to be in the container, investigate matters, apologise and hope that it can be corrected. In any case the vessel by then would have departed.*
> *For the moment, we believe that option 2 is probably the best. It could create problems, however not certain if this will be the case, making sure that the vessel will not be delayed.*"

267. Mr de Geus replied on the same day saying "*My blessing on option 2*".

268. In a letter sent to Mercon on 17 September 2008 Bluewater said this:

> "*Last Friday, 12-SEP-2008, BLUEWATER understood from MERCON that certain items (Flame Detectors) have not been shipped, despite the fact that [Mercon] had confirmed that these items were on board. Moreover based on documents and pieces of advice as received, these short shipped items have already been declared with Russian Custom authorities upon arrival of the vessel in St. Petersburg.*
> *BLUEWATER find this most disturbing, as the consequences for potential delays in Astrakhan could be severe. Moreover, at this stage BLUEWATER cannot determine what other consequences BLUEWATER or their Clients might face, resulting from this matter.*
> *On several occasions BLUEWATER have underlined the importance to MERCON of a meticulous and precise administration of the cargo to be shipped in order to avoid any discussion with our Clients and/or problems with the Russian Custom Authorities. This is, and always has been, of the utmost importance.*
> *MERCON will understand that for the moment BLUEWATER have no other option than holding MERCON fully liable for any and all consequences that might result from this short shipment.*
> *In addition to the aforementioned, BLUEWATER are under the impression that MERCON are showing more and more reluctance to co-operate with BLUEWATER in order to issue the required documentation i.e. Certificate of Origin, shipping document, etc. despite BLUEWATER initial instructions for documents with exact specifications. These documents form the basis of [Bluewater] documents which, in turn, will be used by BLUEWATER Client for the Customs clearance of the cargo on board Ms. A. Marinesko.*

By means of this letter BLUEWATER formally request MERCON to fully co-operate as precise and quickly as possible in order to provide BLUEWATER with all the necessary, true, accurate and correct documents as soon as possible."

269. On 19 September 2008 Lukoil said that they were aware that there were 7 flame detectors on Ship 2 but that 13 flame detectors had been stated in the documents used to receive a transit customs declaration in St Petersburg. Lukoil stated that the wrong documentation would prevent preliminary customs clearance and would mean that the cargo had to be unloaded at the Central Cargo Port to perform customs clearance. Bluewater sent this letter to Mercon on 22 September 2008 saying that: "*BLUEWATER hold MERCON fully responsible for adverse impacts, should these arise and cannot be mitigated, as previously notified to MERCON.*"

270. On 23 September 2008, Mercon sent Bluewater a letter explaining the position. There were 13 Flame Detectors and 2 Gas detectors free-issued by Bluewater and subject to temporary import into the Netherlands. 7 flame detectors were installed on the Turntable/Pig receiver deck and shipped to Astrakhan on Ship 2; 4 Flame Detectors and 2 Gas Detectors were awaiting transport to Baku and 2 Flame Detectors were originally installed on the crane structure but were disassembled and subsequently shipped to Astrakhan.

271. However Mercon said that the Bill of Lading for Ship 2 erroneously contained all these items. Mercon then stated:

"*Moreover, BLUEWATER has demanded from MERCON to be the party verifying and releasing the Bill of lading for use with the second shipment. By means of its approval, BLUEWATER has taken responsibility for the contents of the Bill of lading. MERCON now has to conclude that BLUEWATER missed the referred discrepancy while checking and approving the Bill of Lading despite the knowledge it should have had that six detectors are destined for Baku and that the Flame Detectors installed on the Crane Structure in accordance with BLUEWATER's design, would remain in Gorinchem.*
Per L-474 BLUEWATER commits to assisting MERCON in this matter, MERCON however is not actually importing the cargo. In turn MERCON will of course do its utmost to assist BLUEWATER in correcting the paperwork used for the preliminary customs declaration. MERCON is willing to put effort in preparing a revision of this Bill of Lading as was done for the first shipment with the 1kg discrepancy between documents."

272. In the event the second option was adopted and no change was made to any of the shipping documents and the original documents were used by Bluewater/Lukoil to clear the entire cargo through customs without problems. The over declaration of the gas and flame detectors therefore did not have any effect on the passage of the second shipment through customs.

273. On 16 October 2008 Mr Knibbe raised the problem of the gas and flame detectors with Mr Heij. He said that there were the 7 flame detectors which had arrived on Ship 2. There were 2 which had been shipped separately and were in his office in Astrakhan and there were 4 still with Mercon, together with 2 gas detectors. He said:

"*As already discussed with Maurice, the items still at MSS (4xflame detectors, 2x gas detector) are going to be delivered separate because Lukoil doesn't want to do the declaration again. So we also need to take them of the packing list. Please inform how we are going to deliver them???*"

274. The flame and gas detectors were not in the event referred to in the shipping documentation for Ship 3. They were, in fact, placed on the crane structure but were not declared on the basis that they should have arrived on Ship 2.

275. There were then problems with Ship 3 on its arrival in Astrakhan on 11 November 2008 when it was sent straightaway to ACCP, the customs port. The difficulty was that having, on paper, already imported all of the flame and gas detectors into Astrakhan, it was necessary to deal with the 2 flame detectors and 2 gas detectors left in Gorinchem.

276. In an email to Mr Brouwer on 12 November 2008 Mr Knibbe outlined the problems with the customs for Ship 3. He also said:
"*Lukoil have seen the two flame detectors which should already have been here on the previous ship. According to me it's part of the structure and declaration is already done. According to them this is a BIG problem, they didn't inform me how we could solve this.*"

277. On 28 November 2008 to speed up customs clearance Lukoil asked Bluewater to sign a declaration stating that the gas and flame detectors in Ship 3 had been shipped by mistake and did not belong to Lukoil.

278. On 5 December 2008 Bluewater wrote to Lukoil setting out the position on the supply of flame and gas detectors and saying that the packing list for Ship 3 was incorrect in relation to gas and flame detectors.

279. On 5 January 2009 Bluewater wrote to Lukoil warning that if the gas and flame detectors were not installed then neither DNV nor RMRS would issue a final release certificate.

280. On 28 January 2009 Lukoil said that 13 flame detectors and 2 gas detectors had been cleared by customs on the arrival of Ship 2 and that "*custom clearance of the flame detectors (2 off) and gas detectors (2 off) disassembled from the crane structure and which are currently stored at ACCP is the responsibility of [Bluewater].*"

281. On 15 February 2009 Lukoil informed Bluewater that it would carry out customs clearance of the two flame detectors and the two gas detectors.

282. Bluewater says that it was not responsible for the issues causing delay relating to Ship 3 at Astrakhan. Bluewater says that the flame and gas detectors should have been shipped earlier in Ship 2 but for some reason Mercon attached them to the crane on ship 3 and it was as a result of this that these items were held in customs and further customs difficulties were experienced. Bluewater says it was errors for which Mercon was responsible which led to the detention of the flame and gas detectors by customs.

283. Mercon accepts that it made an initial mistake in showing the wrong number of flame and gas detectors on the Bill of Lading for Ship 2 but it says that Bluewater failed to deal with it honestly or properly with the result that Bluewater created a major customs

problem. Mercon says that when this problem came to the attention of Bluewater after Ship 2 had transited through St Petersburg but while it was still en route to Astrakhan, the obvious and honest response to the problem would have been to amend the bill of lading, or otherwise to disclose the correct quantities, prior to clearing the goods through customs.

284. Mercon accepts that it was primarily responsible for drawing up the bill of lading and that it would be responsible for the consequences of the need to amend the Bill of Lading or to make disclosure to customs because of the mistake in the Bill of Lading. However, Mercon says that Mr Heij of Bluewater with the blessing of Mr de Geus decided to do nothing and keep the documents as submitted.

285. The initial problem arose on Ship 2 when, although 13 flame detectors and 2 gas detectors were not part of the shipment, Mercon prepared the relevant shipping documentation showing that they were. In fact only 7 flame detectors were shipped on the deck section loaded on Ship 2. When that was discovered, Ship 2 had passed St Petersburg and was en route for Astrakhan. It is evident that it would have been better to adopt the first option in Mr Heij's letter of 11 September 2008, with no doubt the consequent difficulties which would then have been caused on arrival of ship 2 at Astrakhan. It is accepted by Mercon that it would have been responsible for the consequences if that approach had been taken by Bluewater.

286. It is evident that Bluewater decided that it would be better commercially to take the easier but less honest route of leaving the documents as they were and hoping that there would be no problems. That strategy worked and there appears to have been no suggestion at the time from Mercon that Bluewater should have taken any other course. There was no provision by Mercon of amended documents to correct the mistake, for instance. In the event there was no problem with the shipment when it reached Astrakhan and the discrepancy did not come to light. On my reading of the letter of 19 September 2008 Lukoil were aware of the discrepancy and the concern it raised related to problems with customs which did not transpire.

287. The problem was that the documentation showed that 13 flame detectors and 2 gas detectors had already been imported into Astrakhan on Ship 2 when only 7 flame detectors had actually been shipped on that vessel. The particular problem was that Mercon still had 2 flame detectors and 2 gas detectors in the Netherlands which were needed at Astrakhan and which the documents showed had already been delivered. In my judgment the difficulty with the inconsistency between the number of detectors and the documentation in relation to Ship 3 was, as a matter of causation, the result of Mercon's initial mistake made in relation to the packing list for Ship 2. Whilst Bluewater might have taken steps to obtain amended documentation from Mercon when it became aware of the error, it did nothing and Mercon similarly did not seek to intervene. The causative potency of the original error was not therefore altered by what either Bluewater or Mercon did.

288. What Mercon then did was to fit the detectors onto the crane being shipped on Ship 3 but prepare documentation which did not show those items on the packing list. Mercon were clearly aware of what was being done and did not raise any concerns and, as can be seen from Bluewater's internal email of 16 October 2008, taking the items off the packing list was something which Bluewater, at the very least, knew about and

encouraged. It was therefore actions taken by Mercon as a result of the mistake it had made with the shipping documents for Ship 2 which foreseeably led to the difficulties which then occurred when the crane with the detectors arrived in Astrakhan without the necessary documentation. Mercon might have insisted on preparing documentation which showed the detectors in which case the causative potency of the original error in respect of Ship 2 would have ceased. Instead they took action which itself caused or contributed to the difficulty and maintained the causative potency of the original error.

289. If the inconsistency had not been noticed when the detectors arrived in Astrakhan then the dishonest strategy would have worked. However the discrepancy came to light and the detectors were retained in the ACCP area until they were finally released after 16 February 2009. I consider that, as a matter of causation, this was the result of the original error and the deliberate strategy undertaken by Mercon of fitting the detectors on the crane but not including them in the documentation. The correspondence shows that Bluewater then tried to overcome the difficulty with Lukoil until, in the end, the detectors were successfully released.

290. On that analysis I consider that, as a matter of causation, it was Mercon who was responsible for the continued detention of the detectors in the period up to February 2009 and Mercon's inability to carry out the installation of the detectors was a matter for which it was responsible and for which it was in default at 23 January 2009. Having done nothing and being able to do nothing in relation to the installation of the detectors, I do not consider that the schedule prepared on 30 January 2009 amounted to compliance with the obligation under Clause 30 to "*immediately commence and thereafter continuously proceed with action satisfactory to BLUEWATER to remedy such default.*"

291. Accordingly, Bluewater was entitled to come to the conclusion that Mercon's action was not satisfactory and therefore issue the Notice of Termination on this ground and terminate under Clause 30. Bluewater's subjective view that the action taken by Mercon was not satisfactory is not affected by anything which comes within the limitations on the exercise of that discretion.

Other items

292. In the pleadings and the witness statements of Mr Knibbe and Mr Wickerhoff a number of the other items referred to in the Notice of Default were referred to and some were covered in oral evidence. Neither party addressed all of the outstanding work issues.

293. Bluewater submits that demonstrating that Mercon was and remained in default of the main items is sufficient to justify termination. It submits that if Mercon were not in default in respect of a small number of items, that would not show that Bluewater was wrong to terminate.

294. Mercon submits that the validity of termination would not turn on the other relatively minor items which were all planned for completion in a short period at the end of February 2009. If Mercon was not in default in relation to the major items or had presented a satisfactory remedial plan for them, then it submits that, even if Mercon might have technically been in default in respect of the other items, it is difficult to see how Bluewater could properly have terminated based on those items alone.

295. I have considered the various items which are referred to and do not consider that they affect the views that I have taken on termination based on the main items. For completeness I deal with some of these other items.

296. Bluewater says that, in any case, in respect of a number of the items disputed in his witness statement, in his oral evidence Mr Wickerhoff accepted that Mercon could have been carrying out the works in January 2009. They refer to OWL-TS4.1 (Modified lead block support) and E&I works PL-CC3.1 (Heat tracing on spools), PL-TS3.1 (Install and flush tubing between Swivel and drain tank on HCD) and PL-TS3.2 (Hydraulic grease tubing to be flushed). Mercon says that these were all minor items and were included in the 30 January 2009 plan with durations of not more than three days to be carried out in February 2009 and that this should have been satisfactory to Bluewater. These were items of work where Mercon was in default by 23 January 2009 and failed then to carry out any work as a result of the notice or by 3 February 2009. The failure to carry out even these minor items reinforces the findings I have made above.

297. In relation to OWL-CC2.1 (Re-install bellow seals) Bluewater says that Mr Wickerhoff's evidence was that Mercon did not install the bellow seals because he did not understand, when Bluewater wrote "install bellow seal" in the Notice of Default, that Mercon was required to install the updated bellow seal, and not the obsolete one. Bluewater says that it should have been obvious to Mercon which seals were to be installed but Mr Wickerhoff relied on the fact that the Notice of Default contained the reference to the obsolete SIs. However, Bluewater says that the table obviously referred to the seal which had physically been provided to Mercon. Bluewater says that failure to complete this item also meant that Mercon was unable to test the watertight floor (OWL CC 1.1) and remove the drain hose (OWL-CC2.4).

298. Mercon says that it was not reasonable to have required Mercon to have carried out the test by 23 January 2009 when the latest version of the bellow seal had only been delivered to Mercon on 16 December 2008, any instruction had been given only on 6 January 2009 and freezing weather conditions meant that the watertight floor test could not practicably be carried out. Mercon submits that the remedial action proposed by Mercon was to carry out the test between 20 and 28 February 2009 and should have been satisfactory.

299. It was clear what bellow seals were required to be fitted, certainly after 6 January 2009 if not before and again Mercon's failure to carry out even these minor items reinforces the findings I have made above.

300. In relation to OWL-CC2.3 and TS2.1 (Replace deluge nozzles) Bluewater refers to Mr Wickerhoff's evidence that Mercon could not install the nozzles because it did not have all the requisite nozzles but says that this is not mentioned in the documents at the time, including the Outstanding Works List compiled by Mercon after termination to identify items Mercon had been prevented from completing. Bluewater says that Mr Knibbe's evidence that the site instruction was made by someone based in Holland who was not aware that the nozzles had already been brought to site, should be accepted as should his evidence that the nozzles were available from 16 December 2008 at Mercon's site office.

301. Mercon says that Bluewater issued a site instruction on 18 December 2008 for the fitting of replacement deluge nozzles and the issue is whether those nozzles were in fact supplied. Mercon says that the site instruction itself states that the nozzles would not be available until New Year 2009 but Mr Knibbe said that they were on site on 15 December but was more equivocal in cross-examination. Mercon says that Mr Wickerhoff had a clear recollection, consistent with the site instruction, that the nozzles were not delivered on 15 December. Mercon says that if, contrary to that evidence, Mercon did have the deluge nozzles and should have fitted by 23 January 2009, then Mercon's remedial plan to fit them on 16 February 2009 should have been satisfactory to Bluewater**.**

302. On this issue I prefer Mr Knibbe's evidence which I found to be more convincing and is consistent with the contemporary documents produced by Mercon. Again the failure by Mercon to carry out even these minor items reinforces the findings I have made above.

Conclusion

303. For the reasons set out above Bluewater validly terminated the Contract on or about 3 February 2009 under Clause 30 of Section 2(a) of the Contract.

Liquidated Damages/Entitlement to an Extension of Time

Issue 17: Is Mercon entitled to an extension of time to complete any of the Key Dates (and in particular the Key Dates which carry liquidated damages, namely B4.1, B4.2, B4.3, C3, C6 and C9)?

304. Mercon puts its case on extension of time in two alternative ways. First, it says that the delay to Milestone C9 so that load out would only occur in June 2009 entitled it to an extension of time to Milestone C6 up to June 2009. Alternatively, it says that because of delays caused by matters for which Bluewater was responsible it was, in any event, entitled to an extension of time.

305. There is a threshold question as to whether the Contract provides a mechanism for extensions of time. For the reasons set out below where I have analysed Clauses 14.2 to 14.7 of the Contract in more detail, I consider that the ability of Mercon to request and Bluewater to give a Variation under Clause 14.2 includes an adjustment to the Schedule of Key Dates, which are the dates for completion of the Milestones. The dates for completion can therefore be extended by Bluewater. The grounds for such an extension are broad but, importantly, as explained below, Clause 14.2(c) shows that Mercon is entitled to receive a Variation to cover any instruction, decision or act of Bluewater. It follows that there is a mechanism for extensions of time under the Contract by way of the adjustment of the Schedule of Key Dates.

306. It is therefore necessary to consider, first, the position in relation to delay to Milestone C9.

Impact of delay to Milestone C9

307. Mercon submits that Milestone C9 could not be undertaken without the necessary vessel for load out and that, under the Contract as revised by VO-005, the date for C9 load out was 15 September 2008. It says that it is common ground that the SYMS

components were not ready for final load out on that date but that it is also indisputable that no vessel was provided for load out on that date, nor could or would there have been, as Lukoil had decided and on 17 January 2008 had communicated to Bluewater its decision to defer the final load out to 1 June 2009. On this basis Mercon submits that the operative and only cause of the delay to C9 was Lukoil's decision that no vessel would be provided for final load out until June 2009 and that Bluewater has not established that Mercon could not have achieved the revised C9 Milestone of 1 June 2009 because of matters for which Mercon were responsible. Mercon submits that Milestone C9 would not be achieved until June 2009 through no fault of Mercon and so any delay to Milestone C6 would have no causative effect.

308. Bluewater submits that the correct analysis is that a storage activity was inserted between the completion of Milestone C6 and the start of Milestone C9. On this basis Bluewater says that the critical path runs through completion of the structure (C6) into storage and then to load out (C9) and that the delays to completion of C6 were the actual cause of delay to the critical path of the project. It submits that this causes delay to progress of the works towards achieving C9 but there is then further delay caused by the requirement to store the structure. On this basis the delay to the completion of Milestone C6 and the delay to the Milestone C9 run consecutively.

309. Bluewater submits that on this project the Milestones are broadly linear so that delays to a preceding Milestone cause delay to a following Milestone. On this basis Bluewater says that the approach of the planning experts has therefore been to assess delay to a later Milestone by taking the accrued delay to the preceding Milestone and adding the additional delay to the succeeding Milestone. It says that this approach was applied consistently by the planning experts up to Milestone C6 but that Mr Cookson then changed his approach and ignores the accrued delays to C6 when assessing the cause of delay to C9.

310. In relation to delay to load out caused by the instruction to carry out storage after the completion of Milestone C6 because Milestone C9 could not commence until 1 June 2009, I do not see that this affects the position in respect of delay to Milestone C6 which had not been completed before termination. Milestone C9 was dependent on the completion of Milestone C6. In order to load out the integrated SYMS under Milestone C9 it was necessary for the integrated SYMS to be "ready for Load-Out" under Milestone C6. Once there was an integrated SYMS ready for load out then it would only be at that stage that an instruction to store the integrated SYMS would cause a delay to the load out of the integrated SYMS under Milestone C9.

311. Equally in the absence of a vessel to load out there would then be a delay to load out. However, unless and until there was an integrated SYMS ready for load out there would be no delay to the subsequent Milestone C9 caused by the absence of a load out vessel or the need for storage in the meantime. Until the time had come for load out by having an integrated SYMS, any operations which might then affect load out for Milestone C9 would not be an operative cause of delay. They would not delay the completion of Milestone C6 and until Milestone C6 was complete whilst they may be predicted to cause delay to Milestone C9 they would not actually do so until the time when it was possible to commence Milestone C9 had arrived. For instance, it may be that Lukoil would change its mind and make a vessel available and it was only when

the need for storage or the absence of a vessel impacted can it be said that delay is caused.

312. On that basis, because the instruction to carry out storage and/or the absence of a load out vessel until 1 June 2009 had not impacted on the work necessary to complete Milestone C6 by February 2009 so as to be causative of delay by the date of termination, I do not consider that Mercon can rely on a cause of delay which would only impact on Milestone C9, after completion of Milestone C6. It follows that I must now consider whether Mercon can establish grounds for extension of time based on its alternative delay claim.

Alternative Delay Claim

313. Mercon's alternative delay claim is made on the basis that it is entitled to an extension of time up to and beyond the termination date because of delays to the Works which were caused by Bluewater. Mercon contends that it is entitled to an extension of time, essentially due to three causes:
(1) Failures by Bluewater to provide RFC drawings on time and changes in scope of the design;
(2) Delays to the transport of the SYMS components caused by matters which were Bluewater's responsibility;
(3) Delays to the integration works at Astrakhan due to Bluewater's defaults.

Late supply of AFC drawings

314. Mercon says that by Clause 5.1 of Section 2(a) of the Contract, Bluewater had to provide materials and equipment in accordance with the dates set out in Section 7 of the Contract. It refers to Attachment 7A which, in respect of the provision of all AFC drawings, gives an early delivery date of 1 June 2007. Mercon says that it could not reasonably be expected to plan its resources for the varied works without the critical information from Bluewater. It says that the information about the variation to the scope of the works was not provided in any coherent way but was given sporadically and in an ad hoc fashion.

315. Mercon says that under Clause 2 of Section 6 of the Contract Bluewater was required to provide it with copies of drawings, specifications and other documents mentioned in Attachments 6A and 6B "*in sufficient time to support the MILESTONE SCHEDULE*" and that it could not be expected to programme or prepare for the additional work accurately and prospectively when the re-design information was produced in a haphazard and unplanned manner. It also says that this explains why the Baseline Schedule contained errors.

316. Bluewater accepts that the Fabrication Drawings were not completed and accepted by 1 July 2007 but says that this did not have any impact on the Works, which started before the drawings were finalised. It also says that Mercon did not require all of the AFC drawings to achieve Milestone B2, the start of fabrication.

317. Bluewater also says that Mercon's delay analysis relies on long delays to the front of the works in 2007 caused by Bluewater's alleged failure to provide RFC drawings on time, followed by periods of mitigation during fabrication or small incremental delays. Further it says that Mercon's claim that it was delayed in completing the Works by the late provision of drawings has never been fully particularised and Mercon has not

identified which changes to which drawings caused it to be delayed in carrying out the Works or for how long.

318. Bluewater says that Mercon's claim is based on a theoretical analysis advanced by Mr Cookson not on the facts of what happened during the works or what impact the late drawings had on the progress of the works.

319. As a result of the agreement of the Baseline Schedule, Bluewater submits that delays prior to 31 December 2007 are irrelevant and Mercon's only entitlement to an extension of time would be in relation to any changes to drawings which occurred after January 2008.

320. Bluewater says that, consistent with the factual evidence from Mercon's own witnesses, the late release of RFC drawings did not cause delay to the Project against the Baseline Schedule. Bluewater says that the same is true of Mr Cookson's analysis of the fabrication stage, leading up to load out under Milestones B4.1, B4.2, and B4.3, when he says that fabrication was broadly a period where delays were mitigated. Bluewater says that this is not consistent with the evidence of Mercon's witnesses who stated that there were issues which caused delay during fabrication.

321. Bluewater says that fabrication started on 18 September 2007 and that, by reference to the contemporaneous documents, Mercon was not apparently ready to commence fabrication in Gorinchem earlier than that date. In particular, Bluewater refers to Mercon's letter of 18 September 2007 in which it confirmed that after delivery of documents the previous Monday, it had reached agreement to start the fabrication in the yard at Gorinchem as from that date. Bluewater says that Mercon did not say that the Works had been held up by the late issue of the fabrication drawings or design changes, but instead by its own readiness.

322. Bluewater notes that when Mr De Jong joined the project in March 2008 there was no suggestion that there was some 254 days delay to the Yoke, as now alleged and the March monthly report showed a delay of just 19 days.

323. As Bluewater accepts, it did not complete its obligation under Milestone B1 by 1 July 2007. Milestone B1 is in the following terms: "*Completion and acceptance of Fabrication Drawings of complete Central Tower, including Mooring Turntable, Pig Receiver Deck, Hose Turntable, Yoke Arm and Ballast Tank.*"

324. However Mercon has not properly analysed what, if any, delay to the fabrication work was caused by the delay in producing the AFC drawings. Mr Cookson's analysis is purely a theoretical exercise and does not consider what actually happened. First, from the contemporaneous documents, it is evident that Mercon were not ready to commence fabrication until 18 September 2007 and therefore were not, in fact, delayed by the absence of drawings.

325. Secondly, Milestone B2, the commencement of fabrication, did not depend on the completion of Milestone B1 as it was not necessary to have all the AFC drawings to make a start on fabrication. Thirdly, there is nothing to show that at the time in July 2007 when drawings were to have been provided there were large delays to the works which were then caught up during the fabrication phase. Further, the factual evidence

does not support such a case. Fourthly, where there is a failure to provide drawings it is the impact of the individual drawings on the relevant activities which shows the necessary link between a late drawing and any delay. That type of analysis has not been carried out in this case and any impact of delayed drawings has not been identified.

326. It follows that I do not consider that Mercon has established that Bluewater's admitted delay to Milestone B1 has caused any delay to the start or progress of fabrication which would otherwise have entitled Mercon to an extension of time.

Revisions to the Drawings

327. Mercon also relies on revisions to the drawings which were issued by Bluewater. Again Bluewater says that Mercon's case on revisions to drawings is based on the fact that there were a large number of revisions. It says that, as he accepted, Mr Cookson did not analyse whether a particular drawing revision caused delay to the Works which entitled Mercon to an extension of time.

328. Bluewater submits that, as stated by Mr Illingworth, it is necessary to consider any revision to a drawing to decide if it may have had an impact on progress. First, it says that there were revisions which did not have design changes but were revisions to mark a stage in the approval process such as DNV approval. Secondly, that there were some with minor modifications or revisions relating to platforms, gratings or similar matters which would not have caused significant delay. Thirdly, that there were also revisions due to Technical Queries, Site Queries, etc. which were linked to actual progress. It submits that, unless the actual drawings are analysed, it is not possible to conclude what, if any, impact a drawing revision may have had.

329. Bluewater also refers to Clause 2.5 of Section 5 to the Contract which provided for payment "*if the Contractor can [prove] the related work has been fully completed and if any Changes to the Approved for Construction drawing (rev2 and above) have been made*". The relevant rate for new drawings above revision 1 was €200 as set out in Attachment 5C to the Contract.

330. Bluewater therefore says that the Contract provided a mechanism for compensating for such changes and that this provision was operated by the parties and given effect in VO-003. Bluewater says that in each of the revisions of VO-003, up until revision 6 on 27 November 2008, Mercon did not dispute that the time impact of the revised drawings was "NIL". Bluewater says that it was not until that time, after the date for completion of Milestone C9 had passed, that Mercon began objecting to this but Bluewater says that this was too late to comply with the provisions of Clause 14.3. Bluewater says that in Mercon's Amended Further Information they rely on 375 revisions beyond Revision 1 and that VO-003 covers 371 drawings and so includes the vast majority of the drawing revisions.

331. I accept Bluewater's submissions. It does not follow that, because a drawing has a different revision number, the revised drawing will have caused delay to Mercon's progress. Again, the question of any delay caused by revised drawings must be the subject of an analysis which establishes that the particular revision caused delay. Mercon has not sought to deal with the case on that basis and I do not consider that, without such an analysis, it is possible to come to a conclusion on what delay, if any, might have been caused.

Shipping delays

332. Bluewater exercised Option 5 in the Contract on 29 March 2007. This transferred responsibility for transportation from Gorinchem to Astrakhan and Baku from Bluewater to Mercon. The exercise of Option 5 was formalised in VO-005, the final revision of which was produced on 20 June 2008. This extended several of the Milestone Dates and, in particular, for Milestone B4, ready for load-out, this became three Milestones (B4.1, B4.2 and B4.3) one for each Ship and there was an extension of time of between 51 days and 122 days, the date for Ship 3 being changed from 15 April 2008 to 15 August 2008.

333. Both party's experts are in agreement that there were delays caused to the Works as a result of issues which arose with shipping the components from Gorinchem to Astrakhan and clearance of the components at Astrakhan. However, there are significant issues between the parties as to (i) who was responsible for the various steps involved in shipping the components to Astrakhan; and (ii) what, as a matter of fact, caused the delays to the ships and the handover of the components. Mercon says that there are two critical areas of the shipping process which gave rise to delays for which Bluewater was responsible: the production of transport documents and the provision of the ships themselves.

Shipping documents

334. In relation to documents, Mercon accepts that it was obliged to deliver the SYMS components ex Gorinchem DDU following the exercise of Option 5 and this meant that it was responsible for preparing the shipping documentation. However it says that it was dependent upon Bluewater, who in turn relied upon Lukoil, for the information that was to be put into that documentation.

335. Mercon also says that on 20 June 2008, Bluewater told Mercon that all shipping documents had to be approved by Bluewater before issue, except for export documents for goods leaving Holland and that this affected responsibility for documentation. Mercon says that if Bluewater decided to impose a supervisory role, it cannot complain later if those documents are wrong and cause delays.

336. Mercon also submits that, on the basis of Mr Heij's email of 20 June 2008 and Clause 2 of Section 6 of the Contract, ultimate responsibility for the provision of accurate and compliant shipping documents, in time to support the key dates, rested with Bluewater and therefore the delays to shipment caused by documentation defects were Bluewater's responsibility. It further says that, in providing information to Mercon for the shipping documents, Bluewater had a contractual obligation to ensure it was provided, or checked, in sufficient time to support the Milestone dates. Mercon says that shipping was a high risk activity for which more float should have been allowed.

337. Bluewater says that under the Contract, including the Equipment Handover Procedure and the INCOTERMS 2000 DDU, Mercon was responsible for obtaining all documents necessary for export of goods from Gorinchem, for providing all commercial invoices, packing lists and certificates of origin, for providing documents for transit clearance in St Petersburg, for obtaining and supplying the Bill of Lading to Bluewater at Astrakhan and for preparing the original certificates of delivery and acceptance of equipment for signature by Bluewater and Lukoil.

338. Bluewater refers to Clause 3.2(e) of Section 2(a) of the Contract and says that it makes clear that "*Any review, approval, acknowledgement and the like, by or on behalf of BLUEWATER REPRESENTATIVE, shall not relieve the CONTRACTOR from any liability or obligations under the CONTRACT.*" As a result Bluewater says that nothing by way of approval of the shipping documents altered the position that Mercon was responsible for the shipping documents.

339. Bluewater says that Mercon had difficulties throughout in coping with the demands of transporting the components to Astrakhan and on to Baku. It says that Mercon was late in its preparations, it had little experience as to what the requirements were, and it did not pay adequate attention to the difficulties that can be experienced in transporting goods to Russia. It also says that Mercon failed to address these issues by, for example, appointing an experienced transport manager but instead sought to blame Bluewater for its difficulties.

340. I consider that, as appears to be common ground, under the Contract and the DDU INCOTERMS, the primary responsibility for producing the shipping documents fell upon Mercon. There is nothing in Clause 2 of Section 6 of the Contract to affect that position. Given the terms of Clause 3.2(e) of Section 2(a) of the Contract, the letter from Mr Heij of 20 June 2008 did not change that obligation. From the documentation, whilst Mr Hoep may have tried his best, he clearly did not have the expertise or specialist knowledge of commercial shipping documents. If he had had that expertise and knowledge then I consider that most, if not all, of the problems with the shipping documents would have been overcome. I do not think that Mercon can properly assert that any of those problems were the responsibility of Bluewater.

341. With those observations I now turn to consider the causes of delay, first to the B4 Milestones and then in the course of the shipments themselves.

Delays to the B4 Milestones

342. The B4 Milestones were for load out of the pre-assembled units and ship loose items including sea fastening and required a warranty survey to be issued. "Load out" is defined in Section 3 of the Contract as "*the physical movement of items from shore onto/into the Barge/Vessel*". The date for Milestone B4 of 15 April 2008 was extended to 15 June 2008 for B4.1, 15 July 2008 for B4.2 and 15 August 2008 for B4.3.

B4.1: Load out of Ship 1 (Volzhskiy 10)

343. Mercon says that load out of the Central Column and sea fastening was certified by LOC on 20 June 2008 and although Bluewater did not issue the certificate for B4.1 until 26 June 2008, B4.1 was substantially achieved on 20 June 2008. It says that the lay time calculation indicates that loading and securing was completed on 24 June 2008.

344. Mercon says that Ship 1 arrived at Gorinchem on 16 June 2008 and 4 umbilicals were to be shipped as part of the ship loose cargo but on 20 June 2008 Mr Hoep told Bluewater that one was still missing and the ship could not leave without it. It says that completion of load out of the vessel was delayed to 24 June 2008 whilst Bluewater delivered the umbilical.

345. Mercon says that there were 217 hours of lay time at Gorinchem between the arrival of the vessel on 16 June 2008 and its departure on 27 June 2008 and this was caused by a combination of delays to sea fastening lashing which was not completed until 24 June 2008, problems with the delivery of the fourth umbilical and obtaining sufficient information from Bluewater to enable Mercon's agent, Flinter/Mondial to complete the shipping documents.

346. Bluewater says that Ship 1 departed from Rostock on 10 June 2008 with its cargo of Piles and arrived at Gorinchem on 16 June 2008, one day late to Milestone B4.1 and that this is not alleged to be Bluewater's responsibility. It says that Ship 1 did not then depart Gorinchem until 27 June 2008.

347. Bluewater says that Mercon alleges that it was awaiting information from Bluewater, specifically approval of the Bills of Lading but Bluewater submits that the Bill of Lading was Mercon's responsibility as under INCOTERMS 2000, DDU, A8: "*The seller must provide the buyer at the seller's expense the delivery order and/or the usual transport document (for example a negotiable bill of lading…) which the buyer may require to take delivery of the goods in accordance with A4/B4*". Bluewater also refers to the fact that Mr De Jong accepted that the bill of lading was the responsibility of Mercon.

348. Bluewater refers to an email exchange on 12 June 2008 which suggested that Mercon would use the vessel as a means of applying pressure to Bluewater. It also refers to the fact that on 16 June 2008 Flinter said that they must have confirmation of acceptance of additional costs of €85,000 for calling at Baku before the departure of the vessel, then planned for Friday 20 June 2008. Mercon passed this onto Bluewater, saying initially that the amount was €115,000 and that if Mercon did not receive the money, the vessel would not leave.

349. Also Bluewater refers to the fact that on 19 June 2008 Mr Hoep was still asking Mondial what information it needed to "make/finalize the export documents and the B/L?" Mr Heij then sent Mr Hoep the "crash course" in shipping on 20 June 2008 and on 23 June 2008 Flinter made a further request for documents which Mr Hoep passed onto Mr Heij. Bluewater says that by this stage, Mercon had not asked Bluewater for invoices for Bluewater supplied items such as the umbilicals and Mercon had not provided invoices for its own scope of works and so the vessel was not ready to sail at this stage.

350. In relation to the questions put to Mr Illingworth to the effect a letter showed that an umbilical from Bluewater was holding up the ship, Bluewater says that this was not part of Mercon's pleaded case or as put to factual witnesses. Bluewater says that it replied to this letter the same day by email but there was no evidence from either party as to when the umbilical was provided because it was not an alleged cause of delay.

351. On 24 June 2008 Flinter wrote to Mr Hoep trying to get the Bill of Lading right and Mr Hoep then responded. Flinter said: "*B/L should read: 1 lot stc (said to be) 11 packages: 1 column and 10 pipes.*" to which Mr Hoep responded: "*Is this an advice? Or a question. What I see on the B/L about 1 lot equipment as per con…, does this come from Bluewater? Or is this something Flinter likes to see on it?*"

352. Mr Hoep also included the following comments: "*I adjusted the invoice for Astrakhan (without winches) to the new weights. Can you then use this also for the B/L?* and "*I hope somehow that everything is now right, but I am ready for the next list with questions.*"

353. On 26 June 2008 Flinter wrote to Mercon saying: "*This is to inform you that the a.m vessel is not able to sail today from Gorinchem. This is because of the fact the orig. B/L's for the cargo loaded in Rostock for Astrakhan had to be amended according to your latest instructions.*" Bluewater refers to Mr De Jong's acceptance that a problem with the cargo loaded in Rostock leading to the bill of lading having to be amended before the vessel could leave Gorinchem was the responsibility of Mercon.

354. Bluewater says that it was difficulties with the Bill of Lading for which Mercon was responsible that caused the delay and not something for which Bluewater was responsible meant that Milestone B4.1 was not met.

355. Ship 1 arrived one day late at Gorinchem and Mercon does not say that this was Bluewater's responsibility. Whilst one umbilical was replaced because it was damaged that was not something which held up the achievement of load out. The letter of 20 June 2008 was evidently written by Mercon with a view to seeking to put some responsibility for the delay to B4.1 onto Bluewater. In fact, as the other documentation shows Mr Hoep was still trying to understand what was required by way of documentation and then obtain it. That was clearly the cause of delay and was not something that Bluewater were responsible for.

356. In so far as he was requesting further documentation from Bluewater the documents show that these were new requests and the documents were provided. Any delay was therefore Mercon's responsibility. The final delay occurred on 26 June 2008 when there were difficulties with the Bill of Lading for the cargo loaded at Rostock, which again was a matter for Mercon. Ship 1 was therefore only able to sail on 26 June 2008.

357. In relation to the laytime calculation, as set out below, Mercon claims demurrage charges which it incurred under the terms of the Charterparties based on shipping delays caused by matters outside its control. Mercon refers to VOR 075 rev 4 which was incorporated into VO-005 and says that the parties agreed time allowances for discharge (48 hours) and customs clearance (24 hours) and a daily rate for demurrage. On this basis Mercon says it is entitled to be compensated for demurrage where the laytime arose from causes outside its responsibility. It says that Bluewater accepted this principle when it confirmed its liability to Mercon for 95 hours' demurrage to Ship 1 in Mr Brouwer's letter dated 28 August 2008.

358. Bluewater accepts that VOR-075 excluded demurrage costs from the Lump Sum amount but stated that the Lump Sum price includes "Time allowance for loading 48 hrs per shipment", "Time allowance for Discharge 48 hrs per shipment" and "Time allowance for Customs clearance is 24 hrs."

359. Bluewater refers to Schofield on Laytime and Demurrage (6th Edition) and says that demurrage only applies to delays during the loading or discharging operation and that delays during the voyage are the ship owner's risk. Further it says that, whilst the Charterparties between Mercon and the Shipping Agent provide that laytime is 48

hours per shipment, if the ship owner is in default in the course of this laytime, it cannot claim sums over and above the laytime as demurrage.

360. Bluewater says that demurrage stops running once loading and discharging stops and that any delays incurred after this point are not demurrage and should not be passed onto Bluewater by Mercon as they fall within the Lump Sum in VOR-075. If the ship is delayed due to reasons for which Mercon as the charterer is responsible during the loading/discharging operation, then the remedy for the shipowner is damages for detention which the owner must prove and cannot claim demurrage. Finally, Bluewater says that if, as a matter of fact, the reason the Ship took longer to load at Gorinchem, or discharge at Astrakhan was due to defaults on the part of Mercon as set out in the delay section and says that Mercon cannot pass these on to Bluewater as demurrage as, but for Mercon's actions, these costs would not have been incurred.

361. In relation to Ship 1, there is a claim for demurrage at Gorinchem on the basis that laytime commenced on 16 June 2008 and the total time claimed, including Rostock, is 217 hours through to 27 June 2008.

362. Bluewater says that the entire allowance of a 48 hour laytime period in Gorinchem was taken up by the crew having the weekend off: "no work – time to count" and delay caused by this is not something it can seek to recover from Bluewater.

363. Bluewater also says that charges incurred after loading has completed are not demurrage and therefore should not be passed onto Bluewater. In particular it says that it was not responsible for the period from 24 June to 27 June where loading had been completed and the ship was "waiting for documents" and "awaiting confirmation to sail" and "awaiting letter of indemnity" when Mercon had difficulties in finalising the documents for Ship 1 prior to sailaway in Gorinchem. As a result, Bluewater says that, of the 217 hours of demurrage claimed, including loading in Rostock, at the very most 101 hours are legitimately demurrage claims but Mercon has not explained why the loading took so much longer than intended and so this claim should be disallowed.

364. I have considered the laytime calculation and also the calculation produced by Mr Brouwer in which he accepted 95 hours of demurrage. It is clear that there is no claim for the period of 6:45 hours taken at Rostock. At Gorinchem laytime commenced on 16 June 2008 at 13:00 and loading commenced on 19 June 2008 at 00:00. Loading was then completed on 24 June 2008 at 12:00 but no loading took place on 21 or 22 June 2008. From 24 June 2008 at 12:00 until 8:00 on 27 June 2008 the ship was waiting documents, a letter of indemnity and confirmation to sail. Whilst Mercon may be liable to pay demurrage under the charterparty and, in my judgment, the payment provisions in VO-005 entitled it to recover for time in excess of 48 hours if it was not caused by its fault, that does not give grounds for an extension of time under the Contract unless it can be shown that delay was caused by a matter which arose because of an instruction, decision or act of Bluewater.

365. There is no period of delay which, by reference to the laytime calculation and as I have found above, arose because of an instruction, decision or act of Bluewater. There was a period from 16 June 2008 at 13:00 until 24 June 2008 at 12:00, excluding 12 and 22 June 2008 when I consider there was, subject to the 48 hour allowance, a period when demurrage was applicable. After 24 June 2008 at 12:00 all the delay was caused by

Mercon and the need for the necessary documentation to be produced. It follows that Mercon is entitled to demurrage of 191 hours from 16 to 24 June 2008 less 48 hours (21 and 22 June 2008) less 48 hours, which gives 95 hours which accords with Mr Brouwer's calculation. At €4,500 per day the demurrage is €17,812.50.

366. I therefore do not consider that Mercon has established an entitlement to an extension of time for the 11 day delay from 15 June to 26 June 2008.

B4.2: Load out of Ship 2 (Alexander Marinesko)

367. Key Milestone B4.2 relates to the load-out of Ship 2 which contained the Topsides and containers from Gorinchem and was to be completed by 15 July 2008.

368. Mercon says that Ship 2 arrived at Gorinchem on 7 August 2008 and that LOC certified load out on 18 August 2008 but Bluewater certified load out on 21 August 2008. It says that B4.2 was substantially achieved on 18 August 2008.

369. Mercon says that the delays to the Topsides were caused by 225 days critical delay as a result of the late release of drawings, further problems with the Main Bearing Support Ring (MBSR) and 13 days critical delay arising from the decision by the Ship's Master to revise the weight distribution of the cargo on deck.

370. Mercon says there were 225 hours of lay time at Gorinchem caused by concerns expressed by the master about weight distribution and loading plans on the vessel following the revisions needed to achieve the height restrictions for the HCD, delays in receiving Bluewater's approval of shipping documents and problems with the presentation of the flame and gas detectors on the shipping documents.

371. In Mercon's Opening it said that it was "impossible for Mercon to load out the Topsides by 15 July 2008 as Bluewater had failed to provide, in sufficient time, design information that was essential to the fabrication and assembly process. It refers to VOR-018M issued in respect of a lifting frame on 15 April 2008 and says that Bluewater was warned that late approval of this VOR would delay the transport schedule.

372. Mercon says that the delays to load out arose out of the Ship's Master's dissatisfaction with the weight distribution of the cargo following alterations to the hose connection deck that had been required to achieve the Russian inland waterways height restriction, including the need to carry more ballast. It says that Flinter advised Mercon of this on 10 August 2008. As a result the cargo had to be re-arranged, which led to a delay to load out to 18 August 2008.

373. Bluewater says that Key Milestone B4.2 was achieved on 21 August 2008 when the relevant Certificate of Release was signed. This was 37 days late.

374. Bluewater says that the experts consider that fabrication was completed on 8 August 2008 (Mr Cookson) or 1 August 2008 (Mr Illingworth). The difference is in relation to pre-commissioning works which were being carried out in early August 2008 which Bluewater says was done because Ship 2 was not ready yet.

375. Bluewater says that Mercon's reference to the VOR issued in respect of a lifting frame on 15 April 2008 is not relevant. Bluewater says that the relevant VOR dealing with the lifting frame was VOR-108 which became VO-12 and was agreed in December 2008 as having a nil time impact and was signed off by Mercon.

376. Bluewater says that the Baseline Schedule shows that the turntable was planned to be completed ready for integration by 10 April 2008, and that the machining of the MBSR was to start on 4 February and finish on 29 February and that the MBSR was required to be completed before the turntable was ready to integrate with the Pig-Receiver Deck which was planned to be completed on 5 May 2008. Bluewater says that there was a period of float between 10 April 2008 when the turntable was planned to be ready and 5 May 2008 when it needed to be ready for integration.

377. Bluewater says that originally Mercon said that there was a 42 day critical delay between 1 January and 11 February in relation to the start of machining of the MBSR but that since the machining was only ever planned to be commenced on 4 February 2008, it was at most 7 days late and Mr de Jong said that his recollection was that the start of machining of the MBSR would not have been critical for the works in Gorinchem. Bluewater says that the as-built schedule shows that the turntable was completed ahead of the completion of the Pig-receiver deck on 24 April 2008 and therefore there was no delay caused by the MBSR.

378. Bluewater says that fabrication of the Topsides was complete, except for pre-commissioning, by 25 July 2008 and that from that date to 8 August 2008 pre-commissioning works were taking place on the Topsides. Bluewater refers to the fact that, as recorded by Mr Illingworth, this further work was minor fit-out and follow on works, which could have been carried out during integration at Astrakhan.

379. Bluewater refers to Mr De Jong's evidence that Mercon was pre-commissioning between 25 July and 8 August "while we were waiting for the platform" and that "there was a long period where we were doubting whether Bluewater would wish us to delay the second vessel in order to trial fit [the Yoke Hinge]." Bluewater says that the trial fit of the Yoke Hinge was something that Mercon was required to carry out under the Contract and that it instructed Mercon to carry out in Gorinchem. Bluewater says that Mercon was responsible for the delays in completion of the Yoke Hinge, and if delays were caused to Ship 2 by it then this is a matter for which Mercon is responsible. However Bluewater says that Ship 2 was not in Gorinchem in time for the completion of the Topsides and was not ready to depart until 22 August 2008, 21 days after the units were available.

380. Mercon says that the delay to Ship 2 was due to the split in the Topsides but Bluewater says that given the amount of time Mercon had to plan for Ship 2 in the knowledge that the Topsides would be split, this should not have caused delay. It refers to Mr De Jong's evidence where he accepted that split had been known about in December 2007, the structures had been fabricated by April 2008 and the weight and centre of gravity did not change after that. Bluewater also refers to an email at the time in which Mercon blamed its agent, Flinter. Mr de Jong wrote this: "*I am astounded and have now been obliged to accept that the planned load out of the ship was not started on Saturday and cannot proceed any further on Monday (morning) either. This causes us some*

substantial financial loss and delay to the project." Bluewater says that it then took until 20 August 2008 for the new revised stowage plan to be approved.

381. Bluewater also says that Mercon had experienced further difficulties with gathering together the necessary documents for shipping which took until after 19 August 2008 to complete. It refers to the following documents:

(1) On 5 August 2008 Mr Hoep was asking Flinter: "*As regards the B/L instructions, what are all the things you need to prepare the B/L? Last time, I sent so much off to you, that I have forgotten what is actually needed.*"

(2) On 15 August 2008 Mr Hoep sent Bluewater a new set of revised documents for Ship 2. Mr Heij responded on the same day stating

> "*1) Proforma Invoices*
> …
> *As already discussed only the fire and gas detectors have been imported on a temp. basis the value for this cargo should be the same as at the time [of] import as well as description, [etc]*
> …
> *3) BOL*
> *Because the Gas and fire detectors are mounted on the structure you will not be able to issue a separate BOL for this. In fact there is no requirement to issue a BOL for this.*"

(3) Mr Hoep checked this information with Flinter on 18 August 2008 and Flinter confirmed that this was correct.

(4) On 19 August 2008 Mr Hoep sent revised transport documents to Mr Heij. Mr Heij responded that the detectors should form an integral part of structure on which they are mounted in order to avoid problems and if it is listed separately it will cause problems at customs and asked for documents to be revised. Mr Hoep then appears to have revised the documents, adding the flame and gas detectors to the Astrakhan Bill of Lading and Proforma.

(5) On 19 August 2008 Mercon raised an issue with the Bill of Lading which it wanted Bluewater to check. Bluewater said that the Bill of Lading was Mercon's responsibility and insofar as Mercon required Bluewater to sign the Bill of Lading, that was not required. Finally, also on 19 August 2008, Mr Hoep advised Bluewater that, although it had previously not been thought that the transport documents were urgent, they now were and he requested further comments.

382. Ship 2 departed Gorinchem on 22 August 2008 and Milestone B4.2 was achieved on 21 August 2008. Bluewater says that there was 37 days delay to Key Milestone B4.2.

383. Mercon says that the Topsides were delayed by matters for which Bluewater was responsible and that this meant that Load out of Ship 2 could not happen before 15 July 2008 which was the B4.2 Key Milestone date. Whilst it is correct that the Topsides were not complete, except for pre-commissioning, until 25 July 2008, the split in the Topsides was discussed and known about in late 2007 and should not have delayed the

load out of Ship 2. If there was delay then that was a matter for which Mercon was responsible.

384. The evidence does not establish, in any case, that the delay in the arrival of Ship 2 from 15 July 2008 until 7 August 2008 was caused by delay in completing the Topsides. Rather it seems that the delay from 15 July 2008 until 7 August 2008 was something for which Mercon was responsible.

385. After load out started the Ship's Master said that he was unhappy with the load out plan devised by Mercon due to the weight distribution. Although Mercon more recently sought to blame the split in the Topsides for this, I do not consider that to be correct. The email from Mr De Jong to Flinter shows his obvious frustration with the fact that the planned layout of Ship 2 was not started on Saturday 9 August and could not proceed on the morning of Monday 11 August when it was thought that the loading plan had been agreed but the Master did not accept it. Mercon says that, as a result of this, the cargo had to be re-arranged, which led to a delay to load out to 18 August 2008.

386. In parallel with this, Mr Hoep by 5 August 2008 had still not to grips with the necessary documentation and, as the documents referred to by Bluewater show, the process of obtaining the necessary documents continued substantially up to Key Milestone B4.2 being achieved on 21 August 2008.

387. I have considered the laytime calculation of 225 hours under which Mercon claims demurrage. Bluewater says that the demurrage claim includes periods on 21 August 2008 and 22 August 2008 for "awaiting cargo documents" which is not demurrage for which Bluewater is responsible. It says that the 24 hour period on 21 August 2008 is said to be "Lashing/awaiting cargo documents" and in the absence of evidence as to how much of this period was caused by cargo documents, this entire period should be disallowed. Bluewater also says that, as with Ship 1, there is a 24 hour period on 17 August 2008 where no work was done and this should not be passed on to Bluewater.

388. Bluewater says that the delays in Gorinchem were caused by the Ship's Master disagreeing with the loading plans prepared by Mercon which is Mercon's responsibility. This arose on 10 August 2008 and the load-in plans were not approved until 20 August 2008. Further Bluewater says that Mercon was not ready with the requisite documents for Ship 2 from 15 August 2008 until 19 August 2008. Bluewater also says that the laytime calculation shows "lashing and securing of cargo" lasting over 48 hours from 19 August 2008 to 21 August 2008 with no explanation given but, given the issues with documents in this period, it says this should be disallowed. As a result, of the 225 hours of demurrage claimed, Bluewater says that at the very most 113 hours could be claimed but Mercon has advanced no explanation as to why the loading took so much longer than intended and this claim should be disallowed.

389. The laytime calculation started at 07:00 on 11 August 2008 and ended at 16:00 on 22 August 2008. It is clear that a substantial amount of time was taken dealing with the load-in plans and then on 21 and 22 August 2008 waiting for documents, both of which were caused by matters for which, as between Bluewater and Mercon, Mercon was responsible. It is not possible on the evidence to identify any period when one or other of these causes was not impacting. On that basis and allowing for no work being carried

out on 17 August and the 48 hour allowance, I am not persuaded that any of the demurrage claim results in liability for Bluewater. Certainly there is no basis for an extension of time.

390. I do not therefore accept that Mercon has established any grounds for an extension of time to Key Milestone B4.2 which was 37 days late from 15 July to the relevant B4.2 date of 21 August 2008.

B4.3: Load out of Ship 3 (Ulus Breeze)

391. Milestone B4.3 relates to the load out of Ship 3 from Gorinchem and was to be completed by 15 August 2008. Ship 3 contained the yoke assemblies and the crane, together with containers. The delay experts consider that fabrication was completed on 27 September 2008 and was therefore 43 days late to Milestone B3.3 and they also agree that load out under Milestone B4.3 was not achieved until 23 October 2008 and was therefore 69 days late from 15 August 2008.

392. Mercon says that there were 254 days of critical delay in achieving Milestone B4.3 as a result of the late release of drawings but this delay was recovered to some extent during fabrication. It says that there were then 27 days critical delay caused by procurement of Ship 3 during the busy winter period.

393. One of the issues which, at one stage, formed the basis of Mercon's delay claim, was the machining of the Yoke Hinge body. In Mercon's Further Information in October 2012 it was pleaded that the late instruction for Mercon to commence machining works to the Yoke Hinge Body caused a critical delay from 30 January 2008 to 21 April 2008 of 83 calendar days, plus a further 42 calendar days for late construction information, giving a total of 125 days. In the Amended Further Information this section was deleted. In Mr Cookson's Expert Report he sets out the chronology in respect of machining and states that "*the root cause of the 165 calendar day delay to the achievement of Key Date B3.3 was the re-design of the SYMS, the late and fragmented release of design for the Yoke System by [Bluewater] which was carried forward from Period 1 and the late instruction to proceed with machining of the Yoke Hinge Casting on 21 April 2008.*". In Mercon's Opening Submissions it refers to issues with the machining sub-contractor and states that Bluewater "dithered" over providing an instruction for this work. However, it does not make such a claim in its Closing Submissions.

394. At the hearing Mercon suggested that delays may have been caused by a lack of capacity in MRC to complete the machining of the Yoke Hinge before it did so in June 2008 together with delays caused by issues which arose as a result of comments by MRC on the designs. Reference was made to TQR 224 raised by Mercon on 13 May 2008 which led to changes to drawing LUK-M-823-DR-2325-001 which was revised on 17 June 2008.

395. Bluewater submits that any delays to the Works caused by the Yoke Hinge Casting were Mercon's responsibility because, despite having all the information that the Yoke Hinge Casting required machining, it did nothing for 3 months and then possibly delayed matters for a further month whilst it sought instructions and then delayed in subcontracting the machining works. It says that the drawings for the Yoke Hinge Body and the rough-machined Yoke Hinge Body itself were delivered to Mercon by

December 2007 but Mercon did not carry out any work. Bluewater also refers to Mr De Jong's evidence where he accepted that he had an instruction to machine the Yoke Hinge body on 21 March 2008, following a telephone conversation with Mr Brouwer.

396. Bluewater also says that Mercon was always to machine the Yoke Hinge house, as can be seen from the Baseline Schedule, activity MS0314.1212. From that schedule, it says it is also apparent that Mercon realised it had to machine the Yoke Hinge Body – the schedule shows an activity "Machining TT Connection". Following the changes to the design of the Yoke in 2007, the only component to which this refers is the Yoke Hinge Body.

397. It is necessary to consider the detail of the progress of the Yoke Hinge.

398. In October 2007 the machining drawings were sent to Mercon by Mr Nijboer. Mercon then sent TQ103, dated 25 October 2007, on the subject of "Machine drawings, missing info" and asked for information on "*Yoke Hinge Casting: Material: According to LUK-M-SP-823-2360, spec. is missing, material quality unknown. Please provide this specification in advance.*"

399. On 29 November 2007, there was a meeting between the engineering teams of Mercon and Bluewater when machining drawings were again discussed. Following this meeting, the revised details for the Yoke End and the Yoke Hinge Casting were issued on 5 December 2007 (Rev A). These were re-issued on 28 December 2007 as RFC drawings, with no significant changes from the Rev A version.

400. After the issue of the Rev A machining drawing, the engineers held a further meeting on 6 December 2007. One of the issues discussed there was Mercon's scope of machining:

> "*5. Where does stop [Mercon] responsibility for the machining of structural components? For instance, the bronze rings (free-issued by Bluewater) are rough or fine machined? [Mercon] need to provide only the machining of the structural steel. Bronze bearings will be free-issued final machined, ready to install in the structure.*"

401. The Yoke Hinge Assembly (including the Casting) was delivered free-issue to Mercon on or around 24 December 2007 and had been rough machined but required final machining. Mercon had been issued with drawing number LUK-M-823-DR-2325-001, "Manufacturing drawing yoke hinge to turntable yoke hinge body machining". The drawings also specified "Inconel cladding" to be done after the machining was carried out.

402. On 21 January 2008 Mercon submitted Rev 2 of VO-003 which included the Yoke Hinge Body machining drawing LUK-M-823-DR-2325-001.

403. On 24 January 2008 there was a further meeting at which it was stated: "*Ring thick 195mm as shown on drw. M-2326 will be machined by [Mercon] from plate thick 210.*" Drawing 2326 was the drawing for machining of the Yoke Hinge House and was sent with drawing 2325.

404. In the January 2008 Monthly Progress Report Bluewater notes that "*Mercon have so far not subcontracted machining*" and states that installation of Yoke Hinge Casting is Mercon's responsibility.

405. On 29 January 2008 Bluewater sent Mercon comments on Mercon's Weekly Progress Report for Week 3 of 2008 and asked that Mercon add the following under "Areas of concern": "*9.25 Lack of progress with respect to machining activities (Yoke Hinge Casting).*"

406. Mr de Jong then arrived in March 2008 and said to Mr Leenheer that at a meeting with Mr de Geus that, in respect of the Yoke Hinge, he would "*make it clear that they must specify what exactly they would actually like to see machined and in what manner.*" On 18 March 2008, Mr De Jong noted in his diary that the delay to the Project was "*probably result of late start of yoke?*".

407. At the weekly progress meeting on 18 March 2008 at Note 6.3 Mercon stated that the completion schedule for machining is a problem. The note states:

> "*[Bluewater] explained to [Mercon] that all details concerning machining were made available to [Mercon] before X-mass 2007 including the delivery of the main yoke casting to [Mercon]. [Mercon] has waited 3 months before starting the subcontracting process.*"

408. Following a telephone conversation with Mr Brouwer on 21 March 2008, Mr De Jong sent an email "*confirmation of instruction to partially execute add. machining*" in which he stated "*we confirm your instruction, as expressed by you during this telcon, to consider the receipt of information on the design of the yoke hinge system as an instruction to execute the referred work.*" He said that he considered that the work required a Variation Order.

409. In reply to this email from Mr De Jong, Mr Brouwer stated:

> "*We are very concerned about the delayed subcontracting of the machining works for Yoke Hinge Assembly by [Mercon], furthermore we are surprised receiving such e-mail from [Mercon] at this stage of the project.*
> *Please note that the [Mercon] notification is far too late, [Mercon] to indicate in detail what they have done to mitigate so far.*
> *Note that the Yoke Hinge Casting is already at [Mercon] since before Xmas sufficient complete with documents allowing [Mercon] to shop around to subcontractors at that time when sufficient lead time was still available.*
> - *We have noted that [Mercon] have not done anything with the yoke hinge casting since its arrival at [Mercon] before Xmas.*
> - *We have noted that [Mercon] have not done anything with the yoke hinge document indicating the machining scope of work, that were issued before Xmas.*
> - *We have noted that [Mercon] started with the subcontracting process not earlier than March 2008.*"

410. At a meeting on 8 April 2008, Mercon said that the contract with MRC to machine the Yoke Hinge was to be issued informally. On 21 April 2008 Bluewater issued an

instruction to proceed with the machining and inconel welding "*notwithstanding the provisions of the Agreement*" with the purpose of "*safeguarding the Project Schedule and ensuring that Key Date(s) are met.*"

411. On 24 April 2008 Bluewater accepted MRC as Yoke Hinge machining subcontractor. On 9 May 2008 Mercon had a kick-off meeting with MRC and the machining of the Yoke Hinge House commenced on 3 June 2008 and of the Yoke Hinge Casting in the week of 21 July 2008.

412. Based on this chronology I consider that Mercon had all the information to carry out the relevant machining work together with the casting itself from late 2007 and should have proceeded with that work then or, at the very latest, by March 2008 when the instruction was given to Mr De Jong. If Mercon had proceeded with the work to the Yoke Hinge at that stage then there would not have been any delay caused. As it was they commenced work to the Yoke hinge late and this caused delay to the machining and other work needed. This delay, in my judgment, was delay for which Mercon was responsible.

413. Bluewater says that Mercon experienced delays in the procurement of Ship 3. Mercon sought to establish in cross examination that Bluewater tried to delay the shipping date of Ship 3 so that the surge dampening system (SDS) and pendulums could be transported on Ship 3. In relation to the SDS and pendulums, Bluewater says that Mercon had to provide Bluewater with proper notification of the vessel name and arrival windows under VO-005.

414. Bluewater refers to Mr Illingworth's evidence that the crane structure was ready to sail on 3 July 2008 and the Yoke was ready on or around 27 September 2008, but Ship 3 did not sail until 23 October 2008, 26 days later.

415. Ship 3 was originally intended to take the pendulums and SDS, which were being manufactured in Ijmuiden, and then travel to Gorinchem for the Yoke Hinge Assemblies. As stated in a meeting on 8 April 2008:

> "*Shipment 3: Loading 01..16 AUG-2008, Departure TBC. [Mercon] expect that fabrication completion will be 20-AUG-2008 (ready for loadout). [Bluewater] and [Mercon] agree that [Mercon] will have close look into the following matters to determine schedule optimizations:*
> - *Incorporation of detailed Vessel Transport Details into Schedule;*
> - *Detailing of Yoke Arm Subassembly Fabrication and critical activities;*
> - *Detailing of mitigating measures.*
>
> *[Bluewater] clarified that [Mercon] shall consider closure of locks in Russian Federation, usually closing in period of 10…15-NOV each year, subject to weather conditions.*"

416. Mercon pleads that there were delays caused by changes to the design which meant it was trying to procure Ship 3 at a busy time. Bluewater notes that, in issuing VOR-181 for the Ballast Tank Lugs on 30 July 2008, Mercon stated that "*If final confirmation is provided by return then the work is foreseen to be completed in time for Shipment 3*" and confirmation was provided and the Work was incorporated in VO-010.

417. Bluewater says that by July 2008 Mercon had not nominated a ship or provided a loading plan and, as Mr Cookson notes, under para 7.1 of V0-005-03, Mercon was to notify Bluewater of a 2 week window a minimum of 8 weeks prior to an ETA in Ijmuiden.

418. The Minutes of Meeting on 17 July 2008 show that Mercon was to act as soon as possible to provide the loading plan for Ship 3 and that Mercon informed Bluewater that "*Vessel 3 was not ordered yet, because of fabrication and test schedule availability. [Mercon] Proposed ETA of Vessel 3: ETA Ijmuiden 19/09/08; ETA [Gorinchem] 23/09/08; ETD [Gorinchem] 10/10/08.*"

419. Bluewater says that the notice was provided 6 days later than required under that Variation Order and that once the window was notified, it bound both parties unless a different window was agreed. The pendulums were being fabricated at Ijmuiden by another sub-contractor and Bluewater says that it planned the sub-contractor's activities in accordance with the fact that Ship 3 would arrive in Ijmuiden on 19 September 2008.

420. On 30 July 2008 Mercon changed the date of departure and said:
"*Mercon herewith informs Bluewater that the third vessel is expected to arrive in Gorinchem on the 10th of September. Despite earlier discussion and schedules we are strongly advised by our forwarding company to leave Gorinchem latest week 38 because of possible weather condition influence. These influences can have enormous impact on both cost and schedule. Departure of the third vessel is now expected the 19th of September.*"

421. At the weekly minutes of meeting on 21 August 2008 Mercon said that Ship 3 had not been ordered yet and Flinter had advised that the estimated time for departure from Gorinchem was not later than 15 September 2008.

422. Bluewater wrote to Mercon on 27 August 2008 saying that Ship 3 was no longer required to call at Ijmuiden. It asked Mercon for the name of the vessel, the place and date of the suitability survey and the estimated time of departure from Gorinchem. Bluewater accepts that there was a delay to the pendulums for which it was responsible and, as stated above, does not claim for the additional costs of transporting the pendulums and SDS.

423. Mercon did not notify Flinter that Ship 3 was not stopping in Ijmuiden until 3 September 2008 and then passed on Bluewater's request and asked Flinter for "*Name of vessel #3 - Suitable place and date for suitability survey of vessel #3 - ETA of vessel #3 in Gorinchem*"

424. At a meeting on 4 September 2008 Bluewater asked why Ship 3 had not been nominated and Mercon stated "*that since then lot has changed and that arrangements with the Russian Owners is difficult to achieve.*"

425. On 9 September 2008 Flinter reported that it was still awaiting the owner's nomination for Ship 3, and that the Russian inland market was very busy at this time.

426. On 15 September 2008 Mercon informed Bluewater that "*a ship has already been ordered in accordance with VO-005 and based on BLUEWATER's repeated*

Instructions." Bluewater sent further letters seeking details of Ship 3 on 15, 16 and 19 September 2008. On 19 September 2008 Flinter notified Mercon that the owners nominated the "Professor Kerichov" or its sister vessel for loading at Gorinchem on 25 September 2008.

427. On 24 September 2008 Bluewater emailed Mercon to say:

> "*BLUEWATER are extremely concerned by lack of progress, lack of confirmations and lack of information from MERCON's side in consideration of MERCON's notice that ETA of Ms Professor Kerichov or sister vessel at MERCON in Gorinchem was confirmed at 25 SEP 2008 on 19 SEP 2008.*
> *Since 19 SEP 2008, MERCON has not been forthcoming with alternative details nor further confirmations.*
> *Now, being 24 SEP 2008, BLUEWATER understand from MERCON that no further information and confirmations regarding the Third Vessel can be made available until an undisclosed date, which is unsatisfactory and unacceptable to BLUEWATER.*"

428. On 26 September 2008 Flinter emailed Mercon to state that the MV Lotus had been fixed for loading in the Netherlands on around 10 October 2008. At a meeting on 1 October 2008 Mercon said that Ship 3 would arrive on 15 October 2008 in Gorinchem, the survey could take place in Southampton. The vessel was the Ulus Prime. On 15 October 2008 Mercon advised Bluewater that the nominated vessel was now the sister vessel, the Ulus Breeze.

429. Bluewater submits that it is apparent from these documents that Mercon was having problems in obtaining a vessel and that this was the responsibility of Mercon not Bluewater and that, in the circumstances, the delay to B4.3 was the responsibility of Mercon. It seems that by 15 August 2008, which was the date when Key Milestone B4.3 should have been achieved, Mercon was working to an estimated date of arrival of Ship 3 of 23 September 2008 with departure from Gorinchem on 10 October 2008, the dates being given on 17 July 2008. It is not clear what had caused that date to slip but the delay experts consider that fabrication was completed on 27 September 2008 so that it seems that the date of arrival of Ship 3 at Gorinchem was delayed to late September 2008 to allow for the completion of fabrication.

430. As I stated above I do not consider that Bluewater was responsible for any delay to the completion of the Yoke Hinge and therefore to the extent that there was a delay to the fabrication work necessary to provide the items to be shipped on Ship 3, I am not satisfied that Mercon have established that any delay was caused by matters for which Bluewater was responsible. The delay to the arrival of Ship 3 was then clearly caused by delay by Flinter in obtaining a vessel, for whatever reason. This is clearly a matter for which Mercon was responsible. It follows that I do not consider that Mercon has established any grounds for an extension of time.

431. As a result there was a delay to Milestone B4.3 of 69 days from 15 August 2008 until 23 October 2008 for which Mercon is not entitled to an extension of time.

Delays in shipping

432. I shall now turn to consider the delays to each of the Ships.

Ship 1: Volzhskiy 10

433. Having sailed from Gorinchem on 27 June 2008, Ship 1 arrived in St Petersburg at 15:50 on 3 July 2008. The Ship waited at anchor until its customs documents were in order. It left St Petersburg on 9 July 2008.

434. In its Further Information Mercon pleaded that under VO-005 Bluewater took the risk of any customs formalities beyond the 24 hours allowed in VO-005 but this was deleted from the Amended Further Information.

435. Mercon says that there were 112 hours of laytime in St Petersburg between 3 and 10 July 2008 and that the causes of delay were waiting time to berth and a problem due to a discrepancy with the weight of the umbilicals of 1kg between the bill of lading and the packing list. Mercon says that Bluewater had demanded that all shipping documents, except export documents out of Holland, should be submitted to it for checking.

436. Bluewater says that the issue at St Petersburg according to Mercon was an incorrect weight on the Bill of Lading which showed the umbilicals as weighing 5635kg whilst the packing list showed a weight of 5636 kg. Bluewater says that these documents were for Mercon to finalise and complete and any errors were therefore matters for which Mercon was responsible and, in any event, Mercon revised the Bill of Lading at St Petersburg.

437. Mercon says that it was for Bluewater to get the weight of the umbilicals right. Bluewater says that Mercon made an error because Mr Hoep provided Flinter on 24 June 2008 with a packing list prepared by Mercon, which showed that the weight of the umbilicals was 5635kgs whilst the Bill of Lading also prepared by Mercon and dated 26 June 2008 showed a weight of the umbilicals at 5636kgs. Bluewater says that this discrepancy between two documents prepared by Mercon and any delays caused by this are Mercon's responsibility. It refers to Flinter's email to Mercon on 5 July 2008 which said: "*Vessel arrived at St Petersburg roads 03.07.2008 15.50 hrs and stay at anchor awaiting 'green light' that all customs documents are in order*" and the laytime calculation provided by Flinter which showed that in St Petersburg the ship was "*waiting as documents not ready*" from Friday 4 July 2008 to Tuesday 8 July 2008.

438. Mercon also says that there was a delay due to the ship waiting for a berth. Bluewater submits that time waiting for a berth would be Mercon's responsibility.

439. In relation to the demurrage claim based on the 112 hours of laytime, Bluewater says that Mercon was responsible for transit customs clearance which included clearance through St Petersburg and this is not demurrage and should be disallowed. Further, Bluewater says that it was not responsible for delays caused by errors in Mercon's documents and the laytime calculation describes the delay as "waiting as documents not ready" which is not Bluewater's responsibility, so the 112 hours of demurrage claimed should be disallowed.

440. On the basis of the evidence of what happened at St Petersburg, there was first delay caused by the discrepancy in the shipping documents and then, it seems there may have

been some delay whilst Ship 1 waited for a berth. I consider that the delay caused by the discrepancy in the shipping documents was a matter for which Mercon was responsible for the reasons set out above. It was for Mercon to make sure that the correct documents were prepared and no approval by Bluewater could affect that. Even if the error were to have been caused by a document coming from Bluewater, which is not clear on the evidence, then it was for Mercon and not Bluewater to make sure that the documents were consistent. It follows that Mercon is responsible for the period of delay whilst the shipping documents were sorted out. If there was delay in availability of a berth then that was a matter which was Mercon's responsibility as part of its shipping obligation under VO-005.

441. The laytime calculation of 112 hours shows all the time except for Customs Transit Clearance of 20 hours being "*waiting as documents not ready*". I consider that Mercon was responsible for the period when the documents were not ready and as customs clearance did not take more than 24 hours, there is no claim for demurrage.

442. Ship 1 arrived in Astrakhan on 24 July 2008 and alongside the quay at Astrakhan on 25 July 2008 at 08:00.

443. Mercon also says that there were 394 hours of lay time at Astrakhan from 24 July 2008 to 11 August 2008 caused by the need to off load the FMS into the bonded area, and a dispute about the bill of lading so that load in and cargo clearance through customs was not completed until 11 August 2008.

444. Bluewater says it is not responsible for any costs or delays incurred by the refusal of the Ship's master in Astrakhan to place the FMS Frames on top of the Ship's hatches or for the delay in ASPO commencing the off-loading of the FMS frames on 31 July 2008. It also says that it should not be responsible for Mercon's delay in handing over the original Bill of Lading at Astrakhan which caused delay between 24 July and 26 July 2008.

445. In a letter dated 23 July 2008 Mercon stated that custom clearance could begin with the copies of the Bill of Lading, the originals being available on 25 July. However, Bluewater stated that the procedure required certificates and the original Bills of Lading were needed. On 25 July 2008 Bluewater noted that handover was delayed by the unavailability of the Original Bill of Lading and it also refers to Mr Knibbe's record for 25 July 2008 where he notes that the ship has arrived but "*BOL not on site, so still no signing handover certificates.*" Mercon says that the original Bill of Lading was hand delivered later that day and unlashing of the cargo started on 25 July 2008 at 09:00 but the cargo was not discharged. Mercon says that it provided the Certificate on 26 July 2008 which both parties signed. Up to 26 July 2008 I do not consider that Mercon has established any shipping delay for which Bluewater was responsible.

446. There were then two matters which occurred: the need to unload the FMS and the way in which the Central Column was unloaded which I must now deal with.

FMS

447. Bluewater says that further problems arose in Astrakhan relating to the unloading of the FMS from Ship 1. Bluewater says that it had made it clear that equipment including the FMS bound for Baku could not be offloaded at Astrakhan. Ship 1 was also used to

transport the Central Column and piles bound for Astrakhan. Mr Nijboer had stated in a letter to Mercon dated 2 June 2008 that "*Equipment and containers for BAKU has to stay on board and is not allowed for temporary storage/re-loading in Astrakhan. Re-loading can be executed only on deck.*"

448. Mercon's stowage plan meant that the piles were located underneath the FMS frames which therefore had to be removed. The FMS frames were to be lifted out of the hold and placed on the ship's deck after the Central Column was offloaded at Astrakhan, allowing the piles to be offloaded and the FMS frames would then be loaded back into the hold. However, upon arrival in Astrakhan it became apparent that the ship's Master would not agree to this although on 24 July 2008 Flinter had said that this operation of re-stowage of cargo from the hold onto the hatch covers had been discussed and agreed with the Master.

449. As a result, the FMS was unloaded into a bonded area on the quay. Bluewater accepted that this should happen but on 31 July 2008 stated that this acceptance was issued "under objection." Bluewater says that it was Mercon's responsibility under Clause 5 of VO-005 to optimise the stowage plan and the problems caused by loading the FMS on top of the piles meant that this unloading difficulty was caused in Astrakhan.

450. The piles were loaded onto Ship 1 at Rostock whilst the Central Column and the FMS were loaded at Gorinchem. It was clear that the FMS and other equipment which was to be shipped to Baku could not be unloaded at Astrakhan. For that reason Mercon made arrangements with the ship's Master for the FMS to be stored on the ship's deck whilst the Central Column and piles were unloaded. However when the Master arrived in Astrakhan he said he would not allow this although Flinter said that it had been agreed. This meant that the FMS had to be unloaded into a bonded area on the quay and then loaded back onto the ship again to be transported to Baku. I accept, as Bluewater submits, Mercon were responsible for optimising the stowage plan. The problems caused in Astrakhan arose because of the method of loading of the FMS which was a matter for which Mercon was responsible as part of its transport obligations. It follows that any delay caused by the need to unload and re-load the FMS was the responsibility of Mercon.

The Central Column

451. Ship 1 arrived at the quayside at about 8:00am on 25 July 2008. Handing over the Bill of Lading which was Mercon's responsibility was done on 26 July 2008. The Central Column was handed over to Bluewater and then transferred back to Mercon on 29 July 2008 following customs clearance.

452. The plan was to unload the Central Column from Ship 1 directly into the substructure. The load in procedure for the piles and the procedure for the Central Column installation were issued by Mr Pors of Mercon on 24 July 2008, pending LOC approval. This showed the Central Column being offloaded directly into the substructure.

453. Mercon says that this did not happen because Lukoil required it to be placed in the bonded customs area. It refers to a letter from Bluewater to Lukoil dated 28 July 2008 which states this. However, Bluewater says that the Central Column was never in the bonded storage area but was put on the quay because Mercon's plan to lift the Central Column directly into the substructure had not been approved by LOC.

454. It is clear from Mr van den Brule's email of 12 August 2008 that there were still outstanding issues with LOC about the upending procedures for the Central Column. There was correspondence following LOC's review of Mercon's procedure for Central Column installation (document 910.09.017) sent on 24 July 2008 and LOC set out some initial comments in a document dated 31 July 2008. LOC required "*details in English of the amount of fixation needed before the central column is released from the crane in its vertical position. This should include consideration of the completeness of the base structure, amount of weld for connection to base structure, and back up calculations showing ability to withstand maximum local environmental conditions.*"

455. Whilst Bluewater was complaining to Lukoil about the fact the Central Column was being offloaded onto the quayside, it is clear that it was the late submission of the upending procedures by Mercon which prevented the Central Column from being installed directly into the substructure. Bluewater was evidently seeking to overcome these difficulties by incorrectly blaming Lukoil. It is clear that even by 12 August 2008 LOC had not yet approved the upending procedures. I consider that the delay by Mercon in providing the necessary information to obtain LOC approval was Mercon's responsibility. It was responsible for the design of the temporary condition of the structures and it was this that caused the period of delay prior to lifting the Central Column into the substructure on 18 August 2008.

Summary

456. Therefore, given the views expressed above, I do not consider that Bluewater was responsible for any of the issues which caused to load-in of Ship 1 at Astrakhan. It follows that Mercon is not entitled to an extension of time.

457. In relation to demurrage, the claim is from 08:00 on 24 July 2008 to 18:00 on 11 August 2008. The initial problem with the Bill of Lading caused delay until 26 July 2008 and then from the records it seems that the problems with unloading were then caused by the need to offload and re-load the FMS. It is not possible on the evidence to identify a period of delay when demurrage might apply. I therefore do not allow any demurrage claim.

Ship 2: Alexander Marinesko

458. Mercon says that there were 129 hours of lay time at St Petersburg from 30 August 2008 to 6 September 2008 caused by a mistake on the shipping documentation for the equipment going to Baku when Customs required the values and HS codes for the equipment. Mercon says that Bluewater provided this information on 3 September 2008 and then customs required the values for each piece of equipment leading to updated transport documents being provided on 4 September 2008.

459. Bluewater says that Mercon was responsible for transit customs clearance which includes clearance through St Petersburg and this should not be claimed as demurrage. In any event, Bluewater says that it is not responsible for delays caused by errors in Mercon's documents and that transit customs formalities took from 2 September 2008 to 5 September 2008 to finalise. Further Bluewater says that "Awaiting for berthing" is not demurrage but falls within the journey, which is the owner's risk and so the period up to 1 September 2008 at 19:00 should be disallowed.

460. Bluewater confirms that issues with the documentation prepared by Mercon arose at St Petersburg. On 29 August 2008 Mr Hoep asked for the invoices needed for customs clearance in St Petersburg. Bluewater says that there does not appear to have been any earlier request and it replied 20 minutes later sending the requested information.

461. On arrival in St Petersburg the Ship's agent sent a message on 1 September 2008 detailing items missing from the "Baku BL invoice." This was sent on by Mr Hoep to Bluewater who replied with updated invoices and packing lists later on the same day.

462. Mercon then requested additional information from Bluewater on 3 September 2008 and was then required by Russian officials to provide further information on 4 September 2008. Bluewater says that all of these were sent on the same day. On 5 September 2008 Ship 2 cleared customs in St Petersburg.

463. Bluewater says that under the INCOTERMS it was Mercon's responsibility to arrange for the documents required for transit to Astrakhan, including the requirements to pass through St Petersburg. I accept that and it is evident from the chronology that Mercon failed to prepare the appropriate documents for transit through St Petersburg and are responsible for any delay in the process between 1 and 5 September 2008.

464. In relation to the laytime calculation, claimed from 30 August 2008 at 01:15 to 6 September 2008 at 01:30, it is clear from the evidence that it was the failure of Mercon to provide the necessary documents which caused difficulties during the period on 3 and 4 September when the customs formalities were being carried out. I see no grounds for any demurrage claim on this basis, particularly given the allowance in VO-005 for customs clearance.

465. It was then on 11 September 2008 that Mr Heij learnt that the flame/gas detectors which were supposed to be shipped on board Ship 2 had in fact been loaded on the crane structure to go on Ship 3, meaning that the invoices and documents would be incorrect. As I have found above this was a problem for which Mercon were responsible. It was Mercon's responsibility to provide the correct documentation, including the Bill of Lading and it was also Mercon who packed the items onto Ship 2. Any delays or other consequences because the Bill of Lading was incorrect were Mercon's responsibility as were discrepancies between what was on board and what should have been on board. In the event, there was no problem with the shipment when it reached Astrakhan and the discrepancy did not come to light.

466. Shipment 2 arrived at the port of Astrakhan at 23:10 on 24 September 2008, 18 days after the ship sailed away from St Petersburg on 6 September 2008. However, its arrival in port was delayed by the presence of the Volgar crane by the quayside at ASPO's yard. I accept that, as Mr Knibbe says, had Mercon informed ASPO in good time of the arrival date of Ship 2, this issue and any delay would have been avoided. The fact that the Volgar was operated by Lukoil did not make Bluewater responsible for any delay.

467. There is a claim for demurrage at Astrakhan on the basis that laytime commenced on 25 September 2008 and took 123 hours through to 2 October 2008. Bluewater says that Mercon is responsible for the delays caused by blockage in the ASPO harbour which meant that although Ship 2 arrived on 24 September 2008 it was not able to berth until 29 September. I accept that this was caused by matters for which Mercon was

responsible and so do not give rise to a demurrage claim. The laytime calculation appears to be incorrect but given that Ship 2 finished discharging on 1 October 2008 and there was a 48 hour period allowed in VO-005, I am not satisfied that Mercon has established any demurrage claim for discharging in Astrakhan.

468. Ship 2 berthed on 29 September 2008 but Mercon was not ready with the certificates to handover and off load the components until 30 September 2008 when the Topsides, spool pieces and deck cargo were unloaded and Lukoil then diverted the other two containers for Astrakhan into the customs port (ACCP). The Certificate for the two containers was signed on 2 October 2008 and Ship 2 left Astrakhan on 2 October 2008 at 21:50.

469. However, further issues arose with the containers which resulted in them being retained in customs until a first 'batch' of cargo was released on 30 September 2008, whilst the remaining Topsides materials were released on 16 October 2008 and on 7 November 2008. The documents show that these further issues with customs arose because a bicycle and Swagelok glue were included. The bicycle was not considered relevant to the Works by Lukoil and the Swagelok glue was not declared. These items appear to have caused problems with the release of the containers from customs in the period from 30 September 2008 until 23 October 2008, if not longer.

470. Whilst under the DDU INCOTERMS, customs clearance was a matter for which Bluewater was responsible, these matters which caused the delay were caused by errors made by Mercon in failing to provide the correct documentation.

471. There is also a claim for demurrage at Baku on the basis that laytime commenced on 6 October 2008 and took 49 hours 15 minutes through to 9 October 2008. Bluewater says that Mercon has not explained how discharge in Baku took longer than the 24 hours allowed and why there are long periods of "awaiting discharging" and so this period should be disallowed. I accept that and do not consider that Mercon has established this demurrage claim.

472. On this basis I do not consider that Bluewater was responsible for any issues causing delay to load in of Ship 2 at Astrakhan or for any of the delays after Ship 2 left Gorinchem. It follows that there are no grounds for an extension of time. Equally I am not satisfied that Mercon has any demurrage claim.

Ship 3: Ulus Breeze

473. The problems with Ship 3 relate to its arrival in Astrakhan on 11 November 2008 when it was sent to ACCP, the customs port, because, as reported by Mr Knibbe in his email of 12 November 2008, customs wanted to do a visual declaration. Mr Knibbe noted that "*This means that they have discovered that there are more items on the Crane Structure than mentioned in the BoL*".

474. Mercon says that there were 104 hours of lay time at Astrakhan caused by the dispute over the clearance through customs of the flame and gas detectors.

475. Issues arose because the flame and gas detectors were placed on the crane structure but not declared as they should have been shipped with Ship 2. Bluewater says that, again,

it was Mercon's responsibility to get the documents correct under the DDU INCOTERMS and it was Mercon's responsibility to pack the ship.

476. As I have found above this was a problem for which Mercon were responsible. It caused the difficulty with the discrepancies between what was on board and what should have been on board Ship 2. The discrepancy in Ship 3 came to light and the detectors were retained in the ACCP area until they were finally released after 16 February 2009. As I have found above, as a matter of causation, the problems which arose with Ship 3 were the result of the original error and the deliberate strategy undertaken by Mercon of fitting the detectors on the crane but not including them in the documentation. It follows that it was Mercon who was responsible for the continued detention of the detectors.

477. Ship 3 finished discharging on 12 November 2008 and departed Astrakhan on 13 November 2008 but the crane structure and the Yoke Hinge remained in the Astrakhan customs area (ACCP) and not at ASPO due to the problems with the documentation. At the date of termination the flame and gas detectors on Ship 3 were still held at customs but the Yoke Hinge and crane were released from ACCP on 17 December 2008.

478. There is a claim for demurrage between Gorinchem and Astrakhan without a laytime calculation. Bluewater says that it would appear from the Statement of Facts that load out in Gorinchem took less than 24 hours on 22 to 23 October 2008 and that load-in at Astrakhan was completed in the period provided from 11 to 13 November 2008. This appears to be correct and I do not consider that Mercon has established a claim for demurrage.

479. There is also a claim for demurrage at Baku on the basis that laytime commenced on 16 November 2008 and took 104 hours and 25 minutes through to 21 November 2008. Bluewater says that Mercon has not offered any explanation as to why discharge in Baku took longer than the 24 hours allowed and this period should be disallowed. In the absence of any proper evidence on this, I do not allow any demurrage.

480. As a result I consider that it was Mercon who was responsible for the delay in the load-in. In addition I do not consider that Mercon has established a demurrage claim.

Assembly at Astrakhan

481. Mercon says that the fabrication at Gorinchem and Astrakhan was completed, more or less, in line with the baseline programme and that it was issues such as the delay to the arrival of the Central Column in Astrakhan, followed by its delayed release from customs, problems with pre-heating and welding issues and then, eventually, the onset of the harsh Russian winter that caused progress to slow up between August to December 2008.

482. In relation to Bluewater's case that the delays at Astrakhan between September and December 2008 arose because Mercon was not paying ASPO, Mercon says that there is no evidence that Mercon's disputes with ASPO over timesheets or its queries over invoices resulted in a go-slow by ASPO. It says that what caused or aggravated the delays to the works in this period was Bluewater's refusal to accept responsibility by issuing proper site instructions and that Bluewater's failure to administer the contract properly was the prime cause of the delays during August to December 2008.

483. Mercon's originally pleaded case in relation to this period was that the Yoke Hinge and crane which were part of Ship 3 were off-loaded from ACCP to the wrong place and therefore Mercon was not prepared to accept transfer of care and custody and that it was also delayed by the absence of gas and flame detectors which were held in customs at ACCP.

484. In the Amended Further Information Mercon pleaded that delays were experienced in this period as a result of the delivery of the Yoke Hinge to an area not agreed by Bluewater and Mercon; the Topsides being delayed by the unavailability of the Swivel which was released from customs on 7 November 2008 and the need to incorporate the Yoke Hinge; the Central Column being delayed by Mercon's inability to undertake work during the winter months and the impact of the Russian Christmas shutdown and the slow progress of welding and instructions and changes to welding procedures and that the substructure was delayed by the lack of progress due to the winter sensitivity of the works and the slow progress of the welding.

485. Bluewater says that, as both delay experts agree, Works at ASPO's yard almost stopped in December 2008 and it refers to Mr Cookson's report at paragraph 8.7.82 where he states that little further work was carried out during the period from 18 December to 3 February 2009. Bluewater says that the real reason for work progressing slowly at ASPO was Mercon's failure to pay ASPO and to enter into a new additional agreement. Bluewater also says that critical delay in this period was caused by the absence of adequate pre-heating.

486. In relation to the Yoke Hinge, as I have said above in relation to termination, this component was in customs because of the problems with the documents for Ship 3 but from 19 December 2008 Mercon could have proceeded with installation of the Yoke Hinge and, in any event, could have done so from early January 2009 if there was an issue about an instruction to carry out the work. The underlying cause of the delay was, again, the documents for Ship 3 which were the responsibility of Mercon and any delay in commencing installation was caused by matters for which it was responsible.

487. In relation to the Swivel, it was released from Customs on 7 November 2008 and was installed the next day and the as-built schedule does not show inactivity on the Topsides in the period immediately preceding the release of the Swivel. Whilst the work to the Topsides could not be completed without the Swivel, workers were not standing around waiting for the Swivel. The cause of the problem was, again, the documents for Ship 3 which were the responsibility of Mercon and so any delay was caused by matters for which it was responsible.

488. In relation to Mercon's case that delays to the integration works to the Central Column and substructure were caused by difficulties with welding, it is noted that Mercon says that this related to extra welding in Astrakhan because the change in design needed much thicker steel plates to be used which, in turn, needed pre-heating. Mr Cookson's view is that a delay of about a month was caused by the absence of pre-heat equipment.

489. The need for pre-heating was known of by Mercon, as confirmed in the evidence given by Mr van den Brule, from a meeting in August 2007 when the minimum pre-heating requirements for the Central Column steel were discussed. It is clear that by a meeting

in September 2007, Mercon was reporting that the "*Minimum required preheat at ASPO has been evaluated based on actual material certificates and hydrogen content of consumables used, in accordance with requirements of annex I of AWS D1.1 M 2006.*" Mercon says that the steel had increased considerably in thickness from the initial contract design and pre-heating was going to be required. This was known about at that stage.

490. In May 2008 ASPO knew what the preheating requirements were going to be, as Mr Hoogenboom confirmed in evidence by reference to the relevant WPS for the welding of braces to the Central Column. That WPS (1500-KMY-G), signed off by the classification society and SEC on behalf of Bluewater, stated that the method of pre-heating was "*propane flame or electrical heaters*."

491. At a meeting on 4 September 2008, it was discovered that ASPO was using ring burners to carry out pre-heating and Mercon and Bluewater agreed that this method was insufficient and unsafe. Mercon stated that it was only aware of this from 1 September 2008 and was investigating alternatives. Work to the braces could not continue in the meantime due to unavailability of the pre-heating equipment. On 12 September 2008 Mercon indicated that it had sourced some pre-heating equipment.

492. Although Mercon says that the change in design meant that it needed to use much thicker steel plates which required pre-heating, the thickness of the steel plates which had to be welded had been changed in 2007 and the need for pre-heating was known in August/September 2007. The extent of pre-heat required for the particular welding of the diagonal braces of the substructure to the Central Column was finalised in May 2008, well before the work was started.

493. It follows that the delay of about a month identified by Mr Cookson as being caused by the absence of pre-heating was something for which Mercon was responsible because it failed to obtain the necessary pre-heating equipment. It was not caused by any late changes.

494. In these circumstances, Mercon was responsible for any delays which occurred to the works due to ASPO's failure to apply pre-heating.

495. In relation to Mercon's claim that work was delayed by the weather conditions, as set out above, some work was being carried out and could be carried out during this period. In particular painting was and could have been carried out in January 2009. In any event, Mercon's delays to completion of the Works in September 2008 led both to the need to work in the winter and to the period of delay when Mercon finished working at ASPO for Christmas on 20 December 2008 and to return on 12 January 2009.

496. In relation to the gas and flame detectors detained in customs, for the reasons set out above this was caused by matters for which Mercon was responsible. In any event, although the Works could not be completed by Mercon without the gas and flame detectors, no interruption to the progress of work has been identified by their absence.

497. As a result, I do not consider that Mercon has established that any delay to the progress of the completion of the structure for Milestone C6 was caused by matters which were the responsibility of Bluewater.

Milestone C3

498. Milestone C3 is defined in the Contract as: "*Jacket and Pile pre-fabrication and pre-assembly complete, tested and precommissioned, accepted by BLUEWATER's Representative and Certifying Authority, ready for Integration with SYMS Pre-Assemblies ex.Gorinchem*"

499. There is a dispute between the parties as to whether Milestone C3, which has not been certified as being completed, was in fact completed when the substructure was ready for the Central Column to be installed. The date for this Milestone in the Contract, as amended by VO-005, was 15 July 2008. Mercon refers to Mr Illingworth's evidence, agreed by Mr Cookson, that, although there was a delayed start to the assembly of the substructure in May 2008, it was ready to receive the Central Column on or before 20 July 2008, when all 5 main bracings were in place, which is 5 days after the VO-005 key date for C3.

500. Bluewater says that whilst the Jacket part of the sub-structure was ready on or about 20 July 2008, Milestone C3 could not be achieved until the piles were accepted by Bluewater's representative and the certifying authority as the Milestone requires completion of the "jacket and pile" so the piles have to be complete. Bluewater says that Milestone C3 was never completed by Mercon as work on the piles remained outstanding at termination.

501. I consider that Bluewater is correct in its interpretation of Milestone C3. It was necessary for both the Jacket and the Piles to be completed and, although the Jacket was complete, work to the piles was, as set out above, still continuing at the date of termination. It follows that Mercon had not achieved Milestone C3 by the date of termination.

Milestone C5

502. Milestone C5 is the start of integration of the SYMS pre-assemblies ex Gorinchem into the jacket assembly on 15 July 2008. Mercon says that the Central Column and the Substructure were both fabricated within or close to the periods allocated in the baseline programme.

503. It is common ground that integration started on 18 August 2008 and, for the reasons set out above, I do not consider that Bluewater was responsible for the delay to Milestone C5 caused by the fact that the Central Column was not unloaded directly into the substructure.

504. It follows that Mercon was therefore responsible for the delay to the achievement of Milestone C5 on 18 August 2008, some 36 days after the contractual date of 15 July 2008 in the Contract, as amended by VO-005.

Milestone C6

505. Milestone C6 required completion of the integration of the pre-assemblies ex Gorinchem which had to be tested accepted and pre-commissioned by Bluewater and the certifying authority. The revised date for this Milestone in the Contract, as amended by VO-005, was 14 September 2008.

506. As set out above, it was envisaged that the handover of the SYMS would take place on 18 December 2008, when Lukoil was expected to accept it with a punch list. However Lukoil was not prepared to accept the SYMS. Mercon provided Bluewater with a handover certificate for the SYMS on 29 December 2008 but, for the reasons dealt with above in relation to termination, that was not accepted. DNV did not issue its certificate in respect of Milestone C6 until 24 February 2009 and Lukoil then did not take delivery of the SYMS until 30 May 2009.

507. The delay experts note that the period for integration of the Central Column was 51 days but that it did not start until 20 August 2008. They have then identified a period of inactivity between 11 September 2008 and 1 October 2008. The welding of the upper bracings was put on hold on 2 September 2008 due to concerns over the method of pre-heating being used by ASPO. The Approval of the revised method using electric heaters was given by DNV in its report of 30 September 2008. Mercon then says that welding to the upper bracing continued once the hold was lifted and did not finish until mid-November 2008.

508. From Mr Cookson's as-built programme which he derived from the weekly reports, only punch list items were attended to in December 2008. No or little work was progressing up to 19 January 2009 or from that date up to termination.

509. Mercon's pleaded case was that there was delay to the sub-structure caused by the late and sporadic release of design information resulting in 125 days' critical delay which was then mitigated during construction but then 13 days critical delay was caused by "*the late release of the Central Column from the Lukoil controlled bonded area and the late clearance of Customs on 12 August 2008*".

510. For the reasons set out above I do not consider that Mercon has established that there was any delay caused by the late or sporadic release of drawings and, in any event, the substructure was only a few days late by reference to the date on which it was required to be ready for the integration of the Central Column. Further, for the reasons already given, the delay to the installation of the Central Column was a matter for which Mercon was responsible because Mercon did not have the requisite approvals for the upending procedure from LOC.

511. It follows that Mercon has not established any delay to Milestone C6 caused by matters for which Bluewater was responsible.

Conclusions on Extension of Time

512. For the reasons set out above I do not consider that Mercon is entitled to an extension of time to complete Key Dates B4.1, B4.2, B4.3, C3, C6 or C9 or any other Key dates.

Time at large

Issue 18: Alternatively, is time at large by reason of acts of prevention on the part of Bluewater and/or a break down in the contract mechanism for extending time?

513. In the light of my findings, I can deal with this issue briefly.

514. Mercon says that Bluewater prevented Mercon from achieving Milestones B4.1 to B4.3, C3 and C6 by its own conduct, including conduct in breach of the Contract, principally the failure to issue design drawings on time and conduct permitted by the Contract, principally instructing extra work. Mercon says that the Contract did not, on its proper construction, provide a mechanism for the grant of extra time for such events and time was therefore at large. Bluewater submits that there is a mechanism for granting extension of time.

515. For the reasons set out below, where I have analysed Clauses 14.2 to 14.7 of the Contract in more detail, I consider that the ability of Mercon to request and Bluewater to give a Variation under Clause 14.2 includes an adjustment to the Schedule of Key Dates, which are the dates for completion of the Milestones. The dates for completion can therefore be extended by Bluewater. The grounds for such an extension are broad but, importantly Clause 14.2(c) shows that Mercon is entitled to receive a Variation to cover any instruction, decision or act of Bluewater. It follows that there is a mechanism for extensions of time under the Contract by way of the adjustment of the Schedule of Key Dates and that the grounds include grounds which cover acts of prevention.

516. Equally, for the reasons set out above, I have not found that there were acts of prevention for which Bluewater was responsible.

517. The principle by which time becomes "at large" was summarised by Jackson J, as he then was, in Multiplex Construction (UK) Ltd v Honeywell Control Systems Ltd [2007] BLR 195 at [56] where he said:

> "*(i) actions by the employer which are perfectly legitimate under a construction contract may still be characterised as prevention, if those actions cause delay beyond the contractual completion date.*
> *(ii) Acts of prevention by an employer do not set time at large if the contract provides for extension of time in respect of those events.*"

518. The principle is of some antiquity and has a surprising effect on the contractual obligations as to the time for completion. As I have found that there is an extension of time mechanism for acts of prevention and I am able, so far as is necessary, to determine the appropriate adjustments to the Schedule of Key Dates, this is not the opportunity to consider the underlying basis for the principle.

Liquidated Damages

Issue 19: In light of the answers to 17 and/or 18, is Bluewater entitled to levy liquidated damages and, if so, in what amount (considering what the correct total contract price is for the purposes of the contractual cap)?

519. Bluewater claims liquidated damages up to the cap on liquidated damages which under Clause 35.1(c) of Section 2 of the Contract is limited to a maximum of seven percent of the Total Contract Price. The precise sum therefore depends on the matters set out below, where I have determined that the Total Contract Price is €22,812,995.74, compared to Bluewater's case that it is €17,912,436.66 and Mercon's case that it is €25,899,076.36.

520. Bluewater's claim is based on Mercon's failure to complete milestones B4.1, B4.2, B4.3, C3, C6, C9 and C12 but it points out that, given the rates for liquidated damages and the level of the cap, it only has to establish a comparatively small number of days of delay.

521. Mercon does not accept that, in the circumstances, Bluewater is entitled to liquidated damages. It refers to Clause 35.1(b) of Section 2 of the Contract which provides that:

> "*Liquidated damages for late delivery shall finally be calculated over the last milestone, being Key Dates C9 or C12 respectively, achieved by the CONTRACTOR and delays and liquidated damages on previous milestones shall then be disregarded.*"

522. Mercon submits that, as the earliest date upon which C9 could have been achieved by Mercon was July 2009, regardless of whether Mercon's performance was on schedule or not, and as there is no evidence that Mercon's performance of the works was in any way causative of or affected the delay to C9, Bluewater was not entitled to liquidated damages and Bluewater's inchoate rights to receive liquidated damages under Clause 35.1 had not crystallised at termination. Accordingly Mercon submits that Bluewater is not entitled to liquidated damages.

523. Bluewater refers to Clause 35.1(a) which provides:

> "*If CONTRACTOR fails to complete any of the items listed in the SCHEDULE OF KEY DATES in accordance with the relevant date included therein and/or fails to achieve the requirements of the CONTRACT in respect of any other items listed in Section 4 – Schedule of the Work, the CONTRACTOR shall be liable to BLUEWATER for Liquidated Damages. The amounts of such Liquidated Damages shall be as follows:*
> *a) For late delivery of any and all individual elements as detailed in the SCHEDULE OF KEY DATES (Attachment 4A to Section 4), the amount of Liquidated Damages per calendar day shall be:….*"

524. It says that under Clause 35.1 there is a two stage regime for liquidated damages. It says that the starting point is that under Clause 35.1(a) liquidated damages accrue as Mercon fails to complete any of the Milestones by the stated date and that liability is not contingent upon any future event. It says that Clause 35.1(b) then provides for a separate regime upon the achievement of the last Milestone which has the effect of adjusting earlier accrued liquidated damages and only applies when liquidated damages are "finally calculated" upon achievement of the last Milestone. In the present case as the Contract was lawfully terminated before the achievement of the last Milestone, C9, Bluewater submits that the final calculation of liquidated damages under Clause 31.5(b) does not take place and the accrued right to liquidated damages under Clause 31.5(a) stands.

525. The calculation of liquidated damages under Clause 35.1 is, in my judgment, correctly described by Bluewater as being a two stage approach. The first stage is to make calculations as time progresses and assess liquidated damages which accrue for the non-completion of the Milestones set out in Clause 35.1(a). Subject to the cap in Clause 35.1(c) those liquidated damages are then payable. At completion of the last Milestone

then there is a recalculation of liquidated damages under Clause 35.1(a) so that the sum payable per day and the delay to that last Milestone is used to calculate liquidated damages and delays and liquidated damages on the previous Milestones are then disregarded.

526. Under Clause 35.1(a) Mercon is liable to Bluewater for liquidated damages. I consider that this means that the liability of Mercon to pay Bluewater accrues when there is delay to one of the Milestones which attract liquidated damages. That sum then is payable by Mercon to Bluewater. On termination the provisions of Clause 30.6 deal with further payment to Mercon and, whilst Bluewater may deduct liquidated damages from payment, that is not the sole remedy as Mercon has an independent liability to pay liquidated damages under Clause 35.1. However as made clear by Clause 30.7, after termination the right of Bluewater to be paid liquidated damages does not continue but that does not affect accrued rights. It follows therefore that Mercon cannot avoid liability to liquidated damages by arguing that the "inchoate" right under Clause 35.1(b) has not accrued. Bluewater's right to payment under Clause 35.1(a) had accrued by the date of termination and was enforceable by Bluewater against Mercon and was unaffected by termination. However on termination Clause 35.1, including 35.1(b), did not continue to have effect for delay after that date.

527. On that basis, both because there were accrued rights under Clause 35.1(a) and because the instruction to carry out storage and/or the absence of a load out vessel until 1 June 2009 had not impacted to be causative of delay by the date of termination, I do not consider that Mercon can avoid the impact of liquidated damages by relying on "inchoate" rights under Clause 35.1(b) or a cause of delay which would only impact on Milestone C9 after completion of Milestone C6.

528. On the basis of the delays set out above, Bluewater is entitled to liquidated damages as follows just for the B4 Milestones at €50,000 per day:

(1)	Milestone B4.1: 11 days (15 June to 26 June 2008):	€550,000.00.
(2)	Milestone B4.2: 37 days (15 July to 21 August 2008):	€1,850,000.00
(3)	Milestone B4.3: 69 days (15 Aug 2008 to 23 Oct 2008):	€3,450,000.00

529. I have found that the Total Contract Price is €22,812,995.74 and as liquidated damages for delay are limited to 7% of the Total Contract Price, Bluewater is entitled to €1,596,909.70 for liquidated damages.

Value of the Lump Sum works

Issue 1(a): What abatement is due, if any, for the Lump Sum works not done at all?

530. Bluewater claims an abatement on the lump sum component of the contract price in respect of various items of work that, it alleges, were not done at all or not fully done.

531. The basis for this claim is pleaded in paragraph 37 of the Re-Amended Particulars of Claim as follows:

"*On a true construction of the Contract, including clause 17.9 of section 2A, clause 2.1 of section 5 and the detailed price breakdown in attachment 5B, the Claimant is*

entitled to make deductions from the Contract Price and/or the Contract Price is not payable if and insofar as Work was not in fact done as required by the Contract. From a practical perspective such deductions are necessary primarily in relation to lump sum elements of the Works which were to be reimbursed through payments for the completion of Key Milestones."

532. In paragraph 370 of its Opening Submissions Mercon stated:

"*It should further be noted that an abatement is available only for defective performance. In a number of cases, Bluewater is claiming a rebate for work included in the price but which, for its own reasons, it asked Mercon not to carry out. It is not entitled to an abatement, although for a few such cases Mercon has agreed a rebate as a concession.*"

533. Mercon has also raised two general points which it is convenient to deal with at this stage. First, it says that there is no provision in the Contract for abating the Contract Price on the basis that the work was not carried out. Secondly it says that Bluewater did not assert any right to claim a reduction in the Contract Price for certain items prior to its purported termination of the Contract. At Paragraph 12.3 of the Re-Amended Defence and Counterclaim Mercon says that Bluewater did not seek to correct or modify any sum previously paid to Mercon as contemplated by clause 17.9 of Section 2(a), before the date of wrongful termination and is not now entitled to operate that provision because the Contract is at an end. Mercon also challenges the legal and factual basis for a number of items and I shall deal with those matters below.

534. As pleaded Bluewater submits that on a true construction of the Contract, including clause 17.9 of section 2(a) and clause 2.1 of section 5, it is entitled to make deductions from and not pay the Contract Price for work not done. It also submits that, in any event, the absence of an express contractual mechanism is no bar to Bluewater being able to abate the Contract Price to reflect services not provided. Bluewater also says that Mercon has not properly explained its case on the consequences of termination.

535. So far as quantum is concerned the quantum experts have been able to agree the value of the various items as set out in Appendix 9.1 to their second joint statement, if liability to make the abatement is established.

536. The applicable legal principles on abatement were summarised by Jackson J, as he then was, in Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd [2006] EWHC 1341 at [652]:

"*(1) In a contract for the provision of labour and materials, where performance has been defective, the employer is entitled at common law to maintain a defence of abatement.*
(2) The measure of abatement is the amount by which the product of the contractor's endeavours has been diminished in value as a result of that defective performance.
(3) The method of assessing diminution in value will depend upon the facts and circumstances of each case.
(4) In some cases, diminution in value may be determined by comparing the current market value of that which has been constructed with the market value which it ought to have had. In other cases, diminution in value may be determined by reference to the

cost of remedial works. In the latter situation, however, the cost of remedial works does not become the measure of abatement. It is merely a factor which may be used either in isolation or in conjunction with other factors for determining diminution in value.
(5) The measure of abatement can never exceed the sum which would otherwise be due to the contractor as payment.
(6) Abatement is not available as a defence to a claim for payment in respect of professional services.
(7) Claims for delay, disruption or damage caused to anything other than that which the contractor has constructed cannot feature in a defence of abatement."

537. Clause 17.9 of Section 2(a), as amended by Clause 8.2 of Section 2(b) of the Contract, allows Bluewater, after due consultation with Mercon, to correct or modify any sum previously paid if any sum was incorrect or not properly payable to Mercon or if any work did not comply with the terms of the Contract. Clause 2.1 of Section 5, Compensation and Payment, states that Bluewater shall pay Mercon the provisional Total Contract Price and any revisions thereto calculated in accordance with the provisions of the Contract and Section 5. The Total Provisional Contract Price consists of a "fixed and firm Lump Sum Price for preliminaries", a "provisionally estimated Measurement Price" subject to actual quantities and a "provisionally estimated Reimbursable Price" which shall be subject to changes. Attachment 5B gives a breakdown of the Total Provisional Contract Price into LS (Lump Sum), PS (Provisional Sum) and RS (Reimbursable Sum).

538. In my judgment if part of the work in the form of activities included in the preliminaries was not done by Mercon which should have been done then there would be defective performance and Bluewater could abate the Lump Sum Price to reflect that defective performance. That is the basis of abatement set out above and relied on by Mercon. However, as Mercon submits, if Bluewater requested Mercon not to carry out part of the preliminaries but did not give a Clause 14.1 instruction to give rise to a Variation then there would be no right to abate the Lump Sum Price. If Bluewater was entitled to abate the Lump Sum Price then I consider that Clause 17.9 of Section 2 would permit Bluewater to deduct the relevant sum to abate the Lump Sum Price. So far as termination is concerned, having found that Bluewater was properly entitled to terminate the Contract then, as provided by Clause 30.7(b), Clause 17.9 remains in effect and Clause 30.6(b) provides that Mercon shall only be entitled to be paid for the part of the Work completed in accordance with the Contract up to the date of termination. It follows that, contrary to what is pleaded by Mercon, Clause 17.9 survives termination.

539. I now turn to consider the various items.

Failing Issuance of Interface Matrix(ces)

540. Bluewater's claim relates to Mercon's failure between April 2007 and February 2009 to issue the monthly interface matrix.

541. Mercon denies liability for this item and says that it was unable to issue interface matrices because of a failure by Bluewater to "make all required information available" under Clause 5.5 of Section 3 of the Contract. Mercon says that, for example, Bluewater issued the AFC drawings late and on a sporadic basis and radically altered

the design from a 600 to a 800 tonne mooring load case and introduced new work such as machining and inconnel welding of the Yoke Hinge. Mercon says that these changes to the scope of the project made it impossible to issue an interface matrix.

542. Bluewater submits that the absence of an express mechanism does not prevent Bluewater from abating the Contract Price to reflect services not provided nor does the fact the claim was not made pre-termination preclude the claim. It also says that Mercon has not adduced any evidence on its inability to issue interface matrices because of an alleged failure by Bluewater.

543. The obligation to provide the interface matrix and to update it as work progressed is set out in Clause 5.5 of Section 3, management of interfaces. Mercon's obligation was to update the interface matrix as work progressed and issue it to Bluewater on a monthly basis. There is no evidence that Mercon was prevented from doing this by a lack of available information from Bluewater and, in any event, the obligation was to update it based on progress and information provided so that the lack of information would not prevent the update from being produced and issued. As a result I consider that this is a case of defective performance by Mercon and Bluewater is entitled to an abatement.

544. The appropriate value for this particular item is agreed by the QS experts at €1,500.68.

Failing issuance of Risk Register(s)

545. This item is similar to Bluewater's claim in respect of interface matrices but relates to the failure to issue a monthly risk register. Mercon says that it was Bluewater's responsibility to prepare the risk register. It also says that there was no express entitlement to an abatement on this ground and that the claim was not asserted pre-termination.

546. Bluewater relies on the evidence of Mr de Geus and Clause 5.6 of Section 3 of the Contract. It says that it was to issue Mercon with a pro-forma risk register which Mercon then had to update and reissue on a regular basis but failed to do this.

547. Clause 5.6 of Section 3 makes it clear that, as Bluewater submits, Mercon was to take Bluewater's pro-forma and update and issue the risks register on a monthly basis. It failed to do so and I consider that Bluewater is entitled to an abatement for this defective performance.

548. The appropriate value is agreed by the QS experts at €1,500.68.

Failing Subcontracting and Procurement Process

549. Bluewater contends that, in breach of contract, Mercon did not request approval of subcontractors and vendors; it did not allow Bluewater to participate in its procurement and subcontracting processes; it did not ensure that Bluewater's requirements were incorporated into subcontracts and purchase orders and did not procure fixed and firm priced spare parts lists for vendor/supplier recommended spares. Bluewater says that it notified Mercon contemporaneously of these failures. It relies on Clauses 3.7 and 3.9 of Section 3, Clauses 8.2(a) and (c) of Section 2(a), clauses 10.2 and 10.3 of Section 8 and Clause 1 and 2 of section 10 to the Contract, together with the evidence of Mr de Geus.

550. Mercon denies that it was in breach of its obligations and asserts that the claim is not properly particularised. In relation to Ferna (the piping subcontractor) Mercon asserts that it approached Bluewater's preferred sub-contractor (Fabricom) but could not agree the contractually required terms with Fabricom and thus engaged Ferna.

551. The documents relied upon by Bluewater all relate to the subcontract with Ferna and to correspondence exchanged on 17 April 2008. Whilst that correspondence relates to the problems which Mercon says it had with engaging Fabricom and Bluewater's reaction to Mercon engaging Ferna and there is reference to Mercon's lack of a sub-contracting plan, Bluewater has failed to establish the default alleged. In relation to Ferna the matter was dealt with in NCR 043 dated 29 June 2009. Whilst there was a lack of consent to Ferna initially that does not establish Bluewater's claim and therefore the claim for this item, agreed by the QS experts at €750.34, fails.

Failing Document Control

552. Bluewater contends that Mercon failed to comply with document control requirements throughout the execution of the Work and that documents were not issued in the required hard and electronic format, with no document control register being in place. Bluewater relies on Clauses 5.1 and 5.10 of Section 3 of the Contract and the evidence of Mr de Geus.

553. Mercon says that it did maintain documents registers and that it issued documents in the manner specified in the Contract and it refers to the use of its document control register in relation to VO-003. It also says that Clause 5.1 of Section 3 does not relate to this claim.

554. It is evident that the only relevant provision is Clause 5.10 of section 3. Mr de Geus makes no reference to particular documents or to any correspondence concerning the alleged failure. There is evidence of some document control having been carried out by Mercon and I am not persuaded that Bluewater has established this claim, which the QS experts valued at €1,500.68.

Failing HSE Management

555. Bluewater claims that Mercon failed to provide any, or any adequate, health and safety throughout the contract period. Bluewater relies on Mercon's contractual obligations in respect of HSE management set out at Clauses 7.2 and 9.2 of section 2(a), Clauses 2.1, 3.1, 3.2 and 5.7 of section 3, Item 1.3 of Attachment 5B and Section 11 of the Contract and the evidence of Mr de Geus. It also refers to a letter of 27 August 2008 enclosing a site visit report during the lifting of the Central Column when breaches of HSE requirements were noted and instructed to be remedied.

556. Bluewater also refers to the documents in Bundle K18 which it says show the poor state of health and safety at ASPO and indicate Mercon's failure to provide HSE management. It also relies on a document of 14 July 2008 at ASPO which records insufficient quality control and HSE concerns and a document of 19 August 2008 which reports further issues. Bluewater says that Mercon was neglecting its HSE obligations, in particular in relation to ASPO. Bluewater also raises particular concern at serious HSE failings recorded in ASPO's accident book including a crane crash which occurred on the SYMS project when an overloaded crane with an excessive boom crashed to the ground in high winds.

557. Bluewater refers to the lump sum of €20,000 allocated to this item in the detailed price breakdown in Attachment 5B of the Contract and says that, as the work was not performed at all, it is entitled to a credit of this full amount.

558. Mercon denies this claim and says that a claim for the full amount of HSE management is exaggerated. It says that, as stated in the Contract, Mercon provided HSE management both in Gorinchem and at ASPO. It says that any failures in HSE reported by Bluewater in the documents were remedied as can be seen from a lack of later complaints.

559. At times there were evidently breaches of HSE requirements during the work at ASPO and this reflected poor HSE management but those breaches and poor management do not establish the claim. The fact that there were breaches does not mean that Mercon cannot recover for the preliminary item for this activity. As the QS experts note, for the claim to succeed in the amount of €20,000, there would have to have been a complete non-provision of the service or facility priced by Mercon. That is not the case. Whilst there are some breaches of HSE, I do not consider that this is a case where those breaches establish the claim or, in any event, that it is possible to assess any deduction or make a proportional allowance for this item. The claim therefore fails.

Failing QA/QC Management

560. Bluewater contends that Mercon failed to provide any, or any adequate QA/QC management throughout the contract period and it provides examples of this in Schedule 1a to the Re-Amended Particulars of Claim.

561. Bluewater says that Mercon was in breach of Clause 23 of Section 2(a), Clause 8.7 of Section 2(b), Clauses 2.1, 3.1, 3.3, 3.4, 3.5, 3.8, 5.5, 5.11, 6 and 8 of Section 3 and Clause 11 of Section 8 of the Contract. In particular, it says that Mercon failed to comply with these requirements in relation to Corrective Actions; Close Out of Non-Conformances; Inspection and Test Plans; Dimensional Control; Material Control; Unauthorised Transport of the Central Column from SIF (Roermond) to Mercon; Unauthorised Transport of SPM Piles from Siegen (EEW) to Rostock (EEW); Unauthorised Start of Longitudinal Welding SPM Piles at EEW (Siegen); Unauthorised Start of Circumferential Welding SPM Piles at EEW (Siegen); Unauthorised Removal and Scrapping of Bluewater Project Materials and Unsegregated Storage and Lay Down Areas.

562. Bluewater refers to the lump sum provision in Attachment 5B to the Contract where for "*preliminaries - management facilities [Gorinchem/Astrakhan]*" there is a sum of €97,500. Bluewater says that Mercon failed to perform this work and therefore claims a credit for this entire sum.

563. Mercon denies this allegation and asserts that the claim for the full amount allowed for QA/QC management is exaggerated. It refers to various documents including an NCR issued by it on 8 April 2008 in relation to "*Unauthorised Removal and Scrapping of Bluewater Project Materials*" and says that NCR-033 should never have been issued in relation to the item "*Unsegregated Storage and Lay Down Areas*". It also refers to NCRs 040, 041, 039 and 034 issued by it for unauthorised welding and transport.

564. Whilst there were evidently a number of NCRs issued by Bluewater and Mercon which would be evidence of a failure of QA/QC management and which then had to be dealt with under the contractual NCR provisions, I do not consider that this gives rise to a quantifiable claim for an abatement of the sum paid to Mercon for QA/QC management. As the QS experts note there was a contract allowance for Management QA/QC of €97,500.00 but for the claim to succeed in this amount, there would have to have been a complete non-provision of the service or facility priced by Mercon. That is clearly not the case. Whilst there are some breaches of QA/QC I do not consider that this is a case where those establish the claim made by Bluewater or, in any event, where it is possible to assess any deduction or make a proportional allowance for this item. The claim therefore fails.

Unavailability of Interface Engineer

565. Bluewater claims that Mercon failed to provide a suitably qualified and experienced interface engineer throughout the duration of the project from 1 April 2007 until termination. Bluewater says that it notified Mercon contemporaneously of this failure and relies on Clause 5.5 of Section 3 of the Contract.

566. Mercon denies that it was obliged to provide an interface engineer and says that the relevant work was carried out by the Project Engineer. There was therefore no preliminary item for this.

567. Under the Contract there was no separate requirement for an interface engineer and the only obligation under Clause 5.5 of Section 3 was the updating and issue of updated interface matrices which I have dealt with above. I therefore do not consider that Bluewater has established a claim for this item.

No Handover of Scheduling Control and Reporting Engineer

568. Bluewater contends that there was a failure to carry out a handover when there was a change of the scheduling control planning/reporting engineer from Mr Geijtenbeek to Mr Sansaar.

569. Mercon says that the obligation in Clause 9.3 of Section 2(a) was limited to "Key Personnel" and that Attachment 9B, which identifies those personnel, does not include the role of scheduling control planning/reporting engineer. It also says that Mr Geijtenbeek left at the beginning of the project and there was nothing to hand over.

570. Clause 9.3 of section 2(a) provides, in relation to Key Personnel, that "Any replacement shall work with the person to be replaced for a reasonable handover period." Key Personnel are identified in Attachment 9B but, as Mercon states, neither Mr Geijtenbeek nor the position of scheduling control planning/reporting engineer is included in the list. In any event it is wholly unclear what period, if any, would have been a reasonable handover period in this case. I therefore reject this abatement, agreed by the QS experts at €375.17.

No Handover of Document Controller

571. Bluewater makes a similar claim to that in respect of the scheduling control planning/reporting engineer but in respect of the change in document controller from Mr Visser to Mr Ayoub-Ouai.

572. Mercon says that the document controller was not key personnel and therefore the provisions of Clause 9.3 of Section 2(a) do not apply.

573. Again neither Mr Visser nor the position of document controller is contained in Attachment 9B and I therefore reject this abatement agreed by the QS experts at €375.17.

Unavailability of HSE Inspector / Safety Officer at ASPO

574. Bluewater claims that there was a failure by Mercon to provide a suitably qualified and experienced HSE Inspector/Site Safety Officer at ASPO during the currency of the work. Bluewater refers to Clause 9.2 of Section 2(a) of the Contract which provides that "*All personnel employed on the WORK shall, for the work which they are required to perform, be competent, properly qualified, skilled and experienced in accordance with good industry practice. The CONTRACTOR shall verify all relevant qualifications of such personnel.*"

575. Mercon says that, as recorded in Attachment 2 to the Contract amendment signed in October 2007, Mr Portnov of ASPO provided the HSE function in Astrakhan. It submits that he did provide that function and any recorded breaches of HSE requirements were dealt with.

576. As set out above, in relation to "Failing HSE Management", Bluewater relies on documents in bundle K18 which it says shows a serious position in respect of HSE at ASPO. It refers to Mercon's defence to the LADs personnel claim where Mercon positively asserts that it had no representative other than an ASPO individual responsible for this role. Bluewater says that Mercon was obliged to provide its own personnel to oversee ASPO rather than allow ASPO to oversee themselves.

577. As I have said, at times there were evidently breaches of HSE requirements during the work at ASPO and this reflected poor HSE management but those breaches and poor management do not establish this claim. The fact that there were breaches does not mean that Mercon cannot recover for the preliminary item for the provision of the person providing the HSE function. It is not clear that Mr Portnov was not a suitably qualified and experienced HSE Inspector or that any failure in that respect meant that Mercon "failed to perform HSE Management properly or at all" during the execution of the Work. As a result I do not consider that Bluewater is entitled to an abatement of €28,571.43 which the QS experts agree is the appropriate value for providing this person.

Weighing (1)

578. In relation to this claim, although it denies a breach of contract, Mercon accepts that it did not perform weighing at its fabrication yard at Gorinchem and therefore liability for this item is not disputed. The parties are in agreement that the reduction in the amount claimed is €32,000.00.

Weighing (2)

579. Again the parties are in agreement that a reduction in the amount of €12,000 applies.

Failure to provide translations

580. Bluewater says that Mercon accepts that, allegedly as a result of the termination, it did not carry out the function of translating shop drawings and accordingly liability for this item is not disputed. The parties are in agreement that a reduction of €8,000 applies.

Failure to provide Shop Engineering in relation to Stabbing Points

581. Bluewater claims that the "Pins and Bucket" system did not comply with the specification, evidencing a failure to provide any, or any adequate, shop engineering. Bluewater refers to NCR-008 dated 22 January 2009 and says that the re-work was carried out by ASPO and VO-008 needs to be decreased.

582. Mercon denies this item. It refers to its reply to NCR-008 on 28 January 2009 and says that there was sufficient tolerance between each pin and bucket to accommodate the relatively small departures from specification. Mercon therefore says that Bluewater received the benefit of the fabrication drawings and has been supplied with the pins and buckets.

583. The QS experts note that Bluewater claims abatement for work not done and also claims the cost of correcting the work actually carried out under the NCR claims. They consider that Bluewater is only entitled to claim either abatement or cost of making good, not both. They say that if Mercon failed to perform any of the shop engineering but Bluewater performed the shop engineering and Bluewater is not claiming the shop engineering costs incurred elsewhere it may be open for Bluewater to claim this abatement. The experts agree that Bluewater has correctly identified the allowance in the Contract for this work €4,344.00.

584. Bluewater accepts that these claims are necessarily alternative to the identified NCR-008 and accepts that it would not be able to recover for both claims.

585. On the basis of Mercon's submission it is accepted that there was a departure from the specification. Bluewater had work carried out to correct this default. I consider that if there were errors which were corrected then, as accepted by Bluewater, it cannot claim both for an abatement and the remedial work. This again is a case where I consider that Mercon was entitled to be paid for the preliminaries because it did not fail to carry out any of the shop engineering but carried it out incorrectly. Any claim by Bluewater would therefore be for the costs of the necessary remedial work. The claim for an abatement therefore fails.

Failure to provide Shop Engineering in relation to Walkway Access

586. Bluewater's claim is based on discrepancies in the walkway and access platforms for the Yoke Arm which, it says, evidence a lack of shop engineering. Bluewater says that there were discrepancies in design or fabrication, or a lack of any adequate shop engineering. Bluewater relies on the evidence of Mr de Geus who said that Bluewater decided to take the assembly of the yoke arm out of Mercon's scope of work and had the parts shipped loose from Mercon's yard in Gorinchem to KSM's yard in Baku. He says that it is standard industry practice to supply walkways and platforms "green" with a little bit of leeway and not cut to their exact dimensions or fabricate to size and also to trial fit them before shipment. He says that Mercon did neither and this led to considerable problems assembling the components in Baku. He says that Bluewater incurred extra costs due to the additional work to overcome the problems which

Mercon had created. Bluewater refers to NCRs-011, 012 and 014 dated 25 May, 26 May and 2 June 2009.

587. Mercon denies the claim and says that any problems arose from Bluewater's engineering and design drawings and not from Mercon's production engineering and shop drawings.

588. Mercon refers to the three NCRs and says that in relation to NCR-011 it was not required to supply handrails so that they should loosely fit and a note relied on by Bluewater "Handrail needs remove" was not on the version of the drawing issued to Mercon. In relation to NCR-012 Mercon says that it was not required to fit the relevant part of the grating in Gorinchem as the drawing said that this was to be done after a base plate was welded at Baku. In relation to NCR-014 Mercon says that it complied with the design drawings and notes that the NCR refers to "poor workmanship" rather than any discrepancy from drawings or poor shop engineering.

589. The QS experts point out that Bluewater is claiming an abatement for work not done and also claiming the cost of correcting the work actually carried out under the NCR claims. The experts agree that Bluewater has correctly identified the allowance in the Contract for this work at €3,475.20.

590. Bluewater has not replied to the points raised by Mercon and, in particular, as to the three NCRs. Bluewater accepts that this claim is an alternative to those NCRs and that it would not be able to recover under both the NCRs and under this heading.

591. I do not consider that Bluewater has established that there was a failure by Mercon in relation to shop engineering or shop drawings. In any event, I consider that if there were errors which were corrected then, as accepted by Bluewater, it cannot claim both for an abatement and the remedial work. This again is a case where I consider that Mercon was entitled to be paid for the preliminaries because it did not fail to carry out any of the shop engineering but carried it out incorrectly. Any claim by Bluewater would therefore be for the costs of the necessary remedial work. The claim for an abatement therefore fails.

Interception Yoke Arm

592. Bluewater's claim is based on Mercon's refusal to carry out the relevant Yoke Arm Installation at ASPO. This arose because of Mercon's refusal to accept care and custody of the Yoke Hinge Casting at ASPO, as dealt with above in relation to termination. Again Bluewater refers to NCRs-011, 012 and 014. It also refers to VO-264 and ASPO's invoices in relation to Work Pack No.01.

593. Mercon says that under the original scope Mercon was not obliged to carry out the permanent fitting of the Yoke Hinge but that it carried out the required trial fit at Gorinchem in September 2008. It says that if the Contract had not been terminated Mercon could have charged for this work on a reimbursable basis.

594. The QS experts say that Bluewater is claiming an abatement for work not done and also the cost of correcting the work actually carried out under the NCR claims. They agree that Bluewater has correctly identified the allowance in the Contract for this work at €3,475.20.

595. Bluewater accepts that this claim is an alternative to NCRs-011, 012 and 014 and that it would not be able to recover under both the NCRs and under this claim.

596. As stated above I consider that there was no clear instruction by Bluewater to Mercon to install the Yoke Hinge prior to Bluewater's letter of 6 January 2009 by which they made it clear to Mercon that it should complete the work, including "install yoke hinge". The allowance in the contract covered fabrication and shop engineering which is not the work which is claimed here which is an alleged failure to carry out the installation of the Yoke Hinge. I consider that, as the instruction was given on 6 January 2009, Mercon is correct in saying that the work would have formed part of the reimbursable work which it could have recovered. I do not consider that this is a matter which gives rise to an abatement of the relevant preliminary item.

Transition rotation restraint

597. The parties are in agreement that a reduction in the amount of €16,580.00 applies.

Failure to deliver by mid-October 2008

598. In the detailed price breakdown in Attachment 5B to the Contract there is an item in section 5 "*Supply/Fabrication/Erection SYMS Substructure – Astrakhan*" which states "delivery mid October 2008" with a lump sum of €475,000 against it. The parties agree that this item is related to the item 'Adjustment to Delivery date (discount)' below.

599. Bluewater seeks a deduction in this amount because the load out was not achieved by mid-October 2008. It says that the money was only due if delivery was achieved by mid-October 2008 and that payment of this sum is related to the delivery of Milestone C3, the construction of the sub-structure at ASPO and that the payment was to ensure that works to Milestone C3 commenced and were completed in time to achieve overall delivery for load out by mid-October 2008. Bluewater says that payment for this item was contingent on delivery and load out being achieved by mid-October 2008, which it was not.

600. Bluewater says that Milestone C3 was not completed in time to ensure delivery by mid-October and delivery was not achieved by mid-October and the completion date for Milestone C3 was 1 June 2008 amended to 15 July 2008.

601. Mercon submits that the provision is ambiguous and that extraneous evidence needs to be admitted to properly construe this provision. It relies on its letter of 3 October 2006 and avers that the sum is a booking fee for ASPO's services from June to October 2008.

602. Bluewater says that this evidence is inadmissible unless the clause is ambiguous which Bluewater contends it is not. In addition it says that Mercon's letter merely states "option 1: extra costs for start assembly during early June 2008 and Load-out mid October 2008" which does not provide elucidation in relation to this item and does not demonstrate that the fee was a booking fee. Rather it says that on the face of this letter the payment was for load-out in mid-October 2008 and, even if the sum is a booking fee, it was clearly linked to delivery by mid-October 2008.

603. Mercon contends that if Bluewater is correct then the reason that loadout was not achieved in mid-October 2008 was because of acts of prevention by Bluewater. It

therefore contends that, if the sum is deductible because of a failure to achieve load out by mid-October 2008, the reduction should not apply because of that prevention. Bluewater denies that Mercon was prevented from achieving load out by Bluewater's acts.

604. The provision in Attachment 5B to the Contract is ambiguous on its face. It is a lump sum for "*delivery mid-October 2008*". It could be payable if delivery were achieved on that date or if it was achieved on any date, the mid-October date being merely indicative. However it is to be noted that the Milestone C3 date was 1 June 2008, amended to 15 July 2008.

605. The contemporary documents show that this item arose from Mercon's letter of 3 October 2006 and was an extra cost to start assembly in early June 2008 for load-out in mid-October 2008.

606. On 26 January 2007 Bluewater recorded the following in relation to a discount of €300,000:

> "*Extended Delivery Date:*
> *BLUEWATER can accept the proposal by MERCON for a reduction of EUR 300,000.00 (excl. VAT) due to the fact that management by ASTRAKHAN KORABEL will not be required, since MERCON shall manage the Works at ASTRAKHAN KORABEL.*"

607. The item clearly related to a lump sum for an "extended delivery date" which involved starting assembly in early June 2008 for load-out in October 2008. I do not read that provision as being contingent on achieving something by a particular date and do not accept Bluewater's submission that payment was only due if works to Milestone C3 commenced and were completed in time to achieve overall delivery for load out by mid-October 2008. I consider that it related to costs, whether a booking fee or otherwise, for the work at ASPO to be carried out over an extended, longer period. This is consistent with the reduction of €300,000.

608. I do not consider that Bluewater has established any breach by Mercon which would entitle it to an abatement in relation to those costs. It follows that in relation to this item and the item below, 'Adjustment to Delivery date (discount)', I do not consider that Bluewater is entitled to an abatement.

Compensation through remeasure

609. The QS experts agree that a lump sum of €7,100.00 was included in the Contract Price for the pile sleeve guides, but point out that no credit is due to Bluewater because the finally agreed remeasure did not appear to include this work. As a result, Bluewater no longer pursues this claim.

Adjustment delivery date (discount)

610. I have dealt with this under the item "Failure to Deliver by mid-October 2008" above.

Summary

611. In the light of the conclusions set out above I consider that Bluewater is entitled to the sum of €71,581.36 by way of abatement for work not carried out, as follows:

Failing Issuance of Interface Matrix(ces)	€1,500.68
Failing issuance of Risk Register(s)	€1,500.68
Failing Subcontracting and Procurement Process	Nil
Failing Document Control	Nil
Failing HSE Management	Nil
Failing QA/QC Management	Nil
Unavailability of Interface Engineer	Nil
No Handover of Scheduling Control and Reporting Engineer	Nil
No Handover of Document Controller	Nil
Unavailability of HSE Inspector / Safety Officer at ASPO	Nil
Weighing (1)	€32,000.00
Weighing (2)	€12,000.00
Failure to provide translations	€8,000.00
Failure to provide Shop Engineering in relation to Stabbing Points	Nil
Failure to provide Shop Engineering in relation to Walkway Access	Nil
Interception Yoke Arm	Nil
Transition rotation restraint	€16,580.00
Failure to Deliver by mid-October 2008	Nil
Compensation through remeasure instead	Nil
Adjustment delivery date (discount)	Nil
Total:	€71,581.36

Issue 1(b): What abatement is due, if any, for the Lump Sum works partly not done?

No full time availability of Project Manager

612. Bluewater's claim relates to the lack of full time availability of Mr de Jong as project manager from 1 April 2008 through to termination. Bluewater relies on Clause 3 of Section 9 of the Contract, which provides that "*KEY PERSONNEL shall be engaged in the WORK on a full-time basis, unless otherwise agreed with BLUEWATER*" and refers to the project manager being Key Personnel as identified in Attachment 9B.

613. Mercon denies that it was under an obligation to provide a full time project manager and asserts that it was only obliged to provide "*sufficient personnel at all times to ensure performance and completion of the WORK in accordance with the provisions of the Contract*" as provided in Clause 9.1 of Section 2(a) of the Contract.

614. Mercon further disputes that it did not provide the project manager on a full time basis as a matter of fact.

615. In relation to the extent to which a project manager needed to be on site to properly perform his duties, Bluewater notes that Section 1 Form of Agreement of the Contract provides at Clause 7 that the Contractor's Representative is the project manager and Clause 3.1 of Section 2(a) requires the representatives to be accessible at all times and Clause 2.2 of Section 8 expressly requires the Contractor's representative to be assigned full time to the project "and based at the WORKSITEs for the duration of the Work" to be available full time. Bluewater contends there were periods of many months when Mr R de Jong was not onsite at all, which was unacceptable.

616. Mr de Jong was not based at the Worksite and, as he said in his evidence, he was working on other projects. However from the letters and other activities which he carried out offsite he clearly spent significant time working on this project. If he was not on the worksite but was working on the project then that breach would not sensibly lead to an abatement. Equally, it is not clear to what extent he was not available. I am not persuaded that there should be any reduction.

Unavailability of Transport Manager

617. Bluewater's claim relates to the lack of full time availability of the Transport Manager (Mr J Marijnissen) after 1 April 2008 and Mercon's failure to provide a suitably experienced replacement. Bluewater says that the replacement for Mr Marijnissen, Mr Hoep, was not a suitably experienced transport manager and it rejected the purported appointment of Mr Hoep.

618. Mercon pleads that Mr Hoep replaced Mr Marijnissen but in his second witness statement Mr de Jong says that Mr Hoep did not replace Mr Marijnissen who remained responsible but with Mr Hoep supporting him with administrative matters. Mr de Jong maintained this evidence in cross-examination and I have no basis for doubting it to be correct. On this basis, whilst Mr Hoep lacked the necessary knowledge and experience as I have found, there was no lack of availability of a transport manager who was assisted by Mr Hoep. It follows that the claim at the agreed value of €3,751.69 fails.

Failing Weekly and Monthly Progress Reporting

619. Under this head Bluewater claims that Mercon failed to provide proper weekly and monthly progress reporting throughout the project. It relies on the evidence of Mr de Geus who says that Mercon's progress reporting was very poor. He says that Bluewater had informed Mercon of what it expected to see in a progress report in the meeting of 30 March 2007 and it took a while before Mercon issued the first progress report and after that the reports appeared to be issued at random and did not meet the agreed submission date. He says that the reports missed large amounts of information which were specifically required in the Contract and they also contained errors. He refers to correspondence containing complaints, mainly between July and December 2007.

620. Mercon denies this allegation and contends that the claim is inadequately particularised.

621. There were evidently occasions when the reports produced by Mercon were inadequate or late but this is not a case where there were, as Bluewater contends, no proper reports. In those circumstances I do not consider that Bluewater has established an entitlement to an abatement in the agreed value of €2,626.18.

Unavailability of Russian Representative

622. Bluewater's claim relates to the lack of full time availability of the Russian Representative from 1 April 2007 to 15 September 2007. It refers to certain provisions in the Contract and to correspondence in September 2008.

623. Mercon denies liability for this item and says that the Contract contained a lump sum for the Russian Representative who did not need to be full time. Mercon says that Mr Umerov was the representative and was not required whilst the structure was being redesigned in 2007.

624. I do not consider that there was an obligation for a full time Russian Representative and therefore Bluewater are not entitled to an abatement for a period when one was not provided because, on the evidence of what activities were being carried out in Russia, one did not need to be provided. Accordingly the claim fails.

Unavailability of Offices

625. Bluewater claims that an inadequate number and insufficiently outfitted office facilities were provided for 4 months from April to July 2007. It says that Mercon was obliged to provide those offices under Clauses 6.3 and 12 of Section 3 of the Contract. It relies on Mr de Geus' evidence in which he refers to the Minutes of the Kick Off Meeting held on 30 March 2007 and Bluewater's letter to Mercon dated 22 June 2007. Bluewater says that office facilities were not made available by Mercon until July 2007. It says that what Mercon proposed was only temporary work places limited to 2 people when its obligation was to provide Office and IT facilities for up to 6 Bluewater and 3 client representatives.

626. Mercon denies that it was obliged to provide office facilities during the period in question and relies on Clause 6.3 of Section 3 of the Contract. It says that fabrication had not commenced until 1 July 2007 and that, as a result, Bluewater did not require office facilities. Mercon says that it offered accommodation at its own offices whilst the facilities were prepared for Bluewater on site.

627. Clause 6.3 of section 3 states that "*Personnel of BLUEWATER…shall be afforded reasonable use of the site facilities as required*" and Clause 12 provides the detail of the Site Offices and Facilities that Mercon had to provide in the Netherlands and in the Russian Federation. It is evident that Mercon did not provide those facilities which I am satisfied Bluewater reasonably required from commencement and I consider that Bluewater is entitled to an abatement in the sum agreed by the QS experts at €15,385.00.

Unavailability of Scheduling Control and Reporting Engineer

628. Bluewater claims an abatement for the lack of a Scheduling Control/Reporting Engineer from 20 December 2006 until 1 September 2007 following the resignation of Mr Geijtenbeek at the beginning of the project. Bluewater relies on Clause 2.2 of Section 8 and Clause 3 of section 9.

629. Mercon denies this claim on the basis that the Scheduling Control and Reporting Engineer was not one of the 'Key Personnel' and it was not obliged to provide such an engineer on a full time basis.

630. Whilst Mercon had to carry out planning and reporting, the Scheduling Control/Reporting Engineer was not listed on Attachment 9B. Mr Geijtenbeek was identified on the Organisation Chart but that did not make him one of the Key Personnel. I do not therefore consider that it was a breach by Mercon in not providing a specific Scheduling Control/Reporting Engineer for a period of some 8 months. Bluewater's claim for an abatement therefore fails.

Assembly Engineering

631. Bluewater claims that Mercon was required to provide installation engineering in terms of preparing a Yoke Hinge Assembly Procedure and failed to do so. Bluewater relies on Clause 3.10 of Section 3 of the Contract which obliged Mercon to provide method

statements and procedures and says that it failed to do so. Bluewater says it spent time and effort, calculated at approximately 20 hours in total, providing the procedure.

632. Mercon denies that it was obliged to provide the procedure and says that Bluewater produced the assembly details as part of Bluewater's design obligation. Mercon says that Bluewater provided the relevant assembly procedure on 31 March 2008 and Mercon then produced all necessary shop drawings.

633. I do not consider that Bluewater have established that Mercon was obliged to provide this assembly procedure for the Yoke Hinge or that the drawing which Bluewater produced in March 2008 was something which Mercon should have produced. There is a dividing line between design which was to be carried out by Bluewater and shop drawings and engineering which were to be carried out by Mercon and Bluewater has not established that the drawing fell on Mercon's side of that line. The claim for an abatement therefore fails.

Pile Guides (in sleeves)

634. Bluewater claims that 8 of the pile guides were not fabricated in accordance with the Contract. It seeks an abatement for this work which was raised as NCR-010. Bluewater accepts that there is duplication as it seeks to abate the full amount of the guides elsewhere in its claims and only pursues this claim in the alternative to the claim for the full costs of the guides which is its primary case.

635. Mercon says that in response to NCR-010 dated 23 January 2009 and as acknowledged by Bluewater's representative, Mr Knibbe, on 28 January 2009, it carried out the required remedial work to the pile guides.

636. I have considered the claim for NCR-010 and rejected it on the basis that there was no remedial work to be done at the date of termination. This claim for an abatement therefore also fails.

Failure to transport piles from Rostock to Astrakhan

637. Bluewater says that the parties agreed under VO-005 that the pre-commissioned SYMS components would be shipped to Astrakhan and this overtook the existing agreement to transport the piles separately which was included in the lump Sum price at Item 8.1 of Attachment 5B to the Contract. Whilst Bluewater accepts that VO-005 covered the costs of transport for the 5 piles it does not accept that it also contained or reflected the omission necessary for that part of the Lump Sum price allowed for in item 8.1 which related to the original transport of the 4 original piles.

638. Bluewater originally claimed €301,462.00 but now pleads that €60,000.00 represented the cost of transportation from Rostock to Gorinchem and €241,462 for transportation from Gorinchem to Astrakhan. It therefore amended its claim for an abatement to €241,462. It also pleads that the allowance in the Lump Sum item 8.1 for transportation amounted to €60,000 and that Mercon is entitled to credit for this sum.

639. Mercon contends that VO-005 was an agreed lump sum adjustment to the Contract Price for shipment and no further discount is due.

640. Mr de Geus refers to the revision of VOR-075 which Mercon issued on 19 February 2008 which had an attached schedule. In that schedule there is a reference to a

quotation from Flinters dated 13 February 2008 for an extra over cost of €60,000.00 for loading 10 piles at Gorinchem. He says he believes that this was the amount of the allowance within the original contract lump sum for transportation of the piles. VO-075 was then included within VO-005 dated 20 June 2008.

641. The central issue is whether or not the agreed adjustment to the Contract Price in VO-005 should be construed as taking into account whatever sum had been included in the Lump Sum price at item 8.1 of Attachment 5B to the Contract. By its terms VO-005 provides that the Lump Sum value of the Variation Order was €1,391,000 and the Cumulative Revised Provisional Total Contract Price was €13,514,303.86. As can be seen from the Attachment to VO-005, that figure was based on the original Total Provisional Contract Price of €10,468,223.37 which included the Lump Sum price in item 8.1 of Attachment 5B to the Contract. In my judgment the Lump Sum Price under VO-005 was intended, on an objective reading of VO-005 and Attachment 5B to the Contract, to be a sum additional to the Lump Sum price in item 8.1 and therefore there is nothing which falls to be deducted from that Lump Sum price for the original allowance to transport 4 piles.

Vessel 3 not calling at IJmuiden

642. Bluewater claims an abatement to the Lump Sum price in VO-005 because Ship 3 did not call at Ijmuiden to collect the pendulums. Bluewater says that it did not call there because Mercon failed to procure Ship 3 on time but submits that, although there is a dispute between the parties about the reason why Vessel 3 did not call at Ijmuiden, because the vessel did not call there it is entitled to an abatement in the Lump Sum price for VO-005 as it did not receive these services and should not pay for them.

643. Mercon says that Bluewater decided not to utilise Ship 3 for reasons unconnected with anything Mercon did and that when the change occurred, it was too late for Mercon to cancel the agreement or renegotiate the price of Vessel 3 because it did not call at Ijmuiden and thus says that there should be no adjustment to VO-005.

644. Bluewater says that it is not credible that removing a port of call would not reduce the shipping price and Mercon has not demonstrated this in evidence. It also says that Mercon had issues with arranging Ship 3 and a ship had not even been nominated when the decision was taken to transport the piles by other means.

645. The experts agree that the credit of €26,000.00 sought by the Claimant is correctly identified from agreed VO-005 but note that the additional costs of transportation by rail have also been claimed in Schedule 8. Bluewater no longer pursues the claims related to the transport of the pendulums in Schedule 8 and no question of overlap now arises.

646. For the reasons set out above I consider that Bluewater is only entitled to have an abatement from the Lump Sum price if it can show that there was defective performance by Mercon. In relation to Ship 3 whilst there was a delay, it was Bluewater's decision for Ship 3 not to call at Ijmuiden and I do not consider that there was defective performance by Mercon which caused that.

Non-provision of Vessel Position Updates

647. Bluewater no longer claims an abatement on the basis that Vessel Position updates were not provided.

Summary

648. As a result I find that Bluewater is entitled to an abatement of €15,385.00 in respect of work partly not done, calculated as follows:

No full time availability of Project Manager	Nil
Unavailability of Transport Manager	Nil
Failing Weekly and Monthly Progress Reporting	Nil
Unavailability of Russian Representative	Nil
Unavailability of Offices	€15,385.00
Unavailability of Scheduling Control and Reporting Engineer	Nil
Assembly Engineering	Nil
Guides (in sleeves)	Nil
Failure to transport Piles from Rostock to Astrakhan	Nil
Vessel 3 not calling at Ijmuiden	Nil
Non-provision of Vessel Position Updates	Nil
Total	€15,385.00

Value of the Re-Measure Works

Issue 2: Was there a binding agreement regarding the signed VO8, and, if so, in what sum and for which items?

649. Variation Order VO-008 went through three revisions and contains re-measured work. Revision 1 was issued on 25 July 2008, Revision 2 on 25 November 2008 and Revision 3 on 3 December 2008. Whilst the Variation Order form was not signed, Revision 3 of VO-008 attached an "Interim Assessment of the Re-measurement, status date 21-NOV-2008" which was signed by the parties with that date. It also stated the "INTERIM Value" of the Variation Order.

650. Bluewater's case is that the vast majority of items in VO-008 were the subject of final agreement and that the agreement was 'provisional' only in the sense that there were some particular items which remained in dispute and other specific items yet to be fully valued. Bluewater says that the only items which were subject to adjustment after the provisional VO-008 (excluding discount) were the E&I Reduction Pending Cable Check, Insulation, Weld Test and PWHT.

651. Bluewater relies on the evidence of Mr de Geus, which it says was not challenged, where he says that VO8 says "interim" on its face as there were some items of work which still had to be agreed in the re-measure but in respect of the other items in VO8, they were agreed, and both Mercon and Bluewater signed off the calculations which are binding.

652. Mercon says that each revision of VO-008 was signed by the parties but also provided that it was an "interim assessment of the re-measurement" because the parties adopted a

system of progressive "rolling" measurement. It says that VO-008 had not been agreed in final form by the date of termination.

653. The parties did not reach a stage where they were prepared to sign off the form of Variation Order so as to finalise VO-008. It is common ground that there was not a final agreement of this Variation Order but Bluewater seeks to say that some matters were agreed as binding whilst other matters were still open. Whilst that may have been a view taken by Mr de Geus, it is difficult to see how it can be derived from the documents. As often happens in cases of re-measurement, there is a rolling re-measurement as the work progresses and this allows for interim payment. However until there is some final agreement it is open for a party to revisit the re-measurement and there is no binding agreement in the interim. The language of the Variation Orders makes it clear that this was the position in this case by the emphasis on the word "interim" in terms of the re-measurement and value. In such circumstances, I do not accept Bluewater's submission that there was a binding agreement as to some but not all of the re-measurement.

654. However the effect of that finding is reduced because in many instances the quantum experts have agreed the figures or rates in the provisional VO-008 and Mercon's claims relate mainly to items or drawings which had not been agreed, even provisionally, at the time of Revision 3 of VO-008. I now turn to consider the various claims.

Issue 3: In light of the answer to issue 2 and/or in any event, what is the recoverable value of the re-measurement portion of the Contract?

655. For convenience I shall consider the various items in the order in which they appear on Appendix A (Revision 3) to the Quantum Experts' Joint Statement and I shall use the item numbers in that appendix.

Item 1: Structural Measure

656. The difference between the parties in relation to the structural steel work is €919,878.92. There are a number of components, which are each addressed below using the Item references in Appendix A Revision 3 as corrected.

Item 1a: Undisputed Structural Measure

657. There is an undisputed structural measure of €5,012,051.99 which is agreed between the parties.

Item 1b: Miscellaneous quantities and rates

658. Mercon claimed €298,152.88 under this item but no longer pursues this claim.

Item 1c: Error in turntable item

659. The quantum experts have identified an arithmetical error of €60,448.21 in Bluewater's favour in the value of the turntable in the provisional VO-008. Bluewater says that this discrepancy does not form part of any parties' pleaded case and accordingly should be ignored. The matter has been fully dealt with at the hearing and I consider that Mercon is entitled to claim €60,448.21 to correct that error.

Item 1d: Incorrect rate in yoke section

660. The quantum experts agree that the back-up calculations for the provisional VO-008 erroneously credit Bluewater twice for supplied steel, once in the star rate and once at the end of the measure so that Bluewater has been given a credit of €17,111.23 in error. Bluewater says that this discrepancy also does not form part of any parties' pleaded case and accordingly should be ignored. The matter has been fully dealt with at the hearing and I consider that Mercon is entitled to claim €17,111.23 to correct that error.

Item 1e: Drilling and bolting

661. Mercon originally claimed €86,168.57 for this item and then in its Opening Submissions reduced the claim to £8,427.29. In its Closing Submissions it states that it does not pursue this item.

Item 1f: Grillage and Seafastening

662. The difference between the parties in relation to this item is €457,930.20. Mercon claims that sum for sea-fastening and grillage in connection with the load-out of the SYMS components at Gorinchem, predominantly for the Topsides and the Central Column. The quantum experts are agreed that 79.919 Mton of steel was supplied and used by Mercon to fabricate the sea-fastening and grillage, including the transverse H beams and saddles to the Central Column. I shall deal with this claim by considering a number of issues.

What was an allowance for seafastening in the original Contract Price?

663. Mercon says that sea-fastening and grillage formed part of the "supply/fabrication/erection" work at Gorinchem and accordingly was chargeable on a re-measurable basis under item 4 of Attachment 5B of the Contract and the appropriate rates were those provided in Attachment 5G.

664. Bluewater refers to Attachment 4A of the Contract, Schedule of Key Dates, where Milestone B4 is "*Load out of (pre-)assembled Units and Ship Loose Items, including seafastening and Warranty Survey, alongside CONTRACTOR's Yard in Gorinchem*". Bluewater also refers to the Detailed Contract Price Breakdown in Attachment 5B which contains a lump sum under "*Preliminaries – Yard (Gorinchem)*" at item 2 for "*Load-out*" in the sum of €86,790.00. Bluewater submits that the reference to "Load-out" must include the load out scope referred to in Milestone B4 at Attachment 4A, otherwise there is no identified way of compensating Mercon for the seafastening and warranty survey which form part of its work scope. As part of that submission Bluewater refer to evidence of a discussion between Mr de Geus and Mr van Den Brule in September and November 2006 when Mr van Den Brule identified 8Mt of steelwork as being his estimate and Bluewater says that this was included in the Lump Sum price for load-out.

665. I do not consider that the discussion between Mr de Geus and Mr van Den Brule in 2006 is admissible evidence of the way in which the work involved in sea-fastening is dealt with in the pricing arrangements under the Contract. Mr van Den Brule's evidence was that, as a ball park estimate, 10% of the total weight of the steelwork structure would be expected to be the weight of the sea-fastening steelwork. That I do not consider assists, in any event, in saying whether it is included in the preliminaries item or was part of the re-measurable work.

666. The pricing basis under the Contract in Attachment 5B identifies item 2 as "*Preliminaries – Yard Facilities (Gorinchem)*", item 4 as "*Supply/Fabrication/Erection – Gorinchem*" and item 7 as "*Supply/Fabrication/Erection – Grillage/Seafastening – Astrakhan*". One of the items under Preliminaries is "Load-out" and, as Bluewater submits, Milestone B4 defined load-out as including, amongst other things, sea-fastening. I consider that in the context of load-out being a single operation which included sea-fastening then a Lump Sum for load-out should be interpreted as including the necessary grillage and sea-fastening work which would form part of the load-out operation, as demonstrated by the Milestone definition.

667. I consider that the comparison between items 4 and 7 in Attachment 5B also assists in coming to this conclusion. The wording of item 4 does not mention sea-fastening whilst Item 7 which is only grillage and sea-fastening mentions Supply/Fabrication/Erection - Grillage/Seafastening. Whilst this might be argued to indicate that Supply/Fabricate/Erection in item 4 could include grillage and sea-fastening, I consider that the limitation in item 7 of "maximum of 10% of 651Mton, being 65.1Mton" indicates that the parties intended to limit the amount of steelwork used for sea-fastening and yet they provided for no such limit in item 4. Equally it was made clear that item 7 related to grillage and sea-fastening whilst that was not included in item 4.

668. I have therefore come to the conclusion that Bluewater is correct and that Mercon were re-imbursed for sea-fastening within the Preliminaries for load-out in item 2. That, of course, was related to the original design of the SYMS. Whilst the evidence of Mr van Den Brule does not assist in the issue of where an allowance was made within the Contract Price, on the basis of my finding that the Lump Sum preliminaries item did include an allowance for the costs of sea-fastening then a 10% allowance of the weight of 80Mton or 8Mton represents, in my judgment, the best available evidence of a fair assessment of the allowance within that Lump Sum. I accept that, as set out in Bluewater's letter of 12 June 2008, the additional sea-fastening costs were agreed to be on the basis of re-measurement.

Is Mercon entitled to recover for sea-fastening which formed temporary works which Mercon used as part of the construction of the Central Column?

669. Bluewater says that of the 39.919Mton of the steel used to sea-fasten the Central Column, Topsides and ballast tank, 30.357Mton was used for H beams and saddles, which were "temporary supports" or "temporary work" and was therefore included in the measured work unit rates under "temporary works" under Clause 3.3.1(h) of Section 5 of the Contract.

670. Bluewater says that the steelwork used for H beams and saddles was available for Mercon to use as scrap after use and was not materially altered by the use of the same material for sea-fastening because they were returned to Mercon's possession in ASPO's yard in Astrakhan.

671. Mercon accepts that the H beams and saddles were also used as temporary supports prior to load out. It says that they were nevertheless an integral part of the sea-fastening/grillage and Mercon was entitled to be paid for the use of that steelwork as sea-fastening/grillage.

672. From the evidence, in particular the photographs of the Central Column, it is apparent that the materials making up the sea-fastening were essentially the same as those used for the temporary works to hold the Central Column during the temporary works and transport around the site. Section 5 of the Contract at Clause 3.3.1 (h) provides that "*the rates (in the remeasure) shall include for provision of temporary works, fabrication aids and fabricating and erecting temporary supports, adaptations as necessary, and dismantling and clearing away on completion*".

673. However, I do not consider that the fact that steelwork for use as temporary works or temporary support has been paid for by being included in the rates means that, when that steelwork is later used by Mercon for another purpose, it cannot be paid for as part of that work. Whilst Mercon re-used the existing steelwork, it could have used other steelwork and in doing so it could not be argued that it was entitled to be paid nothing for that steelwork. A contractor is paid for the use of materials for temporary purposes but that does not preclude the contractor from being paid for that steel again when it is used for another purpose.

674. It follows that the mere fact that H beams and saddles had been used as temporary works or temporary supports would not prevent Mercon being paid for the use of that steelwork on a re-measurement basis as sea-fastening and grillage steelwork.

What is the appropriate rate for seafastening?

675. Mercon relies on the evidence of Mr Simon that a rate of €5,729.90 per Mton should be used to value the sea-fastening steelwork. That is based on the rates for steelwork in attachment 5G. Bluewater relies on the evidence of Mr Dixon that a rate of €3,803.28 per Mton should be used. This is based on the rates charged by ASPO to Bluewater.

676. Mercon says that the tables in attachment 5G apply to a range of steel grades and that the rate used by Mr Simon was based on Mercon using the same grade of steel for sea-fastening at Gorinchem as it did for the other fabricated elements. Mercon relies on the evidence of Mr Wickerhoff that it was reasonable to do so because steel with a high tensile strength was needed in order to ensure the stability of the cargo. Mercon also points out that those rates were clearly intended to apply to sea-fastening at Astrakhan because item 7 of Attachment 5B expressly provides for sea-fastening to be calculated "*as per Re-Measurement Tables of 5G*". Mercon submits that there is no reason, as Bluewater submits, to use a different rate taken from a different contract with ASPO for sea-fastening at Gorinchem.

677. Bluewater submits that Mr Simon's rates for fabrication grade steel are too high for sea-fastening steelwork, which should be made from lower grade steel. It relies on the rate which Mr Dixon derived by reference to actual cost of the sea-fastening used by ASPO with an appropriate uplift. If Mr Simon is wrong about the application of the Attachment 5G rates then he agrees in principle with the approach of Mr Dixon, subject to questions about the appropriate grade of steel and the necessary rate adjustments to take into account differences between Gorinchem and Astrakhan.

678. Under the Contract it is evident that the parties applied the rates in the tables at Attachment 5G to the sea-fastening and grillage steelwork at Astrakhan, as expressly stated in item 7 of Attachment 5B. Whilst Clause 3.3.1(x) of Section 5 of the Contract provides for new rates to be calculated where there is no applicable rate, in my

judgment, this is a case where there is an applicable rate for sea-fastening and grillage steelwork and, as Bluewater itself submits, there is no difference in principle between the rates in Gorinchem and Astrakhan.

Conclusion

679. On that basis, I can derive the appropriate calculation from Appendix 1.1 (Revision 1) to the Experts' Third Joint Statement. Using Mr Simon's rate for Central Column, Topsides and Ballast Tank but allowing for 8Mtons already being included I allow a sum of €412,091.00

Item 2: [Bluewater] Materials

680. The parties agree the value of this credit to Bluewater at €558,600.04

Item 3: Painting

681. Given that I have found that the provisional Variation Order VO-008, was not binding on the parties, Bluewater allows an additional €46,779.26 in relation to painting which is agreed by the quantum experts to be the appropriate valuation. The overall value of this item therefore becomes €322,394.77.

Item 4: Pipe Supports

682. On the basis that I have found that the provisional Variation Order VO-008 was not binding on the parties, Bluewater contends that the allowance should be €86,515.69. Mercon claims €132,008.85.

683. The difference between the parties depends on whether Mr de Geus is correct in saying that the FSO Mooring Structure (FMS) and Hose Connection Tower (HCT) costs were included in VO-001, in which case the value would be €86,516.43.

684. VO-001 states that the Variation Order "*is the full and final settlement of the WORK related to the FMS and HCT, including full and final settlement of Punch List and Action List Items.*" Whilst, as Mercon states, the quantum experts have been unable to find any quantities within VO-001 for this item, the effect of VO-001 was to act as a full and final settlement of work related to the FMS and HCT and it is does not matter whether or not, in fact, there is in fact any allowance within VO-001 for that item. I conclude that the pipe supports for the FMS and HCT were settled within VO-001 and no further claim can be made for them. I note that Mr Wickerhoff accepted that this was the position in his evidence.

685. The proper value for pipe supports is therefore, I find, €86,515.69.

Item 5: Pipework & Testing

686. This is agreed at €792,185.70.

Item 6: Equipment E&I

687. This is agreed at €532,399.78.

Item 7: E&I Reduction Pending Cable Check

688. A deduction of €106,479.96 was included in VO-008 'pending cable check' because Bluewater was unable to reconcile the claimed quantities of cable to the cable pulling cards.

689. Bluewater accepts that, taking "a pragmatic and fair approach" the deduction should be reduced by €81,479.96 to €25,000. It refers to Mr Wickerhoff's evidence where he said that he did not check the measure and that the cable pulling records were not provided to Bluewater. Bluewater also refers to Mr Osmond's evidence that the person from Mercon's subcontractor who put together the figures was ill at the time so that final figures could not be dealt with. Bluewater says that, in the absence of any evidence as to how the original amount was assessed and in light of both parties accepting that a further assessment was necessary to justify the full charge, Mercon has failed to prove its case and Bluewater's reduced deduction should apply.

690. Mercon claims that the deduction should be removed in its entirety as there was no requirement to check the quantities, which were derived, as the Contract provides, from the drawings. Mercon says that Bluewater has not put forward any evidence as to the basis on which €25,000, or any amount, falls to be deducted.

691. The quantum experts are not able to comment on this item. Whilst the deduction was originally made by Bluewater, I accept Mr Osmond's evidence that it was made on the basis that Mercon could not provide final figures so that a check had to be made. Mercon has not sought to prove the figure for this item and in the absence of evidence of what sum should properly be allowed on the basis of a re-measure, I consider that the concession by Bluewater is the appropriate way to proceed.

692. The deduction should therefore be reduced from €106,479.96 to €25,000.00.

Item 8: Insulation

693. Mercon claims €52,767.43 for this item and Bluewater says that it should be valued at €30,000.00.

694. This is a star rate claim. Mercon supplied insulation through its subcontractor, Wiko Isolatietechniek, who set out relevant quantities in an invoice dated 31 July 2008. Bluewater says that, in the absence of any proof of the accuracy of the quantities, the court should adopt Bluewater's figure of €30,000.00.

695. The quantum experts have not seen any documents which would allow them to check the quantities claimed by Mercon but have produced the quantification of €52,767.43 using more appropriate rates but assuming that the quantities are established. If the court is not satisfied with the quantities claimed, then the experts would endorse Bluewater's figure.

696. I have seen the invoice from Wiko and note that it contains a detailed schedule to support the amount claimed and the detailed quantities. I consider that this evidence of the quantities is sufficient to establish the claim and I therefore base the value on the experts' quantification of €52,767.43.

Item 9: Weld Test

697. The single biggest item in dispute within the re-measure relates to Mercon's claim for €2,070,000 for weld procedure documentation and qualification testing. Bluewater accepts a sum of €145,000 for this claim.

698. The Contract contains the following tables of rates within Attachment 5G, Measured Work Unit Rates:

Table 4A - Measured Work Unit Rates – GORINCHEM

Ref.	**Description**				**Unit**	**€**
1						
	WPS				No	7,500
	WPQ				No	15,000
	CTOD				No	20,000

Table 4B - Measured Work Unit Rates (NDT Services) – ASTRKHAN

Ref.	**Description**				**Unit**	**US$**
1	**NDT examination – PIPE WORK and the like**					
	WPQ				No	
	CTOD				No	

699. A weld procedure specification (WPS) is a document defined at Section 6 of the Welding Specification. It gives directions to the welder for making a production weld of a particular type in accordance with the code or standard applicable to the project. A WPS is project-specific because it must meet the requirements of the project welding specification and specified welding code.

700. Each WPS must be "qualified", that is proved to be adequate for its application, based on one or more tests. A weld procedure qualification record (WPQR) is a document defined in Section 7 of the Welding Specification which records a test procedure, variables, and the resulting data produced when the test is carried out and the results of subsequent tests. A single WPS may need multiple weld procedure qualifications (WPQs) to qualify it. Equally, a single WPQ may be used to qualify (or part-qualify) multiple WPSs. A WPQ is not necessarily project-specific. Contractors have a library of existing WPQs and these existing WPQs, if suitable, can be used to qualify WPSs on different projects. If no suitable WPQ exists then a new one must be prepared. This involves the production of a weld of the specific type, conducted under test conditions. It is then subject to non-destructive and destructive testing to demonstrate the quality and properties of the weld. It should be noted that Section 8 of the Welding Specification uses the acronym WPQ for welder performance qualifications but the experts and the parties have used WPQ to refer to weld procedure qualification related to WPQRs.

701. A crack tip opening displacement (CTOD) test is a fracture mechanics test carried out to confirm that the weld will not fail in brittle fracture. It is a sophisticated qualifying test only required for some weld procedures. It is an inherently costly test to perform.

The applicability of Tables 4A and 4B

702. The issue between the parties relates to which WPSs, WPQRs and CTODs are to be paid for at the unit rate in Table 4A. The parties are agreed that there is nothing in the Contract which explains how the rates are to be applied. Mercon claims that, in the absence of any particular description or qualification on the rates, those rates apply to any and every WPS or WPQR used by Mercon in the welding of the structure and it is entitled to payment at the stated rate. Bluewater submits that this was not intended. It relies on the evidence of Mr de Geus and Mr van Den Brule as to what was said about payment for welding procedures at a pre-Contract meeting held in Astrakhan on 13 and 14 September 2006.

703. Mr de Geus says that it was clearly understood at that meeting that Mercon and ASPO had "all the necessary weld procedures needed for completion of the work and that, where possible, Mercon would use its pre-existing welds in relation to any varied work". He says that "we did acknowledge in the meeting that there was a possibility that some new weld procedures might have to be created (if there were variations to the works and Mercon did not have any suitable welds in its existing catalogue)." This he says led to Table 4A. Mr van Den Brule says "I do not agree that the weld rates would only apply to new welding procedures required by variations." So far as the record of that meeting is concerned there is reference in the minutes to ASPO providing hourly rates and total costs for work such as "*cost for qualification of welders and welding procedures*". A whiteboard was also used at the meeting which was photographed and includes the following: "*Welding Procedure Qual[ification]s – based on existing pre-qualified [ASPO] proc[edure]s*".

704. In relation to weld procedure qualification, Mr de Geus deals generally with "weld procedures" rather than "weld procedure qualifications". However he then says that "*In other words it was agreed that the cost of a WPQR would include the cost of a WPS*" and that a "*separate charge would only be claimable from Bluewater if a new WPS was created that did not require new WPQR testing.*" Mr van Den Brule says "*If an existing WPQ can be used then there is no need for additional charges to Bluewater.*" He says that the same principle applied to sub-contractors. "*For example, if the sub-contractor had an existing WPQ that could be used without a charge to Mercon we would not charge again.*"

705. There are a number of problems with this evidence. There is no case based on rectification of the Contract as a result of some pre-existing agreement. These discussions took place before Table 4A or the rates in it were produced. Mr Kees de Grijs of Mercon apparently produced them but he was not at the meeting on 13 to 14 September 2006. The Contract was then only signed incorporating Table 4A in March 2007. It is evident that Mr de Geus and Mr van Den Brule are not agreed as to what was said at the meeting as to the basis of payment for WPSs. In relation to WPQRs Mr van Den Brule suggest that no payment would be made for pre-existing WPQs whilst Mr de Geus's evidence on WPQs deals with the fact that WPQs were only charged where new WPQs were required for new WPSs.

706. This I consider highlights why evidence of pre-contract negotiations is generally inadmissible in construing an agreement. Lord Hoffmann explained the exclusionary rule in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38 at [42] in these terms:

"*The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it.*"

707. At [41] in relation to that rule he said this:

"*The conclusion I would reach is that there is no clearly established case for departing from the exclusionary rule. The rule may well mean, as Lord Nicholls has argued, that parties are sometimes held bound by a contract in terms which, upon a full investigation of the course of negotiations, a reasonable observer would not have taken them to have intended. But a system which sometimes allows this to happen may be justified in the more general interest of economy and predictability in obtaining advice and adjudicating disputes. It is, after all, usually possible to avoid surprises by carefully reading the documents before signing them and there are the safety nets of rectification and estoppel by convention.*"

708. The provisions in Table 4A have to be read in the context that the relevant work is being paid on a re-measurement basis. As Clause 2.1 of Section 5 of the Contract states the "*provisionally estimated Measurement Price … shall be subject to actual quantities on shop drawing level in accordance with the provisions of this Section 5.*" Clause 3.3.2 of Section 5 also provides: "*All unit rates shall apply equally to executing the work in large or small quantities at all elevations in all positions and at all locations…*".

709. These provisions would mean that the rate for WPSs or WPQRs would apply to the actual quantities of WPSs and WPQs however large or small. The Welding Specification describes what Mercon has to provide in terms of WPSs and WPQRs. It is clear that there is no distinction drawn in Section 7 between pre-existing or new WPSs and it is clear that WPSs have to be specific to this project although a contractor will obviously have a library of WPSs from previous contracts on which it can draw to provide the project specific WPSs. Those WPSs then need to be qualified. Again in Section 8 there is no distinction between pre-existing and new WPQs or WPQRs. Nor is there any basis for saying that the price for a WPQR includes a price for a WPS.

710. Those provisions have to be read against relevant background evidence which might be derived from evidence of negotiations. Whilst evidently parties to this type of contract would be aware of WPSs, WPQs and WPQRs and would know, as is apparent from the meeting in September 2006, that contractors would have pre-existing WPSs and WPQRs, that does not assist in construing Table 4A, Section 5 of the Contract and the welding specification which in my view are clear. Nor does it mean that the Court can re-write the Contract so that it is more commercially advantageous to one party by seeking to write in the word "new" rather than "pre-existing" before WPSs and WPQRs or on defining what is meant by those terms when existing WPSs or WPQRs are used with a range of necessary changes to make them specific to this project.

711. Bluewater refers to the agreement by the expert welding engineers that it is industry practice to try to utilize existing previously qualified WPQs wherever technically possible. It also refers to their agreement that the cost would be included within the lump sum or measured rate in the contract price and that it is not industry practice to pay a manufacturer or contractor for the use of existing WPQs. Bluewater also says that the Contract was negotiated against an understanding that existing WPQs would be used if possible, in line with industry standards, but that the need for new WPQs might arise. It also says that the weld procedures form part of the 're-measureable' section of the Contract but there is no inclusion or identification of the number of WPQs included within the base price.

712. Bluewater also submits that a similar submission applies in the case of WPSs. It refers to the agreement between the welding expert engineers that, although WPSs are project specific, where there is an existing appropriate WPS the production of the WPS for production is essentially administrative. The experts agree that it is not generally industry-practice for the project specific WPSs to be reimbursable.

713. On this basis Bluewater submits that if the Contract was intended to operate as Mercon contends, there should have been a base number of WPSs and WPQRs in Table 4A and the actual number would then be re-measured at the end of the works but the absence of a base number is only consistent with an intention that a base number of WPSs and WPQRs would not be re-measured but would be included in the steel rates in line with industry standard.

714. I do not consider that to be a sound argument. If the rates were to include for some but not all WPSs or WPQRs that would have to be a qualification to the rates but that is not to be found in the Contract. Rather, the fact that there are no quantities in Table 4A when the Contract provides that re-measurement should use actual quantities, strongly points to the opposite conclusion that there are no quantities included elsewhere.

715. Whilst both parties have engaged distinguished welding experts, the assistance they can give the court is limited. This is not a case where the meaning of technical terms, such as WPS or WPQ or WPQR needs expert evidence of industry practice or a relevant trade usage or custom has to be applied. Indeed the evidence shows that the particular charging structure under the Contract was not typical for this type of contract where WPSs and WPQs would be included in a lump sum or in the measured rates for the steelwork and would not be charged separately. On that basis to have a table of agreed rates for welding procedures such as that in Table 4A would not be usual. Therefore evidence of industry practice in terms of ways in which other parties agree payment for WPSs or WPQRs is not of assistance for this unusual bespoke provision.

716. It follows that I do not consider that the rates in Table 4A are only to be applied to new, as opposed to pre-existing WPSs or WPQRs, as Bluewater submits.

717. Bluewater raises a number of other points. It notes that Mercon only made its claim for payment under Table 4A in August 2008. Whilst Mercon may have made the claim comparatively late, in the absence of an estoppel or other ground, I do not consider this affects the position.

718. Bluewater also relies on Mr Hoogenboom's email to Mr Van Den Brule in June 2007, which was forwarded to Bluewater. The email is in two parts. The first deals with WPSs and records as follows: "*As per the contract, all welding procedure specifications for the above mentioned project shall be based on Previously Qualified Welding Procedures as be used on the AIOC – Azeri project…*" In relation to WPQs, Mr Hoogenboom informed Mr Van Den Brule of the rates applicable to new weld qualifications required which 'exceeded contract requirements'. Bluewater says that this email is inconsistent with the case advanced now by Mercon. However, this cannot affect the meaning of the Contract. The Contract was entered into in March 2007 with effect from December 2006 and evidence of post-contractual conduct is inadmissible to construe it.

719. Bluewater also seeks to derive assistance from the sums which have been inserted into Table 4A. It refers to evidence, accepted by Mr Hoogenboom, that it would take a welding engineer on average between 2 and 4 hours to review an existing WPS in order to determine its suitability and make any suitable amendments to it so as to obtain client approval. Bluewater also refers to Mr van der Brule's evidence that, in relation to the rates in question, the margin was "approximately 40-50%" so that, Bluewater says, the rate of €7,500 would reflect costs to Mercon of approximately €3,750. From this it says that the rate cannot relate to an activity which would take 2 to 4 hours.

720. All that this indicates is that the parties have agreed a rate which may be advantageous to one rather than the other party. I do not consider that a back calculation of the rate, such as this, can be used to derive any assistance as to the interpretation of the Contract.

721. In relation to claims for WPSs and WPQRs produced by sub-contractors, Bluewater notes that whilst the tables in the Contract do not refer expressly to sub-contractor claims, a distinction is drawn between Table 4A (Gorinchem) and Table 4B (Astrakhan) and Table 4B does not include a line item 'WPS' and includes no rates at all. Bluewater says that the basis of the claim for weld procedures or qualifications undertaken at ASPO is not clear.

722. Mercon says that it is entitled to recover for WPSs generated by its subcontractors, including ASPO on the basis that Mercon subcontracted work with the consent of Bluewater and the welding done by Mercon's subcontractors formed part of the services provided by Mercon to Bluewater under the Contract. Mercon says it is therefore entitled to charge for the WPSs necessary for that work just as if it had generated them itself.

723. The purpose of Table 4B is not clear. It appears to relate to or include NDT testing in Astrakhan and whilst it has rows for WPQs and CTODs in Astrakhan it includes no rates at all. It says nothing about WPSs. The currency is noted to be US$. Whilst it is correct that Table 4A is noted as Gorinchem and Table 4B as Astrakhan, it is not clear that Table 4B which has not been completed was intended to apply no rates to whatever NDT examination was carried out in Astrakhan. It is more likely that by not completing that table, Table 4A was intended to be of general application. I consider that Table 4A was intended to cover work which Mercon carried out and did not depend on that being carried out geographically in Gorinchem. I consider that there is strength in Mercon's submission that whether Mercon carried out the work itself of sub-contracted the work it was entitled to be paid at the same rate. Given that there is not clear explanation for

Table 4B I do not consider that it can be used to justify a different rate for ASPO compared to Mercon.

724. In respect of sub-contractors Bluewater also seeks to rely upon the evidence of Mr van der Brule that "*if the subcontractor had an existing WPQ that could be used without a charge to Mercon we would not charge again*" and to the lack of evidence that Mercon was charged by its subcontractors. For the reasons given above that evidence is not admissible. It would seek to introduce a wholly new provision that the rates only applied insofar as Mercon was "charged" by a sub-contractor for the WPQ. That is not a possible reading of the terms of the Contract.

725. In relation to the rate for WPQR Bluewater refers to the agreement between the expert welding engineers where they agreed: "*that if welding procedures are being carried out in accordance with a schedule or rates then in standard industry practice the rate for a new WPQ would include the cost of the pWPS, and generation of a new WPQ would include the writing of the WPS derived from it for that project.*" On this basis Bluewater submits that, in this case, standard industry practice should be applied so that the rate for a WPQR would be inclusive of the relevant WPS. However, as Mercon points out, Mr Denney says in his report that this would only be applicable where there is a one-to-one relationship between the WPQ and WPS, which is rarely applicable in structural work compared to, for example, pipelines. In structural work, as illustrated by this case, WPSs may be qualified by multiple WPQs and sometimes, as shown here by WPS 2125-17, by a combination of new and pre-existing WPQs. Equally, a single WPQ may qualify more than one WPS.

726. For the reasons given above I do not find standard industry practice assists. It may explain what other parties who have adopted standard industry practice in their contracts might have meant by those contracts. However, in this case the parties have adopted procedures for payment which do not conform to standard practice and so the standard practice cannot be used to interpret the Contract where the charging basis is not typical.

727. In relation to WPQRs, Bluewater also raises a number of detailed points which I must deal with.

728. First, Bluewater refers to the fact that Mercon did not obtain approval from Bluewater before carrying out WPQs in way they did. It says that whilst Mercon relies on all the WPSs being stamped for production, except for one, the WPQRs are generally not stamped as approved by Bluewater and the preliminary WPSs (pWPSs) are also generally not stamped.

729. Bluewater says that it was a requirement of Clause 201 of the DNV welding code used as the Welding Code of Practice in this case (DNV-OS-C401) for Mercon to obtain approval and agreement of a pWPS before carrying out the qualification. That Clause provides: "*201 A pWPS shall be prepared for acceptance by the purchaser prior to starting up the agreed welding procedure qualification test (WPQT)*".

730. Bluewater says that Mercon failed to ask Bluewater for approval of the pWPSs/WPQ prior to qualification testing, as required by the Code and if approval had been sought then Bluewater could have controlled the number of WPQs at the appropriate time.

Bluewater says that unless the WPQ was necessary, in the sense of being required to comply with DNV Code, Mercon is not entitled to payment unless prior approval was obtained.

731. Mercon denies that it was under any obligation to have sought acceptance prior to proceeding to test, rather than approval prior to production. It accepts that it did not seek any acceptance prior to carrying out the weld tests.

732. Whilst it seems that DNV-OS-C401 was the Welding Code of Practice used, the Welding Specification (BWS-P-100-SP-9902) was the specification referred to in Attachment 6B to the Contract. At Section 4.2 of the Welding Specification the relevant design codes are cited and do not include the DNV Code. In addition the Welding Specification contains no requirement for Mercon to seek approval of a pWPS prior to undertaking any WPQ.

733. It is evident from the documents that Bluewater introduced the DNV code and there is reference to welds being qualified under both codes. The most complete picture of how this developed is contained in Mr Denney's report at Section 7. He refers, in particular, to the Specification "*Fabrication of Steel Structures for Arctic Conditions*", LUK-S-A40-SP-4063-001-A which was apparently issued by Mr Spelt on 25 September 2007. This document states that WPSs shall be supported by one or more WPQRs qualified in accordance with DNV-OS-C401 but states that the acceptance of previously qualified procedures to alternative codes AWS D1.1 is at the discretion of Bluewater and DNV. The precise status of that Specification is unclear and whilst DNV-OS-C401 was used it is not clear that Clause 201 was a contractually binding requirement. It follows that I do not consider that it has been established that Mercon was obliged to seek acceptance prior to carrying out the relevant WPQ tests.

734. As a result, whilst Bluewater seeks to distinguish between pre-existing and new WPQs and CTODs and between WPSs based upon pre-existing WPS templates and new WPSs, that distinction is not an appropriate one to make in relation to claims by Mercon for payment at the rates in Table 4A.

WPSs

735. Mercon's original claim was for 87 WPSs at €7,500.00 each, giving a total of €652,500.00. In Appendix 1.4 Revision 1 to the Quantum Expert's Fourth Joint Statement the experts have agreed that on the basis of Mr Denney's evidence there are 84 WPSs at €7,500.00 each, giving a total of €630,000.00. On the basis that I have held that Mercon is entitled to payment for WPSs at the rates in Table 4A, it follows that Mercon is entitled to €630,000.00.

WPQRs

736. Mercon's original claim was for 99 WPQRs at €15,000.00 each, giving a total of €1,485,000.00. In Appendix 1.4 Revision 1 to the Quantum Expert's Fourth Joint Statement the experts have agreed that on the basis of Mr Denney's evidence there are 92 WPQRs at €15,000.00 each, giving a total of €1,380,000.00.

737. There are 11 WPQRs which for a number of reasons are disputed by Bluewater and which I need therefore to consider.

MC682-A

738. Bluewater says that this is a wire verification test, not a qualification and it arose out of Mercon's choice of material for a more economical process. Bluewater says that there is no basis upon which to make any charge under Table 4A.

739. Mercon says that, as Mr Denney explained in his evidence, it was obliged under the AWS D1.1 code, which was part of Bluewater's welding specification, to carry out a consumable verification test on the particular welding wire it had decided to use. This was part of welding procedure qualification under the requirements of Section 4 Qualification, Clause 4.11 Fillet Welds for Tubular and Non-tubular Connections. It says that neither of the experts suggested that there was anything unreasonable in Mercon using that wire.

740. Under the Welding Specification incorporated into the Contract, the relevant code for Welding Procedure Qualification was AWS D1.1 which required a Consumables Verification Test under Clause 4.11.3 to qualify the relevant WPS if the conditions there applied. The choice of consumables was a matter for Mercon but it was necessary to qualify the welding wire and I consider that Mercon was entitled to be paid for this WPQR, MC682-A.

MC698

741. Bluewater says that this WPQR related to "buttering" and was required to remedy a non-conformance by Mercon and therefore is not a WPQR for which Mercon can charge under Table 4A.

742. Mercon accepts that it would not be entitled to payment for additional welding procedures caused by fabrication errors. However, Mercon says that the fact that buttering was required does not mean that there was such an error. It relies on Mr Denney's evidence that "*it is an established thing that you will get situations where you have to do buttering on any offshore platform of this degree of complexity. The tolerances on the members are such that buttering procedures almost inevitably occur*". Mercon therefore says that welding to fill a joint by buttering was not needed to remedy a non-conformance. It also says that buttering was permitted under Clause 5.3.1 of Revision 1 of the welding specification, Fabrication of Steel Structures for Arctic Conditions, which provides: "*If excessive gaps are evident, buttering may be performed following BINT and DNV approval on a case by case basis as per the parameters and limitations of an approved buttering procedure*".

743. The need to butter joints would apply where there were excessive gaps but, as the later specification states, that arises because fabrication gaps may not be within the general tolerances and will need buttering. I do not consider that this amounts to a non-conformity but was rather part of the procedures necessary to fabricate steel structures. It is therefore a procedure which requires qualification and I consider Mercon would be entitled to be paid under the provision of the Contract for that WPQR, MC 698.

Fillet welds: Duplication of Mechanical and Manual WPQRs

744. Bluewater says that where Mercon separately qualified both manual and mechanical/automatic welding processes, this was not necessary under DNV Code. It says that the qualification of four procedures should be reduced to two as MC682-1/MC682-2 and MC682-3/MC682-4 are qualifications for similar welds carried out,

respectively, manually and automatically/mechanically. Bluewater refers to Mr Teale's evidence that, under the DNV Code, Mercon could have qualified the manual process and used that for the automatic process because under that code the process was not an essential variable whereas it is under the European, EN Code.

745. Bluewater also says that whilst general practice would assume separate qualification for manual and mechanical processes, this is because the mechanical process is normally associated with significantly higher heat input ranges but, in this case, the heat input range of the two WPQs undertaken manually and mechanically was materially identical.

746. In addition, Bluewater says that, taken individually, the qualifications were not compliant as only one macroscopic test was provided but, taken in pairs, the qualifications would have been likely to have been acceptable as evidenced by DNV approval as there were then two macroscopic tests. It says that there is no evidence that the qualifications were or would have been acceptable in isolation.

747. Mercon refers to Mr Hoogenboom's evidence that although it was possible to use manual qualification for a mechanical weld, which would not be contrary to the DNV code, the parameters for manual welding differ from the parameters for mechanised welding which have a higher deposition rate and so higher voltage, higher amperage and higher energy. Although Mercon accepts that the difference between manual and automatic welding is not an "essential variable" under the DNV code, Clause C500 of the code envisages separate methods of testing for manual and automatic welds with different test plate lengths. Mercon says that it acted reasonably in carrying out the four WPQRs for WPS 2125-12 and the documents were signed off as approved by both Bluewater and DNV

748. Mercon says that there is some confusion about whether only one macroscopic test had been carried out rather than the two required by the DNV code and it is debatable whether only one test was apparent from the face of the WPQs. In any event Mercon says that the WPQRs were approved.

749. I consider that, as evidenced by what was done by Bluewater and DNV at the time, it was reasonable for Mercon to qualify WPS2125-12 separately for the manual and the automatic processes which involved different parameters and had to be carried out on different test lengths under the DNV code. I do not consider that the issue of whether the different processes amount to "essential variables" is a matter which determines the reasonableness of Mercon's decision to carry out separate qualifications for the manual and automatic processes.

750. So far as whether two macroscopic tests were carried out, it is not clear whether or not two were carried out. However the tests were approved and no concerns were raised at the time by Bluewater or DNV and I consider that this cannot now affect Mercon's right to payment for the approved WPQRs.

751. Accordingly, Mercon is entitled to payment for WPQRs MC682-1, MC682-2, MC682-3 and MC682-4.

Fillet welds: Multi-Pass and Single-Pass WPQRs

752. Bluewater says that in relation to fillet welds there should be a single qualification dealing with a single and multi-pass process. Mr Teale said in his report that MC 684, 685, 686 and 687 should have been combined into a single WPQR and MC 688, 689, 690 and 691 should also have been combined into a single WPQR. In his supplemental report he says that MC 686, 687, 688, 689, 690 and 691 should have been combined into three WPQRs. Bluewater therefore submits that Mercon should recover for three not six WPQRs.

753. Mercon says that to combine the six WPQRs as three would have required combined qualifications for single-pass and multi-pass fillets but that, as with the separation of manual and automatic welding processes, it was a reasonable welding judgment to have separate WPQRs. Mercon also refers to DNV-OS-C401 at Clause C704 which states that "*The following changes shall lead to a new qualification…change from multi-pass welding to one-pass welding*" and says that this justifies separate qualification.

754. Mercon also relies on Mr Denney's analysis of the evidence which he says leads him to conclude that DNV required the qualifications to be split. Bluewater says that this is not borne out by the documents relied on by Mr Denney.

755. Again I consider that based upon the DNV code it cannot be said that it was unreasonable for Mercon to have separately qualified single-pass and multi-pass WPQRs. Indeed the change in Mr Teale's evidence indicates that it is acceptable. I have considered the documents relied upon by Mr Denney to conclude that DNV required the qualifications to be split. I am not convinced that the manuscript note concerning Clause C500 of the DNV Code and MC657 to 660 bears any relevance to the particular issue related to single and multi-pass fillet welds. I therefore do not base any conclusions on that note.

756. As a result for the reasons set out above I consider that Mercon is entitled to be paid for WPQRs MC 686, 687, 688, 689, 690 and 691.

MC692, 699, 700 and 704

757. As set out in Bluewater's Closing Submissions, MC699 and MC704 are no longer disputed. In relation to the two other WPQs, Bluewater says that Mercon should not be paid for MC692 as it relates to the MPU project and Mercon should not be paid for MC700 as it was not stamped by DNV.

758. Mercon says it is clear that MC692 was always part of Mercon's claim and was created for the project. In relation to MC700 it says that this was always part of Mercon's claim.

759. These WPQRs were not provided to Mr Teale and in Bluewater's Further Information on Weld Procedures there was no comment on these WPQRs. I consider that MC692 was likely to have been given the wrong title probably because of the use of the original template. In relation to MC700 it is clear that it formed part of the necessary qualification procedure and whilst the copy in the documents is not signed by DNV there is no evidence to show that DNV disapproved it and it seems likely that it was not signed in error. All of these matters were raised too late by Bluewater for the matter to be properly dealt with.

760. I therefore consider that, in addition to MC699 and MC704 which are now accepted by Bluewater, Mercon is entitled to be paid for WPQRs 692 and 700.

761. On that basis I have found that the 11 WPQRs which are specifically challenged by Bluewater have been correctly claimed by Mercon. It therefore follows that, as stated by Mr Denney, Mercon is entitled to claim for 92 WPQRs at €15,000.00 each, giving a total of €1,380,000.00.

CTODs

762. Mercon claims for three CTODs at €20,000.00 each, giving a total of €60,000.00. Whilst Mr Denney has identified a further fourth CTOD, that does not form part of Mercon's claim.

763. Bluewater accepts that Mercon is entitled to claim two of the three 'new' CTODs but in relation to the third CTOD says that this is attributed to Mercon's sub-contractor, SIF and the CTOD itself was not carried out by SIF, but by Bluewater, as stated by Mr Spelt at paragraph 6 of his third statement. As a result it says that Mercon cannot charge Bluewater for a CTOD carried out by Bluewater.

764. Mercon accepts that one plate was welded by SIF at Bluewater's request and was handed over to Bluewater for testing. In Appendix I to Mr Denney's report, SIF item 15 concludes by saying "*No mechanical or CTOD tests were performed on this test plate by Mercon or SIF*." This confirms Bluewater's position.

765. I consider that Mercon is entitled to claim for two of the CTODs. Two are accepted by Bluewater. I consider that SIF 9433 is not recoverable on the basis that, as is common ground on the evidence, the CTOD was performed by Bluewater.

766. It follows that Mercon is entitled to claim €40,000 for the two CTODs.

Summary

767. On that basis I consider that Mercon is entitled to recover for 84 WPSs at 7,500.00 each (€630,000), 92 WPQRs at €15,000.00 each (€1,380,000) and two CTODs at €20,000 each (€40,000), making a total of €2,050,000.00.

Item 10: Post Weld Heat Treatments

768. The parties agree the value of this item at €60,595.20.

Item 11: Substructure Measure

769. Mercon agrees that the original allowance in VO-008 for this item of €4,063,918.67 is correct and does not pursue any additional amount under this heading.

Item 12: Equipment Installation

770. Mercon claims that as a consequence of the increase in the size of the SYMS components which Mercon had to fabricate and assemble, its installation costs for equipment increased to €139,946.40, as set out at paragraph 2.4.2.10 and in the table attached to the financial claim at Appendix 9 to the Defendant's Response to the Claimant's Part 18 request for Further and Better Information dated 15 June 2010.

771. Bluewater contends that no sum is due on the basis that VO-008 is binding but pleads, on its alternative case that, if VO-008 is not binding, then Mercon is entitled to €31,946.40.

772. The dispute is dealt with in Mr de Geus's first witness statement at paragraphs 47 to 50 where he says that items totalling €108,000 are not payable. These items relate to work on the installation of the Yoke Hinge. He says that item SR1.5 (Installation Roll and Pitch Bearing of Yoke Hinge) was included in the original lump sum price for the yoke arm. However, as I have found and as Mercon submits, the Yoke Hinge was originally to be provided as a completed item for welding to the yoke end and no mechanical installation would have been required. I therefore consider that Mercon is entitled to be paid for this item. Mr de Geus says that the four items in SR1.6 relate to "trial fitting and rotation testing" of the yoke system involving the final installation of Yoke Hinge components and that these come within Clause 7.27 of Section 3 of the Contract. However as the yoke system was no longer going to be assembled in Astrakhan, no trial-fit of the system took place there and so Clause 7.27 became redundant and Bluewater wrote to Mercon on 7 August 2008 asking for a rebate for not having to carry out the trial fit and rotation test of Yoke Arm. This aspect is dealt with under VOR-162 and I do not consider that the installation work came within Clause 7.27 but, rather, that Mercon was entitled to be paid for the installation work.

773. The experts say that they have been unable to value this claim in the absence of information relevant to the question of reasonableness of rates. However, in circumstances where it is evident that Mercon were obliged to carry out this work and where Bluewater does not challenge the rates for the smaller items, I consider that the overall sum of €108,000.00 appears reasonable for the necessary installation work. This work was not however carried out by the date of termination, as I have found elsewhere and therefore this is not a sum due to Mercon. Rather the balance of €31,946.40 is due.

Item 13: RT Waiver

774. Bluewater claims a reduction on the re-measured price of €155,998.00 because Mercon reduced the number of radiographic weld tests it undertook. Radiographic testing was required under Clause 8.44 of Attachment 6B, exhibit C of the Contract for 100% of piping weld joints and butt and eye welds and for 10% of steel structures weld joints. It was also dealt with at Section 3.7 of the Welding Specification BWS-S-100-SP-9902/Rev 1.

775. At an early stage of the project, Mercon submitted Technical Query, Clarification and Deviation Request No 029 (TQR-029) in which it sought Bluewater's permission to replace the radiographic tests on structural steel but not piping welds with ultrasonic testing and magnetic particle inspection. Bluewater approved the change "without comments" on TQR-029.

776. Weld testing (whether radiographic or ultrasonic) is not charged separately but under Clause 3.3.1(a) of Section 5 of the Contract is deemed included in the measured rates for steelwork and piping. No variation of the price was requested by Bluewater or agreed by Mercon in relation to the change in testing.

777. Mercon says that, in those circumstances, there is no basis for any change to the measured rates which might lead to a reduction in the re-measured price and Bluewater

could have insisted on radiographic testing but, if it chose not to, then it is not entitled to any kind of rebate.

778. Bluewater's claimed reduction is based on an estimated reduction of 80% in the number of radiographic tests which would otherwise have been done and on the extra time which would otherwise have been taken to carry out radiographic rather than ultrasonic tests. It is based on "rough man hours" assessed by Mr Spelt as set out in paragraph 19 of his witness statement. He explains that he was asked for ballpark manhours on 19 October 2007 and produced these on 17 February 2009.

779. The quantum experts were unable to comment on the sum claimed but noted that in general ultrasonic tests are cheaper than radiographic tests.

780. Bluewater approved a different regime of testing at Mercon's request and this was evidently approved by DNV. It reduced the amount of radiographic testing and should have been the subject of a change to the steelwork rates to allow for this change in NDT of the steelwork included in the rates. Mr Spelt attempted to put together a figure some 18 months later. However it is unclear where he obtained the information to do so. In addition, the quantum experts have been unable to assist in arriving at a rate and there is no indication of whether the overall sum is reasonable. It is noted that it is only a "ballpark" or "rough figure". In the circumstances I consider that Bluewater is entitled to a reduction but given the uncertainty of the figure, I consider Mr Spelt's calculation should be heavily discounted and I consider that an allowance of €50,000 is appropriate in those circumstances.

Summary

781. As set out above I consider that the value of the re-measure in VO-008 should be €12,860,826.03 as follows:

Item	Description	Sum (€)
1a	Undisputed Structural Measure	5,012,051.99
1b	Miscellaneous quantities and rates	0.00
1c	Turntable items error	60,448.21
1d	Yoke Section error	17,111.23
1e	Drilling and Bolting	0.00
1f	Sea-fastening	412,091.00
2	[Bluewater] Materials	-558,600.04
3	Painting (Structural, Piping and Equipment)	322,394.77
4	Pipe Supports	86,515.69
5	Piping and Piping Testing	792,185.70
6	Equipment E&I	532,399.78
7	E&I Reduction pending cable check	-25,000.00
8	Insulation	52,767.43
9	Weld Test	2,050,000.00
10	Post Weld Heat Treatment	60,595.20
11a	Undisputed sub-structure measure	4,063,918.67
11b	Miscellaneous quantities and rates	0.00
11c	Sub-structure painting	0.00
11d	Mud mats	0.00
11e	Mud mats painting	0.00

12	Equipment installation	31,946.40
13	RT Waiver	-50,000.00
	Total Re-measure:	€12,860,826.03

Item 14: Discount

Issue 4: Is Bluewater entitled to a discount on VOs? In particular, is Bluewater entitled to a discount on VORs 1 and 8? If so, at what rate and on what sums?

782. Under Attachment 5G, Table 10 in Section 5 of the Contract Bluewater is entitled to a discount on the total value of measured work Variation Orders on a sliding scale of rates.

783. Bluewater claims a 5% discount on the total value of VO-008. Mercon contends that the discount applies not the total re-measured price in VO-008 but to the increase in the re-measured price effected by VO-008 over the original provisional sums of €5,373,670 set out in Attachment 5B of the Contract.

784. Mercon submits that the obvious commercial purpose of the discount was to give Bluewater better terms if there was an increase in quantities because more work was ordered than the parties had envisaged and not to give a further discount on a price that had already been provisionally agreed for the original scope. It says that if the discount applied to the total re-measured price, then the parties could have agreed lower rates in the first place.

785. Attachment 5G, Table 10 provides for a gradated discount. It refers to "Measured Work Unit Rates (Discount on total value of Variation Orders). It refers to the Total Value of Variation Orders and shows a discount of 5% where the Total Value of Variation Orders is above €1,000,000.

786. Whilst VO-008 has been produced to show the re-measure, I consider that Mercon is correct and that the discount was intended to apply to the true value of the Variation Order which would be the value over the "provisionally estimated Measurement Price" as identified in Clause 2.5 of Section 5 of the Contract. On that basis, the total included in Sections 4, 5, 7 and 8 for re-measured work is €5,373,670.67 and I consider that the discount should apply to the excess value of VO-008 above that figure. As set out below the remeasurement total is €12,860,826.03. When €5,373,670.67 is deducted this gives the total value of Variation Orders of €7,487,155.36. Applying the discount of 5% to this gives a discount figure of €374,357.77.

787. In relation to VO-001, as set out below, I do not consider that Bluewater is entitled to a discount.

Value of the Reimbursable Costs at Contract Rates

Issue 5: What work is Mercon entitled to claim for on a reimbursable basis, and in what amount?

788. The Contract Price included a reimbursable component to cover work generally described as "Assembly/Integration" at Astrakhan which was intended to be carried out

by local personnel. The Reimbursable Price was provisionally estimated in Attachment 5B of the Contract at €2,137,320 (plus mark-up) with the final price being calculated by reference to Attachment 5C2, which contained a table of labour and equipment time rates.

789. Mercon subcontracted the reimbursable integration work in Astrakhan to ASPO and claims reimbursement (plus a mark-up) based on timesheets submitted under cover of invoices issued by ASPO. There are 33 relevant ASPO invoices based on ASPO's net time rates included in Attachment 5C2.

790. In paragraph 2.5 of the First QS Joint Statement the quantum experts agreed:

> "*As a matter of general principle, we agree that Mercon's entitlement to payment from Bluewater under this claim is limited to (a maximum of) the value of the invoices which it actually paid to ASPO (i.e. before consideration of the merits of the relevant invoices and any further issues (if any) as to what credit Bluewater may be entitled. That is to say, it is not entitled to recover payment for invoices which it did not pay, although the position on mark-up requires separate consideration.*"

791. Mercon originally claimed a total of €1,965,207.74 for Reimbursable Work (€3,363,419.20 less €1,407,211.46) but following the quantum experts' agreement set out above the claim for Reimbursable Work has now been reduced to €1,622,190.76.

792. The amount of the claim depends on a number of issues to which I now turn.

Issue 6: How much credit, if any, is to be given for amount paid by Bluewater to ASPO?

793. After Bluewater terminated the Contract it entered into a direct contract with ASPO dated 10 March 2009 ("the Payment Contract") under which it agreed to pay ASPO directly in respect of all of the ASPO invoices said to be outstanding from Mercon.

794. Mercon accepts that it cannot pursue claims against Bluewater for reimbursement of amounts that it was invoiced by ASPO but has not paid to ASPO, if it will not now be called on to pay them to ASPO. However, Mercon says that it remains entitled to its mark-up on the value of the invoice, so that it is still necessary to decide whether the invoice would have been reimbursable.

795. Mercon says that ASPO appears to have given Bluewater inaccurate information about the outstanding invoices and it contends that, as a result, some of the ASPO invoices have been paid twice, by both Bluewater and Mercon and some have not been paid at all. Mercon says that, to the extent that Bluewater has made double payment, that is a matter for which Bluewater cannot claim a credit from Mercon.

796. Mercon admits a credit of some €1,407,211.42 against the total reimbursable claim of €3,363,419.20. Bluewater claims a higher credit for reasons connected with Mercon's purported re-allocation of invoices.

797. Bluewater says that there is difficulty in determining the amount Mercon paid ASPO and, more specifically, in respect of which ASPO invoices. Bluewater says that this difficulty arises as a result of Mercon's letter of 30 January 2009, sent to ASPO just

before the termination. In that letter Mercon sought to reallocate payments made against specific invoices to different invoices and also made a balancing payment which was not specifically allocated to particular invoices. Bluewater submits that the re-allocation was not permissible and should be ignored.

798. In their Second Joint Statement at paragraphs 2.1 to 2.11, the quantum experts have discussed the implications of this repayment and have considered the position on the alternative assumptions that Mercon was, and was not, entitled to undertake the re-allocation.

799. In their Third Joint Statement the quantum experts have considered the invoices which were not paid by Mercon to determine whether the sums would have been properly reimbursable if paid by Mercon. This assessment is relevant to the Post-Termination Damages claim in which Bluewater claims from Mercon the so-called "ransom payment". This is the payment it made to ASPO after the termination of the Contract which included sums purportedly part of the reimbursable work which were in fact not due for reimbursable work.

Issue 7: Is recovery of reimbursable cost dependant on proof of the costs actually being incurred?

800. On the pleadings there was an issue of the extent to which Mercon could only recover reimbursable costs if it could demonstrate that it had incurred such costs and actually paid them to ASPO. Given the quantum experts' agreement, it is now accepted by Mercon that it can only recover for the value of the invoices which it actually paid to ASPO.

Issue 8: On what basis is the percentage uplift to be calculated and upon which sums?

801. Bluewater submits that the mark-up on reimbursable costs is dealt with under Clause 4 of Section 5 of the Contract and is to be calculated in accordance with Attachment 5E, Mark-up for Reimbursable Costs. It says that, under Clause 4.5, the reimbursable costs are to be invoiced upon completion of related activities and that, as a result the sliding scale mark-up in Attachment 5E applies to related activities. It says that the quantum experts have categorised the invoices into different activities which represent the relevant "related activities" for the purposes of the application of the mark up. It submits that if the mark-up applied to individual invoices then this would permit the invoices to be manipulated so that they fell within a particular band to attract the greatest mark-up and that this cannot have been intended.

802. Mercon submits that in relation to work falling within Clauses 4.1 to 4.3 of Section 5 of the Contract, the mark-up in Attachment 5E applies to the total cost of each invoice and not to the total cost of each related activity. However Mercon submits that those provisions do not apply to the integration works carried out at ASPO because those were subject to the rates in the table at Attachment 5C2 and it was agreed that Mercon would be paid a flat rate mark-up of 8% based on the total value of each of ASPO's invoices rather than on the sliding scale in Attachment 5E.

803. Mercon refers to Attachment 5B, Total Provisional Contract Price Breakdown, where item 6 states that the reimbursable costs excluding mark-up are as per the unit rates in

Attachment 5C2. Mercon says that the original scope of the reimbursable work at Astrakhan was described in more detail within the Contractors Execution Plan in Attachment 9A, where the reimbursable activities were marked "*R*" as "*Reimbursable + 8%*" or "*LP*" as "*Lifting Price/Reimbursable + 8%*". On this basis it says that the clear intention was that an 8% mark-up would be applied to all integration work at Astrakhan, otherwise it is hard to see the purpose of the reference to 8%. Mercon also says that this is clear from its tender dated 3 October 2006 where it stated, "*We propose an 8% uplift on all JSC "Astrakhan Korabel" activities*" and then on 7 December 2006 Mercon confirmed that the rates in Attachment 5C2 were ASPO's net rates excluding 8% Mercon uplift.

804. Mercon says that Clause 4 of Section 5 of the Contract relates to an entirely different kind of reimbursable cost and applies if Mercon is asked by Bluewater to procure materials, equipment or third party services for which there are no unit rates in the contract, such as the Yoke Hinge. It says that the sliding scale in Attachment 5E which applies to that type of work does not apply the integration work in Astrakhan because it would make no sense to have a sliding scale for that work where it was obvious from the outset that the total costs would far exceed €500,000.

805. Bluewater says that Mercon's reliance on"+8%" in Attachment 9A is misplaced and there is no support in the Contract for the distinction which Mercon seeks to draw between the reimbursable integration work and the provisions of Clause 4 of Section 5 of the Contract. In addition as a matter of priority of contractual documents then the provisions of Section 5 override those in Section 9, as stated in the Form of Agreement. Bluewater also says that the distinction between rates in Attachment 5C2 and costs referred to in Clause 4 is artificial as the cost rates which Mercon agreed with ASPO are the same as the rates agreed in Attachment 5C2. Bluewater says that Mercon's submission is also inconsistent with Mercon's own approach to VOR 255 where it applied the sliding scale in Attachment 5E.

806. I consider that the provisions of Clause 4 of Section 5 and Attachment 5E of the Contract apply to the integration work to be carried out by ASPO at Astrakhan which was referred to as a Reimbursable Sum at item 6 of Attachment 5B. The reference to Attachment 5C2 in item 6 of Attachment 5B makes it clear that those unit rates are to be applied. Attachment 5C2 refers to all costs being deemed to be included in the tables in that attachment and refers to "costs" many times on page 3 of 4. In my judgment that attachment contains rates which are intended to reflect costs. They are therefore consistent with the provisions of Clause 4.1 to 4.3 of Section 5 of the Contract which refer to cost and which state that the percentage mark-up is to be in accordance with Attachment 5E.

807. It follows that, in my judgment, the provision in Clause 4.5 of section 5 applies so that the reimbursable costs have to be invoiced upon completion of related activities. This, I consider, means that the invoices have to be prepared on the basis of an invoice on completion of related activities. The mark-up will then relate to the reimbursable costs calculated by applying the rates in Attachment 5C2 and that sum will determine which band within Attachment 5E applies to give the relevant percentage mark-up. Any danger of manipulation is avoided because the invoices have to be prepared on a particular basis. There could be some room for argument as to what was a related activity but, in this case, I agree with the way in which the quantum experts have

categorised the invoices into different activities and I consider that those categories represent "related activities" for the purposes of the application of the mark up.

808. I do not consider that the exchange of correspondence pre-contract referring to 8% is either admissible or would assist in construing the terms of the Contract which includes Clause 4 of Section 5 and Attachment 5E. Whilst Attachment 9A refers to "*Reimbursable + 8%*", that is to identify the fact that items marked "*R*" are reimbursable under the Contract rather than setting up a separate payment regime, outside the contractual provisions as to payment in Section 5 and one where a mark-up of 8% applies. If it were necessary, I consider that Bluewater is correct in pointing out that under Clause 2 of the Form of Agreement Section 5 takes precedence over Section 9.

Issue 9: Is Mercon entitled to be paid for 'yard improvement' /mobilisation /demobilisation?

809. Item 6 of Attachment 5B of the Contract is in the total sum of €2,137,320 but, as appears from the Incentive Scheme, that scheme was only to apply to €1,559,000, a difference of €578,320. It is common ground that Mercon was entitled to be paid for the upgrade works carried out at ASPO's yard in Astrakhan and that an allowance of €578,320 was made for it in the Reimbursable Price which was not to participate in the Incentive Scheme.

810. Bluewater says that it has made a nil allowance for yard improvement works because the works were not, in fact, carried out. Mercon claims €578,320 for what it says are more correctly described as 'mobilization and demobilization of ASPO's yard' rather than Yard Improvements Little Holland I.

811. The issue between the parties is whether that amount of €578,320 was agreed as a fixed lump sum or whether it was a provisional reimbursable amount, so that only the actual costs of the upgrade are recoverable.

812. The Contract does not separately identify the sum of €578,320 but Mercon says that, at a meeting on 15 January 2008 between Bluewater and Mercon, it was agreed that the amount of €578,320 should be treated as a lump sum and for this reason it was excluded from the Incentive Scheme in Attachment 5B. Mercon therefore claims €578,320 on this basis. In the alternative, Mercon claims reimbursement for the amount it paid to ASPO under ASPO invoices 2008-02, 2008-33, 2008-55 in a total amount of €390,000, which it says is all referable to item 7 in the scope of work in the Mercon/ASPO contract: "mobilisation and demobilisation of the assembly site". It refers to the description of the work at section 3.3.8(a) of that contract. Mercon says that it paid €312,000 under the first two invoices and claims reimbursement in that amount plus mark-up of €24,960.

813. Bluewater says that the evidence does not establish any agreement on 15 January 2008. Rather Bluewater says that, as Mercon accepts, Section 9 of the Contract provides by reference to the drawing of the yard support base, "*Yard preparation is Reimbursable for yard upgrade*". It also provides that "*The preparation of the concrete foundation is included in lump sum price.*" Bluewater says there is no separate lump sum for the yard preparation and so the lump sum referred to is the preliminaries for the works at ASPO.

Accordingly, it says that to the extent that the works claimed are 'concrete foundations' those sums sought are not recoverable. Bluewater refers to the price breakdown which shows that the amount allocated to foundations was €37,000 but as that the amount was discounted overall by 20% the sums for the foundations would reduce pro rata to €29,600.

814. Bluewater therefore says that Mercon is entitled to be reimbursed for costs insofar as they are for 'yard upgrade' works properly so called and do not include any concrete foundation costs. Given that the sum claimed is limited to invoices paid of €312,000, Bluewater says that the total reimbursable price that Mercon might be entitled to recover is €282,400 being €312,000 less €29,600. Bluewater says that there is no basis for claiming those costs regardless of whether yard improvements had been carried out. Bluewater notes that it is not part of Mercon's positive case that the works have been carried out and Mercon does not particularise what works are included in "*amongst other things, its assembly site mobilisation and de-mobilisation costs*". Bluewater also says that little detail can be gleaned from the relevant ASPO invoices.

815. I do not consider that there was any relevant agreement made on 15 January 2008. The notes of the meeting refer to Attachment 5B of the Contract at Item 6 in the sum of €2,137,320 and refer to the Incentive Scheme and the figure of €1,559,000 and then state "*The Balance is LS already: 578,320*". That is a statement made after the Contract had been entered into recording a view as to what was included in the Contract. Whether that is what the Contract included is a matter for construction of the Contract on which subsequently expressed views are not admissible.

816. Item 6 of Attachment 5B of the Contract identifies the sum of €2,137,320. By reference to the Incentive Scheme it is possible to identify that there was a sum of €578,320 which was included in the sum of €2,137,320. On that basis I do not consider it to be arguable that the sum of €578,320 related to a Lump Sum item. It was part of the work to be paid for on a reimbursable basis at the rates in Attachment 5C2.

817. As a result, on the basis that the yard improvement work was included in item 6 then Mercon were entitled to be paid for that work on a reimbursable basis of those rates.

818. The quantum experts have considered this claim and at paragraph 2.83 of their First Joint Statement they refer to the invoices which are relied upon by Mercon to establish a claim on a reimbursable basis. They conclude as follows as to this claim: "*we remain uncertain as to what amounts may be due to Mercon*". They say that the claim is based on 80% of Project Milestone 7 in the ASPO/Mercon sub-contract but invoices 2008-02 and 2008-33 do not make reference to that Milestone and invoice 2008-55 was not paid by Mercon.

819. On this basis I do not consider that Mercon has established its entitlement to be paid for the relevant work on a reimbursable basis.

Issue 10: Is the Defendant claiming for reimbursable works which are in fact or ought to have been compensated for elsewhere (re measure or lump sum)?

820. Bluewater refers to items 5 and 6 in Attachment 5B to the Contract which relate to "Supply/Fabrication/Erection SYMS Substructure – Astrakhan" and

"Assembly/Integration" in Astrakhan. Item 5 is re-measured work and Item 6 is reimbursable work. It says that the extent to which there might be an overlap is something which Mercon has not taken into account in its approach to identifying work by relying on Attachment 9. Bluewater says that because of the change in the SYMS the scope changed. Originally, the integration and assembly of the jacket involved building the substructure up to the Central Column so that assembly and integration were one item of work but what actually happened was the entire substructure was erected in advance of the arrival of the Central Column leaving only some 8 integration welds to perform. Also Bluewater says that the substructure changed thus changing the nature and scope of the integration and assembly work. Bluewater refers to the fact that post-contract in the knowledge of these changes the parties agreed rates for the substructure which were identical to those applied in Gorinchem.

821. Bluewater says that the potential for overlap was identified by Mr Dixon and accepted in evidence by Mr Simons. Bluewater submits that Assembly and Fabrication are essentially the same thing and that Mercon has charged twice for the same service, both through the sum of €330,738.88 that Mr Dixon identified in his evidence as being included in the re-measure for fabrication and the €600,000 paid (out of a total claimed of €931,325) for the assembly work as part of the reimbursable work.

822. During the hearing I dealt with a number of issues by way of concurrent expert evidence. One of those issues, Issue E, raised this question: "Is assembly of the SYMS substructure covered in whole or in part by the steelwork erection prices in the re-measure or is it part of the reimbursable work-scope? During that evidence it became clear that whilst Mr Dixon had identified the potential overlap referred to above, he was not saying that there was in fact some duplication although he said there could be a complete overlap. Mr Simons accepted that there could be an overlap but again had no means of identifying it.

823. In the light of that evidence and without a specific overlap being identified I do not consider that I am able to take any potential overlap into account. I am therefore unable to say that Mercon is claiming for works as reimbursable work when it ought to be compensated for those works elsewhere in the re□measure or a lump sum. I shall however bear the issue in mind when I consider the individual claims.

Issue 11: What is the proper valuation of the Reimbursable Cost account?

824. Bluewater submits that if the ASPO timesheets are to be used as a basis for assessment, then the sums claimed should be reduced by 5%. It refers to the fact that, as the quantum experts agreed, based on a random sample, the timesheets supported only 95% of the hours claimed. The experts recorded in their First Joint Statement that "*The degree of accuracy between the hours recorded on the timesheets and those claimed in the September invoices is approximately 95%.*"

825. Further Bluewater says that, as noted by the experts, the timesheets signed by Bluewater have the word "Review" circled by the signatory. Bluewater submits that "Review" indicates that Bluewater intended to review the timesheets further rather than that they had been reviewed by them, otherwise the signatory would have circled the "Accept" box or otherwise "Witness" box if they had witnessed the hours being spent.

826. Bluewater also says that Mercon must show that the time was "productive" and did not fall within any of the categories of disallowed time in clause 3.2.2(g) of Section 5 of the Contract. In particular, under Clause 3.2.2(g)(iii) Mercon cannot recover for "*non-productive time*" and under Clause 3.2.2(g)(vii), it cannot recover for "*Remedial work attributable to defective work*". Whilst Mercon accepts that it cannot claim for non-productive overtime, Bluewater says that this precludes a claim for non-productive time, whether overtime or otherwise, and Mercon should prove that the costs claimed do not include costs which cannot be recovered, such as re-work. Bluewater says that, at best, the timesheets show hours worked rather than entitlement and that, in practice, Mercon do not go any further than simply asserting an entitlement to be paid everything that is included on the timesheets.

827. In relation to the timesheets, Bluewater says that from an early stage Mercon had urged Bluewater to sign the timesheets even if they disputed Mercon's entitlement to compensation and in later correspondence Bluewater recorded that the timesheets were being signed under protest because ASPO refused to work if they were not signed. Similarly Bluewater says that Mercon stated, as shown by exchanges in September and October 2008, that ASPO refused to reduce hours on timesheets when they should have done and these hours then formed part of the claims in invoices.

828. Bluewater refers to Mr de Geus's evidence of the significant increase in integration costs. Originally €2,137,320 had been allowed, including €578,320 for yard improvement works, giving €1,559,000 for the integration works, with an incentive scheme anticipating that the core works could cost less than €900,000. Bluewater says that it is difficult to see how the sum now claimed can be justified as representing properly recoverable productive works, excluding re-work and non-reimbursable work.

829. In further support of this contention Bluewater refers to the "sense check" performed by the quantum experts in their First Joint Statement at paragraphs 2.16 to 2.22 where, amongst other things, they say that the industry norm for the integration welding work is 3,844 man-hours, against which Mercon have claimed some 7,312 hours for workers. The experts also agree that it is unusual to see scaffolder hours amount to approximately 60% of welder hours. Bluewater also refers to an internal Mercon email from Mr Van Den Brule to Mr de Jong of 13 September 2008 where he said: "*the supervisor writing the time sheets has a fantasy over the number of men on the job and is a master in creating time sheets with inflated hours*" and that the job was "*flooded with men*". Bluewater also refers to documents in bundle K18 which contains the ASPO log book and, it says, shows work not being carried out efficiently and productively.

830. In relation to inefficiency, Bluewater refers to two issues. First there is the issue of the pre-heat treatment which was known about from early in the project. It says that whilst Mr Wickerhoff considered that there was adequate pre-heat treatment equipment, Mr Cookson, Mercon's delay expert, did not and considered that this was the cause of delay. Bluewater refers to the ASPO log book from 4 September to 9 October 2008 which shows that problems were being caused by the lack of availability of pre-heat equipment.

831. Secondly there was an issue with the general slow progress of the necessary scaffolding, again as shown by the ASPO log book.

832. In relation to the timesheets for "assembly work" Bluewater notes that the provisional lump sum agreed between ASPO and Mercon for this work was €750,000 which was about 25% less than the costs of €931,325 (Assembly invoices 2008-12, 2008-13, 2008-13 and 2009-4) charged by ASPO based on their timesheets when it is not suggested that there were any significant changes to the work scope after the lump sum price was agreed with ASPO.

833. Bluewater also refers to paragraph 2.22 of the quantum experts' First Joint Statement where they note that the supervision hours for foremen and supervisors, excluding Mercon Key Personnel and personnel covered by the preliminaries, are approximately 30% of the other recorded hours which is in the upper range of what might be expected. Bluewater says that this level of supervision is not consistent with the difficulties shown in the ASPO log book. In any event it refers to the quantum experts' agreement that, if the court were to decide that the direct hours were over-claimed, then the supervision hours should reduce commensurately.

834. Bluewater relies on two other matters identified by the quantum experts. First, that the invoices include hours for "indirect labour" resources which do not feature in Attachment 5C2 of the Contract or Attachment 5C of the Mercon/ASPO Contract. The quantum experts have calculated the amount related to this issue in Appendix 2.4. The experts note that Attachment 5C2 does refer to resources such as "Operator" and "White collar worker" which might apply but Bluewater says that the claim is not advanced on this basis and such amounts should not be recovered. Secondly, the experts have also set out in Appendix 2.4 the adjustments necessary to reflect the fact that some supervisor hours appear to be claimed at the wrong rate, i.e. €25.00 per hour instead of €14.00 per hour as provided for in Attachment 5C2. The adjustments to be made to reflect this are also shown in Appendix 2.4.

835. In relation to Bluewater's objection that there was not proper substantiation of the claim, Mercon says that the invoices are backed up by ASPO timesheets and that the timesheets were reviewed and approved by Mercon. Whilst Mercon encountered some difficulties with ASPO at an early stage of the project and some of the timesheets were signed under protest, Mercon says that it conducted a proper review and challenged ASPO where appropriate. It refers to a number of letters in late September/early October 2008 challenging claims by ASPO and says that the position then improved as confirmed by Mr Wickerhoff. It says that contrary to Mr Knibbe's evidence, there was no question of Mercon signing off inflated timesheets.

836. Mercon also points out that the timesheets were forwarded to Bluewater and if Bluewater did not agree with the timesheets then it would refuse to sign them and Mr Wickerhoff would have to resolve the issue with Mr Knibbe of Bluewater as explained by Mr Wickerhoff. As confirmed by the quantum experts in their First Joint Statement, 95% of the timesheets were stamped and signed by Bluewater and Bluewater did not object to the timesheets and invoices at the time. Mercon also says that Bluewater later paid the invoices to ASPO in full without suggesting at that time that they were not properly substantiated.

837. So far as Bluewater's position on invoices is concerned, Mercon refers to the quantum experts' statement that they were unable to establish the basis for the amounts admitted or not admitted by Bluewater.

838. Mercon says that the quantum experts attempted a "sense-check" of the times on the time sheets but reached no conclusion but said that the time claimed for supervision was "*inside the upper end of range that we might expect*".

839. I am concerned that the process by which the timesheets were produced has meant that they are inaccurate. I consider that a 5% reduction in sums claimed is appropriate to take account of these inaccuracies. It is clear that there are proper concerns as to the general accuracy of the timesheets outside the 5% which applies where Bluewater has had the opportunity to review the timesheets. I consider that where Bluewater has been given the opportunity to review the time sheets then a signature is some evidence as to the accuracy of those documents as a record.

840. However where there has been no proper process of reviewing the timesheets at the time then a reduction up to 35% might be appropriate if there are other issues which lead to a lack of confidence in the timesheets. Necessarily the position is impressionistic based on consideration of the timesheets and the process by which they were produced and reviewed.

Reallocation of Invoices

841. There is an issue as to Mercon's re-allocation of amounts previously paid against invoices 2008-13, 2008-20 and 2008-22 to other invoices, in particular to pay 80% of Invoices 2008-53 and 2008-71, as it purported to do on 30 January 2009 whilst also making a further net payment of €130,680.20.

842. Mercon says that it paid ASPO 100% of invoice 2008-38 and 80% of invoices 2008-53 and 2008-71. Bluewater says that it paid ASPO 100% of invoices 2008-53 and 2008-71 under the Payment Contract and also invoice 2009-3 which Mercon accepts it did not pay. There is, therefore, an issue as to whether the parties paid ASPO 80% of invoices 2008-53 and 2008-71 twice.

843. If certain invoices were in fact paid twice then there are certain other invoices which were not paid at all. The central issue is whether Mercon was entitled to re-allocate the money paid in the way that it did.

844. To understand what happened on 30 January 2009 it is necessary to set out some matters by way of background. The Mercon/ASPO Contract divided the work on the substructure ("foundation") into "fabrication" (item 1) and "assembly" (item 2). As set out in the payment Milestones in Attachment 5A, assembly involved "installation and welding of upper bracings". Bluewater says that this assembly corresponded to the assembly work described in Attachment 5B of the Contract as part of "assembly/integration" in Astrakhan which was on a reimbursable basis. Bluewater says that bracings are "assembly" and that adding the Centre Column is "integration".

845. As dealt with above, there was a change to the planned methodology for integration so that the diagonal bracings were assembled prior to the arrival of the Central Column rather than at the same time as the Central Column was integrated into the substructure but Mercon says that this did not affect the basis of payment as the bracings were always intended to be reimbursable work as part of "assembly/integration" rather than being within "supply/fabrication/erection". Mercon says that "erection" is the work

prior to the completion of the "pre-assemblies" referred to in the Contract, being the individual SYMS components such as the substructure, Central Column and yoke system whereas "assembly" is the work required to put the pre-assemblies together and the bracings for part of that.

846. Mercon says that the four invoices for the bracings (2008-13, 2008-20, 2008-22, 2009-4**)** relate to item 2 of the Mercon/ASPO scope of work, described as "assembly" and total €931,325 (€600,000 for Invoices 2008-13, 2008-20, 2008-22 and €331,325 for invoice 2009-4). Mercon says that it has not paid these invoices because of the reallocation affecting Invoices 2008-13, 2008-20, 2008-22 and, in any event, has not paid Invoice 2009-4. It only claims its mark-up in the sum of €74,506 (8% of €931,325) unless the re-allocation was not effective in which case Mercon claims reimbursement of the €600,000 it paid against Invoices 2008-13, 2008-20 and 2008-22.

847. Mercon says that items chargeable under the Contract on a reimbursable basis were generally invoiced by Mercon to Bluewater based on the actual hours worked by ASPO as set out in timesheets but in the case of the assembly work, Mercon provisionally agreed to pay ASPO a lump sum of €750,000, subject to Bluewater accepting that agreement but that, absent such agreement, Mercon and ASPO would revert to "reimbursable base". Mercon refers to the minutes of a meeting between Mercon and ASPO on 22 to 24 January 2008, which were incorporated into the Mercon/ASPO sub-contract where the sum of €750,000 was included for "*Assembly of SYMS foundation*".

848. Mercon paid ASPO €600,000, being 80% of the lump sum against ASPO invoices 2008-13, 2008-20 and 2008-22 between June and October 2008.

849. On 18 November 2008 Mercon wrote to ASPO to say that the lump sum had not been agreed between Bluewater and Mercon and then stated:

> "*Mercon therefore requests ASPO to provide full backup for the costs made regarding Assembly of SYMS foundation.*
> *The already invoiced and paid amounts concerning PM2.1, PM2.2 and PM2.3 are prepayments and will be settled with the reimbursable basis.*"

850. ASPO then provided timesheets for the work for which it had submitted invoices in a total amount of €931,325. These were forwarded to Bluewater on 2 January 2009 as part of VOR 264-M Rev3.

851. On 30 January 2009, following a telephone conversation, Mercon wrote to ASPO stating that Bluewater had not accepted those timesheets, attaching a schedule. Mercon said:

> "*In summary: we will pay today all due amounts deducting the €600.000 paid for scope element 2 (Assembly of SYMS foundation). As a result, scope element 2 is now considered unpaid and all invoices in attached overview are considered paid except for the remaining contractual 20% of invoices 36, 49, 50, 53, 69, 70 and 71.*"

852. Mercon says that it was entitled to apply the payment in that way and ASPO could not accept the payment and then allocate it in a different way. It refers to the passage in the speech of Lord Macnaghten in The Mecca [1897] AC 286 at 293, where he said:

> "*When a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he makes the payment the right of application devolves on the creditor.*"

853. Bluewater says that when Mercon paid ASPO they paid the assembly invoices (2008-13, 2008-20 and 2008-22) and that no letter sent subsequently, such as the letter of 30 January 2009, can change that allocation. Bluewater also says that it paid the invoices which ASPO asserted were outstanding and ASPO did not make reference to the re-allocation which indicates that ASPO did not accept the re-allocation.

854. It is evident that ASPO submitted Invoices 2008-13, 2008-20 and 2008-22 for the work which was covered by item 2 of the Mercon/ASPO scope of work, described as "assembly" and which totalled €600,000. Those invoices were paid against the lump sum of €750,000 included in the ASPO/Mercon Contract. That item reverted from being a lump sum to being reimbursable as confirmed by the letter of 18 November 2008. Invoice 2009-4 dated 28 January 2009 was then issued by ASPO in the sum of €331,325 as "Final payment for 3-D Assembly of SYMS foundation."

855. Mercon says that this Invoice 2009-4 together with the other three original invoices related to the bracings. Having considered those invoices it is evident that what ASPO was doing by Invoice 2009-4 was to submit a final invoice for the work which had been part paid in Invoices 2008-13, 2008-20 and 2008-22. Those invoices had been paid for "Assembly of SYMS foundation" and Invoice 2009-3 was the final payment. If the lump sum of €750,000 had remained the figure in the final invoice would have been €150,000. It evidently became €331,325 on the basis that it was now to be paid on a reimbursable basis.

856. Mercon paid Invoices 2008-13, 2008-20 and 2008-22 for the work of "Assembly of SYMS foundation" and by doing so allocated those payments to that work. I do not consider that the change in the basis of valuation of the work meant that those sums were no longer allocated to that work. Indeed that was also the view of Mercon who made it clear in their letter of 18 November 2008 that the "*already invoiced and paid amounts concerning PM2.1, PM2.2 and PM2.3*", that is Invoices 2008-13, 2008-20 and 2008-22, "*are prepayments and will be settled with the reimbursable basis.*" In other words those invoices remained allocated to that work but now were to be treated as pre-payments for the sums to be paid on a reimbursable basis which was then finalised by Invoice 2009-4.

857. As a result, as Bluewater submits, I do not consider that Mercon was entitled to re-allocate the sum of €600,000 as it sought to do on 30 January 2009 and that accordingly Invoices 2008-13, 2008-20 and 2008-22 were allocated to the "Assembly of SYMS foundation" and remained so. It follows that, as a result, Mercon did not on 30 January 2009 effect payment of 80% of Invoices 2008-53 and 2008-71 and so these invoices were not paid twice when Bluewater subsequently paid them. The position on payment

is therefore that set out by the quantum experts in Column J of Appendix 2.5 to the Second Joint Statement which is based on the €600,000 re-allocation being invalid.

Invoices

858. As explained above the quantum experts have allocated the Invoices into the following 13 categories which I have held to be the relevant "related activities" to which the mark-up in Attachment 5E of the Contract applies:

(1) ASPO Milestone Payments (Invoices 2008-13, 2008-20, 2008-22 and 2009-4).
(2) Labour for Integration for Central Column (Invoices 2008-25, 2008-36, 2008-49, 2008-69, 2009-1 and 2009-6).
(3) Crane for Central Column Integration (Invoice 2008-24).
(4) Lifting Lug for Central Column (Invoice 2008-40).
(5) Assemble Temporary Supports for Upper Bracings (Invoice 2008-52).
(6) Labour for Turntable (Invoices 2008-38, 2008-53, 2008-71 and 2009-3).
(7) Crane for Turntable (Invoice 2008-44A).
(8) Pre-Heating (Invoices 2008-26, 2008-48 plus the claim for equipment rental provided to ASPO).
(9) Cranes – Miscellaneous (Invoices 2008-57 and 2008-63).
(10) Welder Qualifications (Invoices 2008-15 and 2008-43).
(11) Customs Expenses (Invoices 2008-51, 2008-64 and 2008-72).
(12) Painting Materials (Invoice 2008-61).
(13) Office & Phone Calls (Invoices 2008-46, 2008-73 and 2009-7).

859. I shall consider mark-up after I have come to a conclusion on the total value of the sums due in respect of those invoices. The relevant mark-up provision in Attachment 5E is as follows:

Description	**Percentage mark-up**
Costs not exceeding EURO 10,000.00	10.0%
Costs over EURO 10,000.00 not exceeding EURO 50,000.00	8.0%
Costs over EURO 50,000.00 not exceeding EURO 500,000.00	6.0%
Costs over EURO 500,000	4.0%

860. There is an issue as to how the mark-up is to be applied. Bluewater says that the mark-up is part of the reimbursable charge and if there is nothing to reimburse then there is no charge to be made by way of mark-up. As a result Bluewater contends that any mark-up applies only to ASPO invoices that Mercon has actually paid.

861. Mercon says that the mark-up represents Mercon's profit margin on the reimbursable works and there is nothing in the Contract that suggests that the earning of the profit is conditional on actual payment by Mercon to ASPO. In particular, Mercon says that Bluewater cannot avoid paying the mark-up and so deprive Mercon of its profit by simply paying ASPO direct, as it has done. Neither, it says, should it be deprived of its right to the mark-up if it had a good reason for not paying, such as that it was entitled to exercise a set-off.

862. I consider that the submissions of Mercon are correct. If Mercon carried out the work by itself or its sub-contractor and was entitled to be paid on a reimbursable basis then it was entitled to be paid that sum and the mark-up. If, however, Mercon failed to pay ASPO but Bluewater discharged Mercon's liability to pay ASPO then that direct payment is equivalent to Bluewater paying Mercon and in turn Mercon paying ASPO. On this basis Mercon is entitled to receive the mark-up on payment made by Bluewater direct to ASPO. Thus while Mercon is not entitled to payment in respect of the invoices which it did not pay but which were paid by Bluewater, it is entitled to mark-up on those sums. Equally insofar as it arises, if Mercon was entitled to exercise a set-off then this would be equivalent to payment and it would also be entitled to the mark-up.

863. I now turn to consider the particular invoices.

Crane for Central Column integration (invoice 2008-24)

864. Bluewater accepts that Mercon is entitled to reimbursement of this invoice for €567,520 in full. In relation to mark-up, this invoice comes into the band in Attachment 5E of over €500,000 which gives a mark-up of 4% so that Mercon is entitled to €22,700.80 as the mark-up.

Labour for turntable (invoices 2008-38, 2008-53, 2008-71 and 2009-3)

865. The quantum experts calculate the total value of the invoices is €75,827.60. Mercon claims reimbursement of €62,592 paid to ASPO plus an 8% mark-up of €5,007 on €62,592. The invoices relate to the integration of the Topsides in Astrakhan and Bluewater contends that Mercon is responsible for all costs consequent on the splitting of the Topsides so disputes that any payment is due. Alternatively, Bluewater says that, as with the other ASPO invoices, the sum invoiced should be reduced by, at the very least, 5% to reflect the quantum expert's agreement as to the inaccuracy of the ASPO timesheets.

866. As set out below, I do not consider that Mercon was responsible for the costs consequent on the splitting of the Topsides. It follows that it was entitled to be reimbursed those sums.

867. Invoice 2008-38 was for €15,570.80 and was paid by Mercon. Mercon contended wrongly that it had paid 80% of invoices 2008-53 and 2008-71 on the basis of the reallocation which I have found to be ineffective. As a result the quantum experts say that Mercon has paid only €3,312.42 and €1,095.36 in respect of those invoices, a total of €4,407.78. Mercon has not paid 2009-3. Therefore the claim should only be for €19.978.58.

868. Bluewater has paid Invoices 2008-53 (€44,003.18), 2008-71 (€14,551.20) and 2009-3 (€1,704.42), making a total sum of €60,258.80. It follows that ASPO has been paid twice in relation to €4,407.78 in respects of invoices 2008-53 and 2008-71.

869. In the light of the concerns raised by the experts as to the accuracy of the invoices, I consider that the minimum 5% reduction proposed by Bluewater is a proper way to deal with these invoices. The sum paid by Mercon should be reduced by 5% from €19,978.58 to €18,979.65 and the overall invoiced sums reduced from €75,829.60 to €72,038.12.

870. In relation to the mark-up, the sum of €72,038.12 comes into the band in Attachment 5E of €50,000 to €500,000 which gives a mark-up of 6%, so that Mercon is entitled to €4,322.29 as the mark-up.

Labour for integration for Central Column (invoices 2008-25, 2008-36, 2008-49, 2008-69, 2009-1 and 2009-6)

871. These invoices are intended to cover labour involved in the integration of the Central Column. Each invoice relates to one calendar month from August 2008 (Invoice 2008-25) through to January 2009 (Invoice 2009-6). The invoices are for €1,001,138.42 in total. Mercon claims reimbursement of €678,980 paid to ASPO in respect of the first four invoices and a mark-up of €80,090.

872. Mercon has paid ASPO €177,299.02 (2008-25); €20,491.21 (2008-36 as re-allocation was not valid); €16,172.03 (2008-49 as re-allocation was not valid); €13,879.99 (2008-69 as re-allocation was not valid); €nil (2009-1) and €nil (2009-6). That is a total sum of €227,842.24, as calculated by the quantum experts.

873. Bluewater has paid ASPO €272,209.92 (2008-36); €214,833.38 (2008-49); €184,384.50 (2008-69); €120,714.20 (2009-1) and €31,697.40 (2009-6). That is a total sum of €823,839.40. That means that ASPO has overall been overpaid as it has been paid twice for €20,491.21 (2008-36); €16,172.03 (2008-49) and €13,879.99 (2008-69), that is €50,543.23.

874. I consider that Mercon is entitled to €227,842.25 which it has paid less 5%, that is €216,450.13. Equally I consider that the proper amount which should have been paid overall is €1,001,138.42 less 5% that is €951,081.50 on which Mercon is entitled to 4% mark-up of €38,043.26.

Lifting link/lug for Central Column (invoice 2008-40)

875. This invoice for €118,807 relates to the fabrication and testing of a lifting link required to rotate the Central Column from horizontal to vertical for installation. It was required by Bluewater's Marine Warranty Surveyor, LOC and carried out by ASPO and Mercon says that it is part of the reimbursable work. Mercon did not pay the invoice and is not seeking reimbursement but claims only its 8% mark-up of €9,504.

876. Bluewater says that, given the nature of this work it amounts to assembly work and falls into the category of those works which are duplicated by the 'erection' payment in the re-measure payment. The invoice in the sum of €118,807 was paid by Bluewater.

877. I consider that this falls within the integration work and therefore is part of the reimbursable work. The work was clearly needed to integrate the Central Column. I consider that Mercon is entitled to its mark-up based on €118,807, less 5%, that is €112,866.65, so that Mercon is entitled to 6% mark-up or €6,772.00.

Assemble temporary supports for upper bracings link for Central Column (invoice 2008-52)

878. This invoice is for €50,000. Mercon did not pay the invoice and is not seeking reimbursement but claims an 8% mark-up of €4,000**.** Bluewater says that the work is

part of the fabrication and erection of the substructure, rather than assembly and integration work, and so not reimbursable.

879. Bluewater says that this invoice is for assembly work and falls into the category of those works which are duplicated by the 'erection' payment in the re-measure payment. Bluewater paid this invoice in the sum of €50,000. It also says that this invoice is for a round figure and it is not clear why it does not fall within the lump sum agreed between Mercon and ASPO for assembly work.

880. I consider that this work falls within the integration work. It is work which was required to integrate the Central Column and was temporary support for the bracings link to the Central Column.

881. I consider that Mercon is entitled to its mark-up based on €50,000, less 5%, that is €47,500.00 so that Mercon is entitled to 8% mark-up or €3,800.00.

Crane for turntable (invoice 2008-44A)

882. The invoice is for €24,000 for the hire of a floating crane for one day. Mercon paid the invoice and claims reimbursement plus an 8% mark-up of €1,920.

883. Bluewater disputes this invoice because it relates to integration of the Topsides and says that it does not form part of reimbursable work. This invoice relates to the provision of the Bogatyr III crane in support of Topsides integration/re-integration operations. The work performed by the crane is recorded in Work Completion Certificate No. 20, which confirms that the time spent on the operation (on 9 October 2008) was 1 hour 20 minutes. The invoice is based on the day rate of €24,000.00 for the crane as provided for in Attachment 5C2 of the Contract and Attachment 5C of ASPO's sub-contract.

884. Bluewater submits that Mercon is not entitled to claim the full day rate for this crane unless it were established that the use of the crane for such a limited time was essential and that the use was maximised by co-ordinating work. In the absence of evidence to this effect the cost of the crane should be pro-rated.

885. As the quantum experts note that the only quantum issue is therefore whether it is correct to claim a full day rate when the crane was only required for 1 hour and 20 minutes of work. That is a matter for contract construction although factual evidence relating to arrangements for hire of the crane and/or whether the crane was deployed onto other work for the remainder of the day might also be relevant. Mercon provides no evidence in respect of these matters.

886. The question of whether this invoice is reimbursable depends first on responsibility for the integration of the Topsides. As set out above, I have held that Bluewater was responsible for this integration.

887. In terms of quantum, the rate is given as a daily rate in Attachment 5C2 rather than, as for many of the rates, an hourly rate. Whilst the time spent in operation may have been limited, I consider that the appropriate rate was a daily rate to include other operations before and after operation. On that basis, I do not consider this is an invoice to which

the 5% discount applies. Mercon is entitled to €24,000 plus a mark-up of 8% or €1,920.00.

Pre-heating (2008-26, 2008-48 and Mercon equipment rental) Invoices 2008-26 and 2008-48

888. Invoices 2008-26 (€50,000.00) and 2008-48 (€118,912.00) are for a total of €168,912.00 for the provision of pre-heating services by ASPO. Invoice 2008-26 is a €50,000.00 advance payment and invoice 2008-48 is a final invoice for work performed with the advance payment deducted. Mercon says it paid the invoices and claims reimbursement plus 8% mark-up of €13,512. Mercon has also claimed reimbursement for heating equipment rental.

889. Bluewater claims a discount on the invoices on the basis that some of the pre-heating work was included in the agreed measured work unit rates because it does not relate to the Central Column integration welds. Bluewater accepts €49,725.00 against these invoices and submits that, in the absence of proper proof by Mercon, the claim should be limited to that amount.

890. ASPO Invoices 2008-26 and 2008-48 are for the period 23 September to 7 November 2008 which is the time period when the Central Column was being integrated. The claim is based on working 24 hours a day, 7 days a week at a rate of €153.00 per hour. The quantum experts refer to an email from ASPO's sub-contractor, Astroweld, which suggests that it quoted the rate of €153.00 per hour to ASPO for the pre-heating work. They consider that the rate is reasonable if it includes about 4 men plus 4 machines per shift.

891. There is an issue as to whether the parties paid ASPO sums against invoice 2008-48 twice. This issue arises out of Mercon's letter dated 30 January 2009 as previously addressed. As result of my finding on re-allocation the amount paid by Mercon against Invoice 2008-48 is €56,484.38. Bluewater has paid €68,912.00, there is therefore an overlap of €6,484.38 against the overall invoice sum of €118,912.00.

892. I am not persuaded that the invoices include the use of preheating equipment for non-integration welds. The relevant period was the period during which the Central Column integration welds were being carried out and, in the absence of evidence to the contrary, it is likely that the preheating was being used for those welds.

893. The timesheets are in Russian and, whilst they are signed by the person who prepared them, there are no Mercon or Bluewater signatures on the timesheets which the experts have reviewed. That would suggest that either they were not submitted or not reviewed by either Mercon or Bluewater. In addition the timesheets do not identify the resources being used and there is no evidence to support the assumptions that the quantum experts make as to resources in this respect.

894. Mercon has paid €50,000.00 and €56,484.38, a total of €106,484.38. Given the uncertainties with the timesheets in this case I consider that the claims for each of the invoices should be reduced by 35%. This means that Mercon should only have paid €69,214.85 and invoiced sums reduced from €50,000 and €118,912.00, totalling €168,912.00 to €109,792.80. Mercon is entitled to a mark-up based on €168,912.00, less 35% or €109,792.80, giving 6% which is €6,587.57.

Mercon Supplied Equipment

895. The claim relates to the provision of two pre-heating units to ASPO because ASPO or its sub-contractor was unable to source enough units locally. The claim is for 7 weeks rental for each unit during October and November 2008. Mercon originally valued the units at €153.00 per hour, the same rate as charged by ASPO for pre-heating services.

896. The experts have seen timesheets signed by Mercon's Mr Wickerhoff and Bluewater's Mr Gardiner with "Review" circled on the Bluewater stamp and which support the claimed number of weeks for the two units. The experts agree that the rate of €153.00 per hour is not appropriate for the supply-only of pre-heating equipment. They have agreed that Mercon's claim for heating equipment rental should be reduced to €16,786 using appropriate rental rates. They have established a rate of €1,199.00 per week exclusive of mark-up using the rate charged by Mercon's sub-contractor, Delta Heat Services, for equipment supply in Gorinchem as a basis, with a fair allowance added for transportation and local attendance. The expert's valuation assumes that the equipment supplied by Mercon to ASPO is comparable to that used by Delta Heat Services in Gorinchem and that the operation of the equipment is included elsewhere.

897. Mercon agrees in its written opening submissions that it will limit its claim to this amount as assessed by the experts for this aspect of the preheating.

898. Bluewater says that Mercon has not provided any details of the costs incurred to provide the equipment Clause 4.1 of Section 5 states that Mercon "*Shall provide the relevant original invoices in support of any request for compensation*". In the absence of an invoice for rental costs Bluewater says that the equipment may have been Mercon's own equipment brought from Holland or which it did not incur any rental charge. It also says that transport is deemed to be included in the uplift rate under Clause 4.1 of Section 5.

899. I consider that the rate established by the experts is a fair rate subject to the point raised by Bluewater as to transport/attendance. The mark-up would include for transport/attendance as is made clear by the non-exclusive list of matters in Clause 4.1 of Section 5. I do not consider that the absence of an invoice should affect the entitlement to claim and, even if the equipment were to be Mercon's equipment it would be entitled to be paid.

900. The rate includes 10% for transport/attendance and I therefore consider the rate should be reduced to €1,090.00 so that the overall sum becomes €15,260.00. In terms of mark-up Mercon is entitled to 8% or €1,220.80.

Cranes – miscellaneous (invoices 2008-57, 2008-63, 2009-5)

901. The first two invoices are for a total of €6,799 (€4,619.00 and €2,180.00). Mercon says it paid these two invoices in full and claims reimbursement plus an 8% mark-up of €544. Bluewater disputes part of the invoices because they relate to integration of the Topsides.

902. Both invoices relate to the provision of cranes for various activities recorded in ASPO Work Completion Certificates. The certificates support the claimed hours and the rates used in the invoice reflect those provided for within Attachment 5C2 of the Contract and Attachment 5C of the ASPO sub-contract.

903. Invoice 2008-57 for €4,619.00 relates to 8 certificates (No 23 to 31). Bluewater admits a total of €901.00 against this invoice, which reflects the costs associated with certificates 30 and 31. It says that all of the other certificates are associated with the integration/re-integration of the Topsides. Bluewater has paid €4,619.00 against this invoice and because Mercon was not allowed to reallocate it has paid only €434.63.

904. Invoice 2008-63 for €2,180.00 relates to 7 certificates (No 32, 33 and 35 to 39). All are signed by a member of Mercon's personnel, with No. 33 and 37 to 39 being signed by a member of Bluewater's personnel with "Review" circled on the Bluewater stamp. Bluewater says that if the invoices are not signed by Bluewater's personnel Mercon should not recover for that item and that the signed invoices should, in any event, be reduced by 5% and discounted further given the issues with timesheets and hours spent. Bluewater has paid €2,180.00 against this invoice and because Mercon was not allowed to reallocate it has paid only €205.13. Bluewater admits a total of €1809.00 against this invoice.

905. Invoice 2009-5 has been paid by Bluewater in the sum of €389.00. Overall there has been an overpayment to ASPO of €639.76 (€434.63 and €205.13) based on the payments made in respect of Invoices 2008-57 and 2008-63.

906. I have dealt below with the question of integration of the Topsides and held that Bluewater is responsible for this.

907. On that basis, I consider that Mercon is entitled to be paid €639.76 (€434.63 and €205.13) based on the sums which the quantum experts have assessed as having been paid following the invalid re-allocation. So far as discount is concerned I consider that the 5% discount should not apply to the sum claimed in this case because of use of crane hours which are likely to be more accurate. On that basis Mercon is entitled to mark-up on €7,188.00 (€4,619.00, €2,180.00 and €389.00) which is 10% or €718.80.

Welder qualification (invoices 2008-15, 2008-43)

908. The invoices total €25,628 and are for the costs of ensuring that welders were properly qualified. Mercon paid the invoices in full and claims reimbursement plus an 8% mark-up of €2,021. No issue of duplication arises. The quantum experts in their First Joint Statement agree that it is normal practice in the offshore fabrication industry for welders to be required to demonstrate that they are capable of performing the required standard of welding before being engaged and Mercon says that this was also an express requirement of Bluewater's welding specification where paragraph 4.3 provided: "*All welders and welding operators shall [be] successfully qualified in accordance with … and certified by an independent inspection authority.*"

909. Bluewater disputes the claim on the basis that the time rates at Attachment 5C2 of the Contract are inclusive of "personnel preparation (training auxiliary personnel)" and because the rates assume that the welders are qualified. Bluewater also refers to Clause 9.2 of Section 2 of the Contract which requires Mercon to ensure that all personnel are "*competent, properly qualified, skilled and experienced in accordance with good industry practice*" and it says that welders who require to be qualified do not meet this requirement. Further, Bluewater refers to the Structural Welding and Non-Destructive Examination Specification which provides at paragraph 2.1.5 that: "*All welders and*

welding machine operators engaged on structural welding shall be qualified prior to commencement of the work in accordance with AWS D1.1 and the requirements of this specification" Bluewater says that the requirement to be qualified "*prior to the commencement of the works*" means that qualification cannot be part of the works and recoverable as such. Additionally, Bluewater refers to the provision in Clause 3.2.2(g) of Section 5 that Mercon cannot recover for non-productive time and says that the claim is not recoverable on this basis.

910. Mercon says that these costs are not the costs of preparing or training unqualified welders but the costs of verifying their qualifications in accordance with normal practice and with Bluewater's Welding Specification.

911. Bluewater also refers to paragraph 2.62 of the quantum experts' First Joint Statement where they agreed that Invoice 2008-15 for €16,686.00 paid by Mercon had no supporting information and did not give any indication of the identity of the welders, number of welders being qualified, or the weld types. Bluewater says that Invoice 2008-43 for €8942.00 paid by Mercon did not identify the welders being qualified or the weld types, but did indicate that it related to the cost of qualifying 10 welders. Bluewater says that as a result Mercon has failed to prove its case that the costs were properly incurred in relation reimbursable work.

912. I consider that the requirement in the specification for welder qualification meant that this element of the work was reimbursable work for which Mercon was entitled to be paid. The welder qualification was specific to this project and, whilst it was required before the welders commenced the welding, it came within the obligations which had to be complied with under the Contract. The supporting information is unsatisfactory and I considered that the sums claimed should be discounted by 35% from €25,628.00 (€16,686.00 and €8,942.00) to € 16,658.20. Mark-up is therefore 8% or €1,332.66.

Customs expense (invoices 2008-51, 2008-64 and 2008-72)

913. These invoices total €13,056. Mercon did not pay invoice 2008-72 (€3,717.45) and this invoice was included in the Bluewater/ASPO Payment Contract. Mercon paid €4,601.59 being 80% of invoice 2008-51 (€5,430.00) and all of invoice 2008-64 (€3,813.55), a total of €8,415.14. No issue of duplication arises. These invoices relate to customs charges associated with the import of pre-heating equipment. Mercon claims re-imbursement plus an 8% mark-up of €1,044. Mercon says that if the cost of pre-heating equipment is allowed, as I have held it is, then this is recoverable too.

914. Whilst Invoices 2008-64 and 2008-72 relate to customs charges associated with the importing of the pre-heating equipment, the quantum experts are unsure what 2008-51 relates to, since all of the back-up information is in Russian, although it may relate to the pre-heating equipment.

915. Bluewater says that Mercon is not entitled to succeed on this claim because Clause 4.1 of Section 5 of the Contract makes clear that the mark-up includes "*all costs incurred by [Mercon] in addition to the net material or equipment cost such as (by illustration)…taking delivery*" and this covers costs such as customs duties. Bluewater says that the need for pre-heating equipment had been known to Mercon for a long time and it should have procured the equipment locally.

916. Whilst Clause 4.1 of Section 5 is broadly worded I do not consider that it could be construed as extending to customs duty which is entirely separate from the list of items included in mark-up. In the absence of any information as to what is covered by it I do not consider that Mercon can recover for Invoice 2008-51. This is not a case where any discount is appropriate as the Invoices are for customs charges. I therefore consider Mercon is entitled to be paid €3,813.55 and mark up of 10% of €7,531.00 (€3,717.45 paid by Bluewater and €3,813.55 paid by Mercon) being €753.10.

Painting materials (invoice 2008-61)

917. The invoice is for €11,157. Mercon paid the invoice and claims reimbursement plus an 8% mark-up of €892. This invoice is admitted by Bluewater, subject to proof that the work to which the invoice relates was carried out, but it says that no such proof has been provided.

918. Whilst the quantum experts have not seen any documents they say that on the basis that blasting and painting took place in the area of the integration welds this sum seems reasonable.

919. I propose to reduce the sum by 35% given the lack of documentary evidence but support derived from the view of the quantum experts. The sum recoverable by Mercon is €7,252.05, being a discount of 35% from €11,157.00. The mark-up is then 10% or €725.21.

Office & phone calls (invoices 2008-46, 2008-73, 2009-7)

920. The invoices are for €18,780 in total, of which 80% was paid by Mercon. Mercon therefore claims €15,024 plus a mark-up of €1,502, being 8% of €18,780. The invoices relate to the use of site offices and mobile phone SIM cards by Bluewater and Mercon during the integration/assembly phase, for site offices a unit rate is given in Attachment 5C2 and for actual phone use. Bluewater says that it paid ASPO 100% of invoice 2008-73 under the Bluewater/ASPO Payment Contract. There is, therefore, an issue as to whether the parties paid ASPO 80% of invoice 2008-73 twice.

921. Invoice 2008-46 (€13,229.00) relates to office rental and costs of phone calls for the period from July to October 2008, invoice 2008-73 (€3,281.70) relates to November 2008 and invoice 2009-7 (€2,200.00) is for January 2009.

922. The office space was charged for at the rate provided for in Attachment 5C2 of the Contract and Attachment 5C of the ASPO sub-contract. There is no proof of what offices were provided or that they were dedicated to the reimbursable work. Bluewater says that, as the quantum experts note, the first invoice starts in July 2008 which suggests that the office facilities were being used for the construction of the sub-structure which is work included in the re-measure and so the July to October 2008 invoice should thus not be recoverable. In any case, Bluewater says that the offices are part of the general site office requirements and any office costs from September 2008 should be part of a claim for prolongation. It also adopts the question raised by the quantum experts as to whether office costs are recoverable or whether they are part of ASPO's overheads necessary to complete the works in any event.

923. Bluewater says that, as the quantum experts again note, no evidence has been seen verifying the charges for phone calls and this is a breach of the requirement to provide

supporting invoices. Bluewater also says that Clause 3.3.4(c) of Section 5 of the Contract provides that: "*The rates for office facilities shall be inclusive of all normal office supplies, consumables, computer facilities and telephone.*" Further it says that there is a problem in identifying whether these related to reimbursable work or the project.

924. Bluewater notes that the quantum experts have not reviewed invoice 2008-17 identified in Appendix 4 but not listed in Schedule 6 of the Re-Amended Defence and Counterclaim and not part of VOR 264. Bluewater says that Mercon did ask the quantum experts to review the invoice and it is assumed that Mercon do not pursue the claim for that invoice.

925. I am not persuaded that Mercon has established its claim. Invoice 2008-46 relates to office rental and costs of phone calls for a period when other work in addition to reimbursable work was being carried out and I have no basis on which to allocate the sums claimed over July to October 2008 so as to limit it to reimbursable work. Invoice 2008-73 for November 2008 and Invoice 2009-7 for January 2009 suffers from the same difficulty. Also any reimbursable claim by Mercon could not, under Clause 3.3.4(c) of Section 5, also claim telephone costs separately.

926. I therefore consider that Mercon's claim fails.

Assembly Invoices ASPO Milestones (Invoices 2008-13, 2008-20, 2008-22 and 2009-4).

927. These are described as "SYMS assembly" and are the principle substructure assembly invoices which overlap with the 'Erection' costs for the substructure in the re-measure.

928. Invoices 2008-13, 2008-20 and 2008-22 were initially paid by Mercon in June/July (2008-13) and October 2008 (2008-20 & 22) in the total lump sum payment of €600,000.00 but, as set out above, on 30 January 2009 Mercon sought unsuccessfully to re-allocate this amount to other invoices. The final invoice, 2009-4, makes up the difference between the €600,000 paid by Mercon before the purported reallocation and the €931,325 due on the basis of the time sheets. This invoice is described as "Final payment for 3-D assembly of SYMS foundations". The invoice claims the 20% final payment and the difference between the €750,000 and the €931,325.

929. Mercon says that it is entitled to be paid in respect of these invoices which it paid and were supported by timesheets. Bluewater says that none of the timesheets supporting any of the claims under this heading are signed by Mercon and Bluewater and were reviewed contemporaneously by either Bluewater or Mercon, as Mr Wickerhoff accepted. Bluewater says that he only corrected his witness statement under cross-examination. Bluewater says that given the fundamental difficulty that Mercon has in establishing what it was entitled to be reimbursed under this heading and given that the invoices overlap with the re-measure, the claims should fail. Alternatively, Bluewater says that, at most, Mercon should recover not more than €270,000 for these invoices which is the €600,000 originally paid less the €330,000 contained in the re-measure for the same work.

930. It is evident that position on the timesheets for the assembly work is unsatisfactory. As set out above Mercon and ASPO had agreed that this work would be carried out on a

lump sum basis, subject to it reverting to reimbursable costs if that lump sum was not agreed by Bluewater. This meant that contrary to Mr Wickerhoff's initial evidence the timesheets had not been submitted to Mercon until January 2009 and had not been checked at the time. There are voluminous timesheets for this work both in Bundles M3 and other M bundles but it is clear, as confirmed by Mr Van Den Brule, that these timesheets were likely to be inflated and Mercon generally had to argue with ASPO to ensure the invoices were reduced in other cases. This did not happen with these timesheets which appear to have been forwarded straight to Bluewater.

931. I am not persuaded that this is work which is reimbursable rather than work covered at least in substantial part by the re-measure. On this basis it follows that Mercon is not entitled to recover from Bluewater the full sum claimed. I therefore adopt the alternative approach put forward by Bluewater and allow €270,000. Mercon is therefore entitled to €270,000 but, on this basis of calculation, I do not consider that it is entitled to any mark-up.

Summary

932. In summary therefore Mercon is entitled to recover €1,075,965.67 for reimbursable work and €88,896.49 for mark-up, making a total of €1,164,862.16 as set out in the tables below.

		(A)	(B)	(C)	(D)
Invoice Number	**Description**	**Amount paid to ASPO by Mercon**	**Amount of A awarded to Mercon**	**Amount Paid by Bluewater**	**Overall Amount Payable to ASPO**
2008-24	***Crane for central column integration***	567,520.00	567,520.00	0.00	567,520.00
2008-38, 2008-53, 2008-71 and 2009-3	***Labour for turntable***	19,978.58	18,979.65	60,258.80	72,038.12
2008-25, 2008-36, 2008-49, 2008-69, 2009-1 and 2009-6	***Labour for integration for central column***	227,842.25	216,450.13	823,839.40	951,081.50
2008-40	***Lifting link/lug for central column***	Nil	Nil	118,807.00	112,866.65
2008-52	***Assemble temporary supports for upper bracings link for central column***	Nil	Nil	50,000.00	47,500.00
2008-44A	***Crane for turntable***	24,000.00	24,000.00	0.00	24,000.00
2008-26, 2008-48	***Pre-heating***	106,484.38	69,214.85	68,912.00	109,792.80
Mercon equipment rental	***Pre-heating***	Nil	15,260.00	0.00	Nil
2008-57, 2008-63, 2009-5	***Cranes – miscellaneous***	639.76	639.76	7,188.00	7,188.00
2008-15, 2008-43	***Welder qualification***	25,628.00	16,658.20	0.00	16,658.20
2008-51, 2008-64 and 2008-72	***Customs expense***	8,415.14	3,813.55	3,717.45	7,531.00
2008-61	***Painting materials***	11,157.00	7,252.05	0.00	7,252.05
2008-46, 2008-73 and 2009-7	Office & phone calls	15,024.00	Nil	0.00	Nil

2008-13, 2008-20, 2008-22 and 2009-4	Assembly Invoices ASPO Milestones	931,325.00	270,000.00	0.00	270,000.00
Totals				**1,132,722.65**	

		(E) = (B+C-D)	**(F) = (B-E)**	**(G)**	**(H) = (F+G)**
Invoice Number	**Description**	**Excess Amount payable to ASPO**	**Amount to be paid to Mercon**	**Mark-up due to Mercon on (D)**	**Total due to Mercon**
2008-24	***Crane for central column integration***	Nil	567,520.00	22,700.80	590,220.80
2008-38, 2008-53, 2008-71 and 2009-3	***Labour for turntable***	7,200.33	11,779.32	4,322.29	16,099.59
2008-25, 2008-36, 2008-49, 2008-69, 2009-1 and 2009-6	***Labour for integration for central column***	89,208.03	127,242.10	38,043.26	165,285.36
2008-40	***Lifting link/lug for central column***	5,940.35	-5,940.35	6,772.00	831.65
2008-52	***Assemble temporary supports for upper bracings link for central column***	2,500.00	-2,500.00	3,800.00	1,300.00
2008-44A	***Crane for turntable***	Nil	24,000.00	1,920.00	25,920.00
2008-26, 2008-48	***Pre-heating***	28,334.05	40,880.80	6,587.57	47,468.37
Mercon equipment rental	***Pre-heating***	Nil	15,260.00	1,220.80	16,480.80
2008-57, 2008-63, 2009-5	***Cranes – miscellaneous***	639.76	0.00	718.80	718.80
2008-15, 2008-43	***Welder qualification***	Nil	16,658.20	1,332.66	17,990.86
2008-51, 2008-64 and 2008-72	***Customs expense***	Nil	3,813.55	753.10	4,566.65
2008-61	***Painting materials***	Nil	7,252.05	725.21	7,977.26
2008-46, 2008-73 and 2009-7	Office & phone calls	Nil	0.00	0.00	0.00
2008-13, 2008-20, 2008-22 and 2009-4	Assembly Invoices ASPO Milestones	Nil	270,000.00	0.00	270,000.00
Totals			**€1,075,965.67**	**€88,896.49**	**€1,164,862.16**

Reimbursable costs (Star Rates)/ VOR 259

Issue 12: Is Mercon entitled to payment for personnel who worked on integration at Astrakhan at STAR Rates?

933. This item relates to the costs claimed by Mercon for sending Dutch personnel to integrate the Topsides in ASPO after they had been split prior to shipping to Astrakhan.

There are two main issues. First, whether Mercon is entitled to recover costs incurred as a result of splitting the Topsides and, secondly, whether Mercon is entitled to recover the costs of Dutch personnel undertaking the re-integration of the Topsides in Astrakhan.

Splitting of the Topsides

934. It is convenient first to summarise the chronology concerning the decision to split the Topsides.

935. Option 5, the transport option under the Contract was exercised on 29 March 2007, shortly after the Contract had been signed. Mercon then started investigating transport arrangements. In relation to the Topsides one of the issues was the height of those components and whether they would pass under the height restrictions on the Russian internal waterways. The Contract envisaged that the Topsides would be shipped as a single unit. The stowage plan in Attachment 6A of the Contract showed the pig receiver/hose deck as 12m x 7.85m x 10m, shipped on deck. However the design of the Topsides was developed by Bluewater.

936. On 16 April 2007 Mercon wrote to Bluewater with the following question: "*For shipment arrangements for the main structure (top sides) we require confirmation of the following data: - total height of main structure to be shipped: 12,5m?*" In its reply, the same day, Bluewater indicated that the total height of the main structure, to the top hose lifting point, was 13.8m. This was based on the position before further design changes were made to the Topsides.

937. Mr de Geus involved Mr van Schaayk, Bluewater's Logistic Coordinator, in May 2007 and asked him in an email dated 8 May 2007:

> "*What I need to know from you is following:*
> - *All transport restrictions and bottlenecks on route (southerly and northerly, including preference) from Gorinchem to Astrakhan – to be able to double check/verify with Mercon;*
> - *Maximum permissible shipping dimensions of EQUIPMENT (transport envelope) – required as input to project/design engineers;…*"

938. Mr van Schaayk's response on 30 May 2007 gave the following tentative answers:

> "*Presently Northern route is more cost competitive and popular but contractors leave option open which way to go when transport is due. Southern route has 18 locks (Northern route 16) and the tendency to cause severe delays.*
> ***Cargo dimension restrictions***
> *Max height either way (North or South) is 14.0 mtr. This includes transport equipment (vessel is approx. 3.5mtr and barrage approx. 1.5mtr). In extraordinary cases it is possible to arrange passage of objects with max height of 15.2mtr from water level. In such case high voltage power line is to be switched off.*"

939. On 17 July 2007, Mercon sent Bluewater a pre-stowage plan in which the Topsides were shown with a total height of 15m to 16m and it was proposed to split the Topsides into two for shipment.

940. On 27 July 2007 Mr van den Brule asked others in Mercon to consider the feasibility of transporting the Topsides as one unit. Mr Marinus Koek responded by email dated 30 July 2007 indicating issues to be investigated and noting the advantage in shipping the Topsides complete, as follows: "*Building a more complete Topside in Gorinchem, less handling and cranage in [Astrakhan] and developing 3 to 4 months extra time in the Gorinchem planning, because Topside can be shipped with the second transport to [Astrakhan], arriving just before the load-out and handling of the base in [Astrakhan]*."

941. On 9 July 2007 Mercon submitted a Technical Query (TQR No 003) in which it stated that the position of the offshore weld at +25445 was not a practical position. It stated that for: "*construction-transport and installation and welding offshore it is more efficient to position the weld between substructure and static column at a position approx. 1 meter below the mooring turntable deck framing at approx. El +30560. The weld in then positioned higher above the waterline and wave-action. This is to install static column with pig receiver/Hose Deck and turntable deck framing in one lift as intended.*"

942. On 7 August 2007 Mr Nijboer responded to say "*Offshore weld at +30560 is not possible because of drain tank. The anticipated location for the offshore weld is El +27845.*"

943. On 10 August 2007 Mercon replied as follows:

> "*From base the design in the contract and Method Statement we considered that the topside would be a transportable unit in one [piece] and the only item to be assembled in [Astrakhan] was the bolted on crane.*
> *The design has changed dramatically into a substantial size module which is with special effort and additional handling in St Petersburg still likely to be transported as one unit.*
> *With your reply to the technical query it becomes likely impossible to transport this to [Astrakhan] as one unit and consequently scope will have to be transferred to the [Astrakhan] year which was originally intended to be performed in Holland.*
> *This implicates that either we have to mobilise Dutch Subcontractors to [Astrakhan] or transfer scope to [Astrakhan] with consequence of all kind of interface and management problems we would like to avoid and to prevent [Bluewater] with the consequences.*
> *We strongly suggest reconsidering your reply.*"

944. On 21 August 2007, Mercon provided an internal update on the investigation into shipping the Topsides in one unit. They had contacted Flinter, Terranavtica and Vopak/Ppiret. Mercon was being advised by Flinter and Terranavtica that it was not possible to transport the Topsides in a single unit if a ship was used, but Vopak/Ppiret were stating that it was feasible to transport the Topsides as a whole by barge if certain things were done. In particular, the offshore weld split would have to be made at level +31380 and part of the top of the hose connection deck protruding above the railing would have to be installed in Astrakhan. If that was done then with "Space for grillage" being included, the overall height would be 13.085m.

945. On 27 August 2007 Mercon prepared a further revision of the document in which it was investigating shipping the Topsides as one unit, showing that it depended on where the offshore weld was to be located.

946. However by 31 August 2007 when Ppiret quoted prices to Mercon for transport by barge and ship the documents apparently show that Ppiret was then quoting for shipping the Topsides as two parts. Bluewater appears to have been aware of this at the time as Mr Piret of Ppiret forwarded everything he had sent to Mercon, including his detailed pricing proposals, to Mr de Geus who distributed the material internally within Bluewater, noting that it was "*For information only. No forwarding to [Mercon]*".

947. There was a meeting on 20 September 2007 to discuss the transport feasibility and as noted at a Bluewater internal meeting in October 2007 it was stated "Maximum height 10m". Mr van Daele wrote to Mr Nijboer on 21 September 2007 to say that the actions were:

> "*1. [Bluewater] will decide about the final cutting line in the main column week 39. To achieve the requested transport height a max. length of 2 mtr under the turntable is acceptable.*
> *2. [Bluewater] will study the possibilities to make a separation in the topside to achieve a max transport height of 10 mtrs.*"

948. Mr Brouwer responded in an email to Mr van Daele on 21 September 2007 in which he stated: "*As discussed by telecon [Mercon] cost due to transport changes in design and fabrication remain for [Mercon]. Extra engineering cost by [Bluewater] for [Bluewater] account.*" Mr Van Daele responded on the same day: "*Herewith [Mercon] confirms our agreement about split of costs.*"

949. Bluewater then issued Mercon with drawings LUK-S-S43-DR-4321 002 Rev 2 on 27 November 2007 and LUK-S-A43-DG-4335-001 Rev 1 on 30 November 2007. Those drawings showed a splice between the Hose Connection Deck and the Pig Receiver Deck "for transportation purposes". The offshore field weld was at +31150 with the "cutline" above the Pig Receiver Deck at +39900 making that part 8.750m high. The part including the Hose Connection Deck was then 6.5m high, making a total height of 15.25m.

950. Bluewater says that when option 5 was exercised it became Mercon's obligation to transport the Topsides without splitting them and in breach of that obligation it failed to do so and is therefore responsible for the costs caused in splitting the Topsides and re-integrating them in Astrakhan. Further, Bluewater says that it would have been possible to transport the Topsides by the Southern route through the English Channel, the Mediterranean and Black Sea and then through internal waterways to the Caspian Sea.

951. Mercon says that when the transport option was exercised it did not have design information to show that the Topsides had increased in size so that there would be difficulties in transporting it as a single unit through the inland waterways. Mercon says that it was Bluewater who decided to split the Topsides as set out in drawings issued in late November and early December 2007.

952. Mercon says it made a proposal, in good faith and acting reasonably, as to how it would carry out the works. Bluewater chose to accept the proposal and gave an instruction accordingly and that the consequences which flow from that are for Bluewater's account. That decision was made a long time before 30 June 2008 when VO-005 was finalised dealing with the transport option and which included the shipment of the Topsides in two parts. On that basis Mercon submits that Bluewater agreed to the split in the Topsides for transport or knew and acquiesced in the split of the Topsides which then needed re-integration in Astrakhan. Alternatively, Mercon says that, given the increase in the size of the Topsides, the transport of the Topsides in two sections was a reasonable way of carrying out the work. Mercon also says that the height restrictions were similar for the Northern and Southern routes

953. The chronology shows that after the instruction of Option 5, which occurred shortly after the Contract was signed, Mercon started to make preparations for the transport arrangements and an early concern arose about the size of the Topsides. Originally the integration of the Topsides components was to be carried out in Gorinchem and not in Astrakhan. It is evident that the size of the Topsides increased and I consider that, on the basis of the evidence, in 2007 it was accepted by Bluewater that it was necessary to split the Topsides for the purpose of transport. This led to the two drawings being produced by Bluewater in late 2007 which showed the split. The terms of VO-005 were finalised on 30 June 2008.

954. Essentially what Bluewater now says is that it would have been unnecessary for the Topsides to be split for transport if Mercon had properly organised the transport arrangements and therefore the need to split the Topsides arose because of a breach by Mercon of its obligations. On this basis it is said that Mercon is not entitled to a Variation Order to cover the additional integration work in Astrakhan which was requested under Mercon's requests VOR 264-M for local personnel rates and VOR 259-M for non-local personnel. Bluewater says that the fact that Mercon's own decision was embodied in VO-005 in due course does not make Bluewater responsible for the financial consequences of the split. It says that the erection remains to be valued by reference to the measure. Equally whilst Bluewater accepts that later in 2008, it was involved in the process of agreeing star rates for various personnel associated with the Topsides re-integration works, it says that, absent an obligation to pay those rates, this is irrelevant.

955. It is therefore necessary to see what the evidence is about the possibility of shipping the Topsides as one unit. In evidence Mercon referred Mr de Geus to documents in July 2007 which showed an overall height of around 16m. On the document attached to an email dated 17 July 2007 the Pig Receiver/Hose Deck was, it said, to be 12m x 7.85m x 10m but was to be shipped in two pieces 10m x 12m x 9m (Pig Receiver Deck) and 10m x 12m x 7m (Hose Connection Deck). The 16m (9m plus 7m) therefore showed an increase over the original 12m. On that basis and consistent with the information from Mr Schaayk, it was only possible to arrange transport of objects with a maximum height of 15.2m from the water level. Mr de Geus said he was "not sure" that the 16m structure could not be shipped in one piece. On the evidence I do not consider that the Topsides could be shipped as one unit.

956. Bluewater says, however, that the overall height of the Topsides could be reduced to 15.02m if the offshore weld split between Topsides and jacket was moved to +31.380 and that the height could be further reduced to 13.085m by the removal of the hose connection rack which could then be installed in Astrakhan. Bluewater says that this height included space for grillage and sea-fastening. At this height Bluewater says that although transportation by ship was not feasible, transportation by barge was feasible, as shown in the Ppiret documents.

957. Bluewater also says that this is consistent with the information which Mr de Geus obtained from Transglobal in 2012. In the quotation dated 14 May 2012 Transglobal refers to a module 15.06m x 11.84m x 16.66m. They refer to transporting the module by the Southern route with the module being transferred to a "Propus" type vessel in Mariopol to be transported to Astrakhan. However the attached diagram of the m/v Propus shows only a module which is 15.06m x 11.84m x 13.48m being possible. On this basis it appears that a height of 13.085 could be accommodated.

958. A Transglobal quotation was produced for Mercon in late August 2007. Bluewater says that this quotation was based on the Topsides being split into two units 9m and 7m high. On that basis Bluewater says that, as Transglobal was not asked to quote for shipping the Topsides as one unit it is not surprising that Transglobal did not suggest a shipping route which would have permitted that. Bluewater therefore says that, in fact, the Topsides could have been shipped as one unit in 2008 and Mercon cannot recover for re-integrating the Topsides in Astrakhan as they did not need to be split for transportation.

959. Mercon says that it gave the necessary consideration to the shipping of the Topsides at the time in 2007 and that, as the documents now show, Mr de Geus was sent a secret copy of the communication from Ppiret to Mercon at the time and therefore Bluewater had all the necessary information if it had wanted to challenge the decision to split the Topsides at the time. Mercon says that Mr de Geus's investigations in February 2011 and in 2012 when he said that he had discovered that "*the southerly route would have been the better option, as there were fewer restrictions on the transport height*" must be read in the light of how matters were seen at the time in 2007.

960. Mercon says that Mr de Geus's evidence as to the southerly route is inconsistent with the advice he obtained from Mr van Schaayk in 2007. Transglobal's quotation in 2012 was, Mercon says, a purely theoretical exercise long after the event and when Transglobal understood that it was not actually going to be instructed to ship anything. In any event the quotation was not to ship a unit 16.66m because, as noted above, the dimension is 13.48 m. Mercon says that these dimensions bear no relationship to the actual height of the combined Topsides 15.25m.

961. The final dimension of the Topsides, 15.25m, was set out by Bluewater on drawings that it issued and which showed the split in the Topsides. With the Topsides at 15.25m it is evident that it was no possible to transport that unit in one piece. Whilst Mr Schaayk's initial indication was that such a unit could theoretically be shipped in one piece, the reality was that the best that could be obtained was less than that and even the enquiries in 2012 only came up with a maximum height of unit of 13.48m.

962. It is clear that the discussion between the parties in 2007 showed that units of under 10m were in fact the largest practical units to be transported and I consider that Mercon and Bluewater properly and reasonably agreed that the units should be split for the purpose of transportation. That was a decision which was made by parties who were both aware of the transport possibilities and I do not consider that Bluewater can say that it was ignorant of the position. Bluewater then changed the design and issued drawings showing the split and this led to the necessity for the units to be reintegrated in Astrakhan. This was work which was not envisaged within the Contract and I consider that Mercon are entitled to be paid for the additional work caused by the changed design. I therefore now turn to consider what sum is recoverable.

Issue 13: If so, for what personnel and in what sums?

Dutch personnel

963. Bluewater contends that, even if the cost of the re-integration work is in principle recoverable, it only agreed to Dutch personnel undertaking the re-integration work in ASPO because Mercon led it to believe that ASPO personnel were not capable of undertaking the work. Bluewater says that, having engaged ASPO to complete the work and undertake considerable re-work after the termination of the remaining work, Bluewater no longer believes that Mercon's assertions in this regard are justified and thus refutes the additional cost of using Dutch personnel.

964. Mercon refers to its letter of 10 August 2007 where it informed Bluewater that it would be preferable to mobilise Dutch subcontractors to Astrakhan if the Topsides were to be split. Mercon says that Bluewater never objected to that and, as discussed above, it was actively involved in negotiations about the applicable star rates.

965. This work was originally to be done in Gorinchem by Dutch workers and I consider that it was reasonable for Mercon to use those expatriate personnel to carry out the re-integration work in Astrakhan. In principle therefore Mercon is entitled to recover for some expatriate personnel. That raises further issues. First, which personnel should be included? Secondly what rates should be applied? Thirdly, there are then disputes about the hours spent and a dispute about travelling time.

Types of personnel

966. Bluewater says that it was not necessary to mobilise particular personnel to Astrakhan. Bluewater accepts that the claims for welding inspector, electrical technician and insulation technician are valid but says that the claims for the site construction manager, construction superintendent, pipe work inspector or pre-commissioning engineer are not. Bluewater says that Mercon relies on provisional agreements reached at the time which are not binding on Bluewater and, in any event, the claims for certain personnel, such as the site construction manager, have always been disputed.

967. Bluewater also says that, at the time, ASPO was undertaking considerable work with fully priced preliminaries for full time supervision and management and the issue is whether this supervision and management needed to be supplemented by personnel dedicated to the integration of the Topsides, if indeed there were such personnel. Bluewater refers to the evidence of Mr Wickerhoff and says that this shows that Mercon was claiming for the construction manager in the preliminaries, variations and in these star rates.

968. Bluewater also says that Mercon originally sought to claim for its project manager under this claim and also still claim for the construction superintendent, Mr van Zomeren, although he would have been required even if the Topsides had not been split. Bluewater says that the evidence does not justify the general claim for pipe work inspection, the pre-commissioning engineer or the welding inspector and insulation technicians which would depend on the nature of the work and the need for these services. Bluewater also refers to the fact that Mercon's claim is large compared to the direct costs. On Mercon's case those direct costs for integrating the Topsides were some €86,000.

969. Mercon claims in respect of seven types of personnel: site construction manager, construction superintendent, welding inspector, pipework inspector, pre-commissioning engineer, electrical technician and insulation technician. It says that it is entitled to claim for all these personnel and relies on Mr Wickerhoff's evidence. It says that there is no double counting as it is entitled to additional construction manager time in Astrakhan in relation to the increased work for the fifth leg, for the integration of the Topsides and for various variations in Astrakhan.

970. Mercon refers to that fact that before the termination of the Contract, the parties had reached a substantial measure of provisional agreement on the payment for non-local personnel. On 16 December 2008, Bluewater wrote to Mercon proposing star rates and times for the various personnel, adopting the rates in Attachment 5C1. There were then discussions and Mercon sent revised figures on 15 January 2009. On 21 January 2009, an internal Bluewater email summarised the differences between the parties, with Mercon claiming €732,736 and there being €322,971 in dispute. On 28 January 2009 it appeared that Mr de Geus had "provisionally" accepted the figures but there was a need for a final decision internally within Bluewater. As a result Mercon says that Mr de Geus had "provisionally" accepted all but the site construction manager (Mr Wickerhoff) and the pre-commissioning engineer.

971. Mercon submits that whilst, as Bluewater says, a site construction manager was due to be provided at Astrakhan in any event as part of the lump sum preliminaries, the lump sum of €300,000 was by reference to the original scope of the Contract and the integration of the Topsides was an entirely new and separate activity not covered in that lump sum. Mercon says that the pre-commissioning engineer's role was to supervise the integration of the electrical circuitry for the Topsides and its subsequent pre-commissioning and that, contrary to what Bluewater says, that would not have been done by the site construction manager. Mercon says that no proper explanation is given for Bluewater's challenge to the construction superintendent or pipework inspector roles which were provisionally accepted by Mr de Geus in January 2009.

972. I consider that the roles of the construction superintendent and pipe work inspector were a necessary part of the re-integration work. I am not clear that a separate person would be required as a pre-commissioning engineer and consider that this could have been covered by others. Further whilst some time may have been spent by Mr Wickerhoff as site construction manager in relation to this work, I am not persuaded that his full involvement was not recovered elsewhere. I therefore do not make any allowance for the site construction manager or pre-commissioning engineer. This accords with Bluewater's position on 21 January 2009.

Rates

973. The quantum experts have agreed that a fair enhancement on the Attachment 5C1 rates ("5C1 rates") to reflect Western European personnel based in a foreign country, as compared to their usual rate, is 15%. The only area of disagreement between the experts relates to the question of whether a mark-up should then be applied. Mr Dixon is of the view that no mark-up should apply to the 5C1 rates plus 15% because those rates are not 'cost' rates. Mr Simons disagrees and considers that a mark-up based on reimbursable rates should apply.

974. The quantum experts dealt with this issue during a concurrent evidence session when I dealt with item C of the agreed issues for quantum experts: "*Should mark-up be added to Star Rates for non-local personnel working in Astrakhan, where the labour rate is derived from Attachment 5C1?*" Mr Dixon explained that the experts had seen no evidence to support the claimed rates in terms of costs so that he and Mr Simons had agreed to use the 5C1 rates and apply an uplift of 15% as a reasonable uplift to reflect the fact that the personnel were working in Astrakhan. On that basis he says that no mark-up should be added to the rate. Mr Simons said that his understanding of using the 5C1 rates with an enhancement was that the experts were seeking to obtain a cost for the person working in Astrakhan, rather than a value. He said that after obtaining the labour rate for a particular class of individual then, in order to calculate a rate, a mark-up for accommodation costs and transport had to be applied.

975. The experts arrived at the enhanced rates as analogous or "star" rates based on the 5C1 rates. Mr Simons says it is necessary to make some allowance for the cost of accommodation and transport which, he said, would be a fairly small proportion of the overall cost of the person. Bluewater says that no mark-up should be allowed as using 5C1 rates and a mark-up would be a departure from the contractual mechanism. Bluewater says that the 15% uplift has been applied to the whole of the 5C1 rate including the profit element and a further mark-up would include a double profit recovery. Mercon says that the experts arrived at a cost and that, in principle, the mark-up should be applied.

976. I consider that the principle of using the 5C1 rates was to seek to agree a reasonable rate in the absence of information on cost. The agreement of a 15% uplift to establish the equivalent rate for working abroad might have had some increase to allow for accommodation and transport but, as Mr Simons says, any increase would be small. In addition the 15% includes an uplift on profit. Overall therefore I am not persuaded that there should be any additional mark-up and I propose using the 5C1 rates plus 15%.

977. The other outstanding issue is the number of travel days to be allowed for travelling to and from Russia per shift. Mercon allows 3 days based on the experience of Mr Wickerhoff. Bluewater allows 2 days based on Mr de Geus's evidence that it would take one day to make the journey each way for which he provides documentary evidence of flights. On the basis of this evidence I consider that an allowance of 2 days provides a reasonable allowance for travelling time.

Personnel hours

978. There is a difference between the parties on the number of hours which is based on timesheets prepared by Mercon. Having allowed all the personnel, except the Site

Construction Manager and Pre-Commissioning Engineer, I consider that it is appropriate to reduce the hours to those which are agreed by Bluewater.

Conclusion

979. Mercon now claims €651,310.48 plus 8% mark-up, making €703,415.32.

980. The quantum experts have provided a helpful analysis of the possible combinations of figures in Appendix 3.1 to their First Joint Statement. Based on my findings set out above, I allow for the personnel under the heading "Based on Bluewater Provisionally Admitted Personnel (Contemporaneous Assessment)". I adopt the column "Using Bluewater Assessed Hours" and I use "Expert's Assessed Reasonable Rates (5C1 rates + 15% plus agreed allowances for overseas working – assuming 2-day travel allowance" but "With no Mark-up". This gives a figure of €454,899.87.

Other Variations

Issue 14. Did Mercon fail to comply with the notice requirements in clause 14.3 to 14.7 in respect of any claimed variations and, if so, what effect does this have (if any) on its right to payment?

Clause 14 of the Contract

981. Bluewater contends that Clause 14 contains the only mechanism for Mercon to be entitled to Variations and that compliance with its provisions is a condition precedent to recovery in respect of the disputed VORs. Bluewater says that it is for Mercon to prove that, in respect of each disputed VOR, it complied with the requirements for notice or that, in respect of that particular VOR, Bluewater exercised its discretion unequivocally to consider the VOR in any event.

982. Although Bluewater accepts that there were cases where, in its discretion, it agreed to consider VORs in respect of which rights were forfeited, this was not usually the case and Mercon must prove its case in respect of each and every separate VOR.

983. Bluewater says that Mercon cannot rely on waiver because Clause 34.1 of Section 2(a) of the Contract provides as follows in relation to waiver:

> "*None of the terms and conditions of the CONTRACT shall be considered to be waived by either BLUEWATER or the CONTRACTOR unless a waiver is given in writing by one Party to the other. No failure on the part of either Party to enforce any of the term and conditions of the CONTRACT shall constitute a waiver of such terms.*"

984. Mercon contends that none of the disputed VOR claims fall into any categories of work to which Clause 14.3(b) applies. It says that it is entitled to claim additional time and money for out of scope work regardless of whether it has complied with Clause 14 and regardless of the limits which Clause 14 seeks to impose on the scope of that entitlement. It submits that compliance with the administrative provisions of Clause 14 is not a condition precedent and does not operate as an exclusion or limitation on its entitlement to claim extra time and money. It also says that Mr de Geus accepted that he would not deny entitlement simply on the basis of late service of any notice.

985. Mercon says that Bluewater has a right to give instructions under clause 14.1 and, by clause 14.1(b), Mercon is required to proceed immediately with any instruction given. It says that Clauses 14.3 and 14.4 deal with the procedure by which Mercon can request a Variation which, under the Contract, is an adjustment to the Key Dates or Contract Price. It refers to Clause 1.31 of Section 2(a) and says that a Variation, as there defined, is not an instruction for out of scope work. Mercon says that there is no express entitlement to extra time and/or money in the event that a Clause 14.1 instruction is given.

986. Mercon says that the difficulty with Clause 14.3(a) is that it requires that the Variation request includes a reference to the Clause of the Contract under which the entitlement arises but there are no such clauses. Mercon says that whilst Section 5 of the Contract envisages the payment of extra money for Variations and provides a mechanism for payment, there is no clause giving Mercon an express entitlement or right to claim money. In respect of time, Mercon says that the only express entitlement to a Variation for time arises in the event of force majeure under Clause 15.5 or if Bluewater has exercised a specified contractual option as set out in Clause 5 of Section 5 of the Contract. It says that Clauses 14.3(d)(i)-(v) seek to deprive Mercon of entitlement to any "Change" which is not a defined term.

987. Mercon submits that Clauses 14(3) and 14(7) are disconnected from the provisions necessary to give them purpose in the form of a clause or clauses listing defined relevant or compensation events or "occurrences" entitling Mercon to claim extra time and money. In those circumstances Mercon says that neither clause operates, or purports to operate, as an exclusion of Mercon's common law or statutory rights to additional time and money where out of scope work is instructed.

988. Mercon also refers to Clause 14.4 which contains a further obligation on Mercon when applying for a Variation in that, within 7 days of any request made under clause 14.3 or such other date as Bluewater may specify Mercon is required to provide a "fully detailed estimate prepared on a basis as directed by Bluewater" with a description of the varied work, a schedule for execution showing the resources to be employed and the effect on the Contract Price and the Programme and the Schedule of Key Dates.

989. Mercon says that, because of the stipulated 7 day deadline for the provision of information in support of the VOR, Mercon could not issue a VOR until it knew or had to hand all of the likely consequences of the "occurrence" for which it was entitled by a Clause in the Contract to request extra time or money, or had been advised by Bluewater what information Bluewater required to be given under clause 14.4. It says that Clause 14.4 proceeds on the basis of there being some dialogue between the parties, after an "occurrence", but prior to the issue of the VOR, as to the scope of the information Bluewater required by way of documentary back-up and that the requirement to provide the VOR "without delay" in clause 14.3 is meaningless unless Bluewater has indicated what its documentary requirements are.

990. Mercon also refers to Clause 14.7(a) which applies where Mercon wants to claim any adjustment to the Contract Price or the Schedule of Key Dates "additional to that previously determined by Bluewater for a Variation issued by Bluewater or requested by" Mercon. In such circumstances, a notice has to be given "without delay" after "the occurrence giving rise to such claim". The "occurrence" is defined in clause 14.7(a) as

a rejection by Bluewater of a request for a Variation (clause 14.7(a)(i)) or where the effect on the Contract Price or Schedule of Key Dates could not be determined at the time (clause 14.7(a)(ii)). Where a claim under clause 14.7 is made, Mercon is required to keep all contemporary records as may be reasonably necessary to support its claim it may subsequently wish to make (clause 14.7(a)), present Bluewater with daily time and material records, signed by Bluewater, and to provide a monthly record of all such claims (clauses 14.7(b) and (c)).

991. Mercon says that, in this case, a refusal to consider a VOR only because there was a procedural defect in making it would not be a proper exercise of discretion and that the courts readily uphold notices that have achieved their purpose, even if there is some technical flaw. It refers to the decision of the Court of Appeal in Tudor v M25 Group Ltd [2003] EWCA Civ 1760.

992. Mercon submits that if a party's rights under a contract are contingent upon performance of an obligation, that obligation must be clearly set out and refers to the decisions in Persimmon Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd [2008] EWHC 2379 (TCC) at [298] and in Steria Limited v Sigma Wireless Communications Limited [2007] EWHC 3454 (TCC) where His Honour Judge Stephen Davis held that if there was any genuine ambiguity in the wording of the contract as to whether the requirement for a notice was a condition precedent, then the provision should not be construed as being a condition precedent.

993. Mercon says that under the Contract, the issue of an instruction under Clause 14.1 and the requirement for Mercon to proceed "immediately" with such instruction show that the information required in clauses 14.3, 14.4 and 14.7 was not required by Bluewater in order to decide whether to issue the instruction or not and clauses 14.3 and 14.7 are not connected to the issue of instructions under clause 14.1.

994. Mercon says that if it fails to submit a request under clause 14.3(a) when it considers or should reasonably have considered that an occurrence has taken place for which it is entitled to receive a Variation and/or if it fails to provide supporting estimates in accordance with clause 14.4 then it does not lose its rights to extra time or money but rather Mercon shall, at the sole discretion of Bluewater, forfeit any right to receive such Variations and any rights concerning adjustment to the Contract Price and/or Schedule of Key Dates.

995. Similarly, Mercon says that if it fails to present the records and documents to Bluewater in the manner required under clause 14.7(b) and (c), then its right to make claims for extra time and money are only forfeit at the sole discretion of Bluewater, clause 14.7(d).

996. Mercon says that it did submit VORs when it reasonably considered that it was entitled to extra money or time and that it did provide sufficient supporting estimates so as to enable Bluewater to consider the requests and in the circumstances, it could not be a proper exercise of discretion for Bluewater to cause Mercon to forfeit its rights.

997. Mercon says that forfeiture of rights for non-compliance with clause 14.3(a) or clause 14.7(d) is not automatic but is a matter for Bluewater's discretion and Bluewater does not say that it was entitled to and did exercise its discretion or that, in so doing, it had

any or any proper basis for so doing. Mercon says that such a contractual discretion must be exercised for the proper purposes of the contract and relies on the decision of the Court of Appeal in Socimer International Bank Ltd v Standard Bank London Ltd [2008] EWCA Civ 116 and the passage in the judgment of Rix LJ at [66] and Clause 33.1 of Section 2(a) of the Contract, already cited above.

998. Alternatively Mercon submits that, if, contrary to the above, Bluewater is entitled by clause 14.3 or 14.7 to forfeit its rights to extra money *only* as a result of non-compliance with the procedure, then those clauses should be held unenforceable as penalties.

999. Clauses 14.3, 14.4 and 14.7 of Section 2(a) of the Contract, which are in the following terms:

> "*14.3 (a) If the CONTRACTOR considers that an occurrence has taken place for which it is entitled to receive a VARIATION, the CONTRACTOR shall request without delay in writing that BLUEWATER issue a VARIATION. Any such request shall include details of the occurrence including any relevant dates and the Clause or Clauses of a Contract under which the CONTRACTOR considers itself to be entitled to a VARIATION.*
> *(b) If the CONTRACTOR fails to submit requests for VARIATIONS in accordance with Clause 14.3 (a) when it considers or should reasonably have considered than an occurrence has taken place for which it is entitled to receive a VARIATION and/or fails to provide supporting estimates in accordance with Clause 14.1, the CONTRACTOR shall, at the sole discretion of BLUEWATER, forfeit any right to receive such VARIATIONS and any rights concerning adjustment to the CONTRACT PRICE and/or SCHEDULE OF KEY DATES.*
> *...*
> *14.4 Within Seven (7) days of having been requested by BLUEWATER in accordance with Clause 14.2 (a) or the CONTRACTOR having requested a VARIATION in accordance with clause 14.3 (a) (or within such longer period as BLUEWATER shall agree to be reasonable for any specific VARIATION) the CONTRACTOR shall submit to BLUEWATER fully detailed estimate prepared on the basis as directed by BLUEWATER. Such estimates shall include, however, shall not be limited to:*
> *(i) a description of the work to be varied under the VARIATION;*
> *(ii) a detailed schedule for the execution of the VARIATION showing the resources to be employed;*
> *(iii) the effect (if any) on the CONTRACT PRICE;*
> *(iv) the effect (if any) on the PROGRAMME and SCHEDULE OF KEY DATES.*
> …
> *14.7 Disputed or outstanding VARIATIONS*
>
> *(a) If at any time the CONTRACTOR intends to claim any adjustment to the CONTRACT PRICE and/or SCHEDULE OF KEY DATES additional to that previously determined by BLUEWATER for a VARIATION issued by **B**LUEWATER or requested by the CONTRACTOR, the CONTRACTOR shall give notice in writing of such intention without delay after the occurrence giving rise to such claim. Such occurrence shall include but not be limited to the following:*

(i) rejection by BLUEWATER of a request for a VARIATION made by the CONTRACTOR;
(ii) any VARIATION where effect on CONTRACT PRICE and/or SCHEDULE OF KEY DATES cannot be determined at the time;
(iii) outstanding VARIATIONS in accordance with Clause 14.1 (c).

In case of any such occurrence the CONTRACTOR shall keep such contemporary records as may reasonably be necessary to support any claim it may subsequently wish to make.

(b) For any such notice of claim the CONTRACTOR shall keep daily time and material records or further contemporary records as the case may be material to the claim, copies of which shall be supplied to BLUEWATER REPRESENTATIVE on a daily basis. These records may be signed by BLUEWATER REPRESENTATIVE, however, shall at any time be deemed to be signed for receipt only, without confirming correctness or accepting any liability, at that time.

(c) The CONTRACTOR shall send to BLUEWATER at the end of every month an account giving particulars, as full and detailed as possible, of all such claims.

(d) If the CONTRACTOR does not submit records and accounts in accordance with the provisions of Clauses 14.7(a), 14.7(b) and 14.7(c) the CONTRACTOR shall, at the sole discretion of BLUEWATER, forfeit any right to receive any adjustment to the CONTRACT PRICE and/or SCHEDULE OF KEY DATES in respect of any such claims.

(e) Where any matter in respect to adjustments to the CONTRACT PRICE and/or SCHEDULE OF KEY DATES has not been finalised and without prejudice to the rights of either BLUEWATER or the CONTRACTOR, BLUEWATER having taken into account the relevant provisions of the CONTRACT and all other relevant factors, will make such adjustments as it considers to be fair and reasonable."

1000. The provisions of the Contract relating to requests for Variations and the grant of Variations have not been well drafted, as Mercon points out. I do not consider, though, that the poor drafting means that the notice provisions in Clauses 14.3 and 14.7 can be ignored. It is necessary to analyse the provisions of Clause 14 in a little more detail.

1001. Bluewater is given a wide power under Clause 14.1 to issue instructions to Mercon and, as I have stated above, the instruction does not have to be in a particular form provided that it is clear that it is an instruction to which Clause 14.1 applies.

1002. The Contract deals with "VARIATIONS Generally" in Clause 14.2. Clause 14.2(a) provides that Bluewater may require Mercon to submit estimates under Clause 14.4 "*Prior to instructing or authorising any VARIATION*." Together with Clause 14.3 which provides for Mercon to request Bluewater to issue a Variation, this shows that Variations are a matter for Bluewater to issue, instruct or authorise.

1003. Clause 14.2 then contains two important provisions relating to Variations. First, Clause 14.2(b) provides that "*The CONTRACT PRICE and/or SCHEDULE OF KEY DATES*

shall be subject to adjustment only as a result of a VARIATION." This shows the importance of Variations in being the mechanism by which the Contract Price or Schedule of Key dates is adjusted so that, in particular, Mercon is entitled to additional payment or an extension of time.

1004. Secondly, Clause 14.2(c) then provides that: "*The CONTRACTOR shall not be entitled to receive a VARIATION to cover any instruction, decision or act of BLUEWATER which may be made or given in order to ensure that the CONTRACTOR complies with any of its obligations under the CONTRACT.*" This is of importance because by stating that is the situation where Mercon is not entitled to receive a Variation it makes clear by necessary implication that Mercon is entitled to receive a Variation to cover any instruction, decision or act of Bluewater. In my judgment, when read with Clause 14.2(b), this means that Mercon is entitled to receive a Variation for any necessary adjustment to the Contract Price and the Schedule of Key dates as a result of an instruction, decision or act of Bluewater. I consider that those matters would also amount to "an occurrence" under Clause 14.3.

1005. The way in which adjustments to the Contract Price and the Schedule of Key Dates are made are then dealt with in Clauses 14.5 and 14.6. However, the right of Mercon to receive adjustments to the Contract Price or Schedule of Key Dates is stated in Clauses 14.3(b) and 14.7(d) to be forfeited if certain actions are not taken by Mercon. There is an issue as to the effect of those provisions.

1006. Clause 14.3(b) refers to Mercon failing to submit requests in accordance with Clause 14.3(a) "*when it considers or should reasonably have considered that an occurrence has taken place*" or failed to provide supporting estimates in accordance with Clause 14.4. Clause 14.3(a) states that Mercon shall request Bluewater to issue a Variation "without delay" and states that the request should include details of the occurrence including any relevant dates and the Clause or Clauses under which Mercon considers itself to be entitled to a Variation.

1007. Clause 14.7 then applies where Bluewater has rejected a request or part of a request for a Variation and Mercon has then to give notice "*without delay after the occurrence giving rise to such claim*". Clause 14.3(a), (b) and (c) require Mercon to keep records and submit accounts. Clause 14.7(d) states that Mercon's rights to adjustments are forfeit if Mercon does not submit those records and accounts under Clauses 14.7(a), (b) and (c).

1008. It can be seen that the notice provisions require Mercon to provide certain information to Bluewater in relation to the need to issue a Variation and make adjustments to the Contract Price or the Schedule of Key Dates.

1009. The provisions as to the forfeiture of rights in Clauses 14.3(b) and 14.7(d) are subject to the important qualification that the rights shall "at the sole discretion of Bluewater" be forfeit. In my judgment Mercon is correct that this provision then brings into play the general law which applies to contractual obligations which provide for one party to be given a discretion, as explained by Rix LJ in Socimer at [66]. The underlying purpose is that the discretion should not be abused. Rather, as also made plain by 33.1 of Section 2(a) of the Contract, Bluewater's exercise of the discretion is limited, as a matter of

necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality.

1010. Notice provisions, in the context of making adjustments to the Contract Price and Schedule of Key Dates, are necessary so that Bluewater as the decision maker has information in a timely manner so that it can properly assess those adjustments. In this particular case, the Contract gives Bluewater the right in Clause 14.1 to give instructions which Mercon has to carry out immediately. Thus, Bluewater can instruct work which may have a large additional cost and cause a long delay but under Clause 14.3(b) and 14.7(d) are given a discretion as to whether to pay or grant an extension or time by making an adjustment to the Contract Price or Schedule of Key Dates.

1011. In such circumstances the absence of information given at a particular time may have no effect on Bluewater's ability to make those adjustments. It would clearly be an abuse for Bluewater to reject a request for a Variation or to seek to forfeit Mercon's rights to additional payment or an extension of time, merely because the information was not given "without delay" or some information was missing. To do so would mean that Bluewater was entitled to have work carried out for which Mercon would receive no payment and for Bluewater to cause delay and then also recover liquidated damages for that delay. No clearer case of abuse can be made out and would be contrary to the limitations on Bluewater's discretion in terms of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality.

1012. Bluewater has not sought to justify any exercise of its discretion to forfeit Mercon's rights to adjustments to the Contract Price or the Schedule of Key Dates. It merely says that it is for Mercon to establish that it complied with the provisions of Clause 14.3(b) and 14.7(d). I do not consider that this is sufficient. It must decide whether to exercise its discretion to forfeit Mercon's rights to an adjustment. Merely lateness or lack of some information is not an adequate basis for doing so under the Contract. In many cases Mercon has asserted that it complied with the relevant provisions and, apart from a general denial, Bluewater has not responded or sought to justify the exercise of its discretion to forfeit the rights to adjustments. Mere reliance on a notice clause of the type which gives one party to a contract a discretion to allow or disallow a claim is not sufficient.

1013. Despite that I shall consider the extent to which Mercon have, in fact, given the relevant notices in relation to its claims.

Variation Orders and Variation Order Requests

Issue 15: What is the value of the variation account (excluding VOR 8), including discount (if any)?

VORs agreed between the parties

1014. There are a number of VORs which were agreed between the parties. These have to be taken into account in the Final Account analysis.

1015. In addition to those agreed VORs, there are the following VORs which have been agreed since the commencement of proceedings as follows:

Fabrication of main bearing support rings (option O6.1) [VOR 126]

1016. This VOR is now agreed in the sum of €139,282.80.

Additional E&I works [VORs 128, 129, 227, 228, 230, 239, 243, 256, 258, 270]

1017. This VOR is now agreed in the sum of €61,495.75. That sum was agreed by Bluewater on 27 January 2009 on the basis that the time impact was nil but Mercon reserved its position saying that a decision as to the time impact of these out of scope works was pending.

Costs to execute Site Instruction 21 [VOR 148]

1018. This VOR is now agreed in the sum of €748.00.

Fabricating slotted holes in cover ring [VOR 235]

1019. This VOR is worth less than €1,000 and is not now pursued.

Unloading of platforms and supports [VOR 236]

1020. This VOR is now agreed in the sum of €520.

Costs to execute Site Instruction 43 [VOR 250]

1021. This VOR is worth less than €1,000 and is not now pursued.

Disputed VORs

1022. There are a number of disputed VORs for which Mercon makes a claim. The quantum experts have considered the VORs in their joint statements and, although there are some items which they have been unable to value there are no significant points of disagreement between them regarding the disputed VORs.

VO-003 – Resubmission of Drawings

1023. VO-003 revision 05 dated 15 September 2008 included an agreed sum of €74,200.00 for the resubmission of 371 design drawings above revision 1 by Bluewater at a time rate of €200 per drawing, as provided at item 7 Table 3 of Attachment 5C1 of the Contract. The parties now agree a figure of €89,200.00 for the resubmission of drawings on the basis that Bluewater accepts that it resubmitted 446 design drawings above Rev 1.

Revision of shop drawings (sub-contractor invoices)

1024. Mercon also claims the costs of the time spent by its sub-contractor, Iv Bouw & Industrie bv, in providing revisions to shop drawings consequential on the receipt of Bluewater's resubmitted design drawings. Mercon submits that this is additional work not included within the time rate allowance for resubmission of drawings in item 7 of Table 3 of Attachment 5C1, which, it says, is a handling fee, for registration, review and distribution of the new drawing. Mercon says that it is reasonable for it to recover the cost that follows on from the design changes on the drawings, in addition to the rate of €200 per submission.

1025. The quantum experts have agreed figures-as-figures of €71,480. Mercon relies upon the invoices submitted by its subcontractor as evidence of the work that was in fact done

and the variation orders that Iv Bouw issued in respect of Bluewater's resubmitted designs.

1026. Bluewater says that the revision of shop drawings caused by its resubmission of 446 design drawings forms part of the Contract Price. Mercon accepts that at item 3 of Attachment 5B there is a lump sum allowance, as part of the preliminaries of €111,543.90 for the production of fabrication and shop engineering drawings but says that this figure was agreed on the basis of the original SYMS and on the basis the SYMS design would be issued as one package, rather than in an ad hoc and sporadic manner.

1027. The rate in Table 3 of attachment 5C1 is stated by Clause 3.2.4(a) of section 5 of the Contract to "*apply equally to work performed, regardless of the quantity of time or services used*". Equally there is a Lump Sum in Item 3 of Attachment 5B to cover "*shopengineering SYMS*".

1028. I consider that where there is a revision to a drawing then the rate in Attachment 5C1 applies. For some revisions a greater or lesser amount of work may be needed but that is covered by the rate. If therefore there has to be a change in a shop drawing by a sub-contractor then that, too, would be included in the rate. Accordingly included in the payment of the €200 for the 446 drawings would be the cost of any revision of the shop drawings.

Written work instructions

1029. Mercon claims €6,450 (86 hours x €75.00 per hour) for writing work instructions as a consequence of the provision of the 446 revised design drawings by Bluewater. It says that the instructions had to be created by Mercon's production engineering department to the shop floor in respect of work that was done or in progress. Bluewater says that this work is part of the Contract Price.

1030. The quantum experts have verified that the hours and rates claimed are as submitted by Mercon as part of VORs but have not seen any time sheets from Mercon for these claimed hours and these items were not agreed by Bluewater.

1031. Again, where there is a revision to a drawing then the rate in Attachment 5C1 applies and would include the writing of work instructions as a consequence of the revision. Accordingly included in the payment of the €200 for the 446 drawings would be the cost of writing any work instructions as a result of the drawing revision.

Isometric drawings

1032. Bluewater claims €63,294.00 for Bluewater's direct preparation of isometric drawings (based on 548 hours at €115.50 per hour).

1033. Mercon says that these hours first appeared together in VO-003 rev 2 dated 21 January 2008, but the relevant drawings were not and have not since been identified. Mercon says that it did not have the design detail available to produce isometric drawings, although it did produce isometric drawings for the field runs of the minor pipework that it had to design under Clause 5.3 of section 3. It says that this claim by Bluewater is wholly unsubstantiated and should fail.

1034. For Bluewater to be able to make a claim for the cost of the preparation of the isometric drawings it would have to establish that Mercon were responsible for producing those drawings and failed to do so in circumstances where that amounted to a breach of contract or entitled Bluewater to make a claim under the Contract. I do not consider that Bluewater has established this.

Summary

1035. Accordingly I allow €89,200.00 in relation to VO-003, Resubmission of Drawings.

Increased size of contract scope, including 5th leg to the substructure (800T mooring loadcase) [VOR-004]

1036. Bluewater does not dispute liability for this item in broad terms but it is made up of several smaller items some of which are disputed. Further, Bluewater's position is that the claim is vastly inflated.

VOR-004

1037. Mercon claims additional money for lump sum items that were affected by the re-design of the SYMS for an 800 tonne mooring load. The claim excludes elements that have been dealt with through the re-measure account in VO-008.

1038. Bluewater notified Mercon on 18 and 22 June 2007 that it intended to change the SYMS design from a 4 legged structure to a 5 legged structure. Mercon was told there would be no extension of time and was told to provide the "detailed impacts" before 28 June 2007. VOR 004 revision 1 was issued on 3 September 2007 and Bluewater responded on 5 September 2007 accepting some parts and issuing VO-004 and rejecting other parts. On 11 December 2007 Bluewater told Mercon that it would not accept further additional costs other than those agreed as part of VO-004 and noted that some items had not been agreed and remained outstanding.

1039. Mercon responded on 12 December 2007 stating that "*not only the increased fabrication costs need to be compensated for but also the increased costs for management, caused by the changes in the design and the larger quantity of work that were to be delivered within the same unchanged schedule…[Mercon] is willing to execute the presented recovery plan provided [Mercon] will be compensated and Key Dates amended.*"

1040. Mercon originally claimed €1,172,595.46 for this item. Following concessions in Mercon's Opening Submissions at paragraphs 336 and 338, this figure was reduced by €73,830.64. At Attachment 2 of Appendix 6 Bluewater provides its valuation for this item, certain aspects of which have been agreed between the parties and others have been addressed by the QS experts in their first joint statement at 5.56-5.99. The details of the QS's views are addressed on an item by item basis below.

1041. The quantum experts have reviewed the 12 items that make up this claim in paragraphs 5.56-5.98 of their first joint statement.

Item 2.1 – Additional Cost Central Column/Brace Connections (VOR 001 Rev 1)

1042. This is agreed in the sum of €27,210.00.

Item 4.2 (1) - Additional Fabrication Engineering (Heavy Handling Engineer) (VOR 017 Rev 1)

1043. This is agreed in the sum of €66,150.00.

Item 4.2 (2) – Additional Fabrication Engineering (Shop Engineering Co-ordinator)

1044. Mercon accepts €15,000.00 admitted by Bluewater for this claim.

Item 4.3 – Additional Cost for Extra Pile

1045. Mercon claims €246,721.83 and Bluewater admits €241,016.38 but the quantum experts have agreed that the proper value of this item is €244,406.03, which is the sum I allow.

Item 4.7 – Additional Costs Shear Keys to Sleeves

1046. Mercon does not pursue this claim.

Item 4.9 – Additional Costs Grout System

1047. Mercon claims €32,520.00 for this work. Bluewater says that the work is covered by VO-006. The issue is whether two grout lines for the 5th leg were included in VO-006. The grout lines are used to pump in grout to anchor the piles and pile sleeves.

1048. Bluewater says that Mercon has no evidence to support an assertion that VO-006 does not cover the grout lines system. It says that Mr Wickerhoff's evidence demonstrated that he was not able to support a claim that Mercon is entitled to further payments for the grout lines. Bluewater says that all grout lines have in fact been compensated for. It says that the original plan was for two grout lines in each of the four legs but the fifth leg was added and also additional grout lines were introduced into the design for all piles. VO-006 provides compensation for additional grout lines and the question is whether and to what extent this addresses the grout lines in the fifth leg.

1049. Bluewater says that prior to the scope change, the original contract provided for two grout lines in each pile, giving a total of 8 grout lines and that the lump sum included in the Detailed Contract Price Breakdown for these 8 grout lines was €75,000. Following the scope change, it says that three grout lines were required in each pile, meaning that one additional grout line was required in each of the original four piles, with a further three in the new pile; a total of 7 new grout lines. It says that an additional €75,000 was agreed in VO-006 and this additional sum covered all 7 new grout lines and, therefore, Mercon is not entitled to any additional sums under VOR-004 in respect of these. It says that under the original contract price, each grout line was priced at €9,375. Whilst the additional 7 grout lines would be valued at €65,625 in total, using that rate, Bluewater says that the €75,000 agreed in VO-006 might have included an allowance for the grout seals.

1050. Bluewater says that, in addition, the Payment Certificate for VO-006, against which payment was made to Mercon, attaches Piping Pressure Test Results for all three of the grout lines in each of the five piles. Bluewater also refers to Mercon's letter of 18 December 2007 which indicated that additional costs for all the grout lines were dealt with at the same time and in the same way.

1051. The quantum experts says that if two grout lines to the 5th leg are a valid extra, the claimed amount of €18,750 for this work is correct. The claim also includes for

additional grout seals and the QS experts are agreed that it was unclear whether anything further is due in this regard, depending again on what was covered by VO-006.

1052. I have considered VO-006-01 which was signed by the parties in July 2008. That VO deals both with VOR-033 and VOR-072. VOR-033 covered the cost of adding a third grout line. I consider that both from Mercon's letter of 18 December 2007 which refers to 15 grout lines and from the pressure test results attached to the November 2008 payment certificate for VO-006 that the variation did include the cost of all 15 grout lines being an additional grout line for each of the four existing legs and three grout lines for the additional fifth leg. Accordingly, Mercon's claim fails.

Item 4.19 – Additional Scaffolding (ASPO)

1053. This is agreed in the sum of €4,600.00.

Item 4.20 – Additional Support Materials/Temporary Facilities

1054. This is agreed in the sum of €8,862.88.

Item 7.1 – Schedule Recovery ([Mercon])

1055. This is agreed in the sum of €98,962.50.

Item 7.1.1 – Schedule Recovery ([Mercon]) (Recovery Plan)

1056. The claim under Item 7.1 is for non-productive overtime costs associated with working weekday and Saturday overtime for the purposes of schedule recovery for which 8,700 hours is claimed. This claim relates to the supervision of that labour.

1057. Bluewater says that when Mercon first issued VOR-004 there was no mention of the need for additional supervision costs to support schedule recovery. Further Bluewater says that there is no evidence that additional supervision was actually engaged to support the Schedule Recovery Plan and no details have been provided. Bluewater says that Mercon has failed to show that additional resources were actually deployed and, therefore, this claim should fail.

1058. Mercon says that direct labour costs were incurred and supervision should be allowed.

1059. The quantum experts agree that, in principle, direct labour is likely to have been supervised while working overtime. On the basis of the assessment set out in their First Joint Statement the experts agree the value of this claim on a figures as figures basis as €24,762.38.

1060. Although no records have been produced, I consider that the quantum experts are correct in their opinion that, in principle, there should be an allowance for supervision and I consider their allowance of €24,762.38 to be appropriate.

Item 7.2.1 – Schedule Recovery (ASPO)

1061. This is agreed in the sum of €98,104.44.

Item 7.2.2 – Supervision Acceleration (ASPO)

1062. The claim under Item 7.2.1 is for non-productive overtime costs associated with working nightshift overtime for the purposes of schedule recovery for which 9,157 hours is claimed. This claim relates to the supervision of that labour.

1063. The basis on which it is disputed is the same as for Item 7.1.1. Bluewater says that there is no evidence that additional supervision was actually engaged and no details have been provided. Mercon says that the quantum experts agree that, in principle, the direct labour is likely to have been supervised while working overtime. On the basis of the assessment set out in their First Joint Statement the experts agree the value of this claim on a figures as figures basis as €14,376.49 net of any mark-up, which if applicable would be €1,150.12. There is an issue as to whether mark-up is applicable on labour valued at Attachment 5C rates. This issue is similar to the issue in relation to the STAR rates claim although Bluewater says this is weaker as the claim does not concern rates derived from 5C rates but actual 5C rates which are inclusive of profit. On this basis Bluewater says that no mark-up is justified.

1064. For the same reasons as I have allowed supervision at item 7.1.1, I consider that supervision should also be allowed on this item and I allow €14,376.49. In relation to mark-up then I consider that, by using the rates in Attachment 5C which are defined in Clause 3 of Section 5 as being all inclusive, there is no basis on which a Mark-up should be added.

Item 8.3 – Additional Management

1065. Mercon claims for additional management resources, rather than a claim for "prolongation" of those resources. It says that the original Project as specified in the Contract did not justify a full-time involvement of its key personnel and that, as a matter of principle, it should be entitled to recover the additional management costs it incurred for variations as, given the significant scope growth and complexity, its management commitments were far higher than planned in the contract.

1066. Mercon claims increased management resources as follows: project manager, from 50% to 100% involvement; QA Manager, from 10% to 20% involvement; Construction Manager, from 10% to 20% involvement; Construction Manager (AK) from 20% to 100%; Engineering Manager, from 20% to 60%; HSE Engineer, from 10% to 20% involvement; Completion Manager, from 20% to 30% involvement.

1067. Mercon says that the word "engaged" in Clause 9.3, modifying the words "full time basis", must mean that the key personnel will be available for the works as though they were in full time employment, as and when needed, as opposed to being part time, when there are periods when key personnel would not be available at all. Mercon says that it would make no sense to require key personnel to be dedicated 100% of the time to the work if in fact there was not sufficient work, either during periods of the contract, or for the duration of the works, to occupy their time.

1068. Bluewater says that it was agreed in the kick off meeting, as recorded in item 7 of the notes, that the personnel would be fully involved. It was noted: "*[Mercon] showed their organisation chart during the presentation and advised [Bluewater] that all key personnel will be dedicated/full-time on the project.*" Bluewater says that this was a negotiated and agreed position as prior to that meeting Mercon had asserted that it would provide personnel on a lesser basis but this was rejected by Bluewater resulting

in the final understanding reflected in Clause 9.3 of Section 2(a) of the Contract which provides "*Key Personnel shall be engaged in the Work on a full-time basis, unless otherwise agreed with Bluewater.*"

1069. Bluewater says that this is a prospective claim first advanced in 2007 and has not been updated to reflect actual costs. It was advanced on the basis that Mercon was required broadly to double the amount of time spent by its key personnel for the remaining 13 months of the Project.

1070. Bluewater says that the key personnel were not provided full time and this forms part of its claim for work not done. Bluewater says that, as accepted by Mr Wickerhoff, if the relevant personnel were required to be on the project full time and therefore already covered in the preliminaries, Mercon would not be able to charge for them again.

1071. Bluewater also says that, in fact, Mercon did not provide those personnel full time despite claiming for their full time work both under the preliminaries claim, under this claim and, in some cases, under the STAR rates claim.

1072. This issue was considered as Item D of the quantum experts' list of disputed issues which were dealt with during concurrent evidence from which it was clear that the claim depends on a matter of interpretation of the Contract and their allowance of €100,000 to €150,000 was a notional one.

1073. I consider that under Clause 9.3 of Section 2(a) of the Contract Mercon had to provide the relevant Key Personnel on a full-time basis for the Work, unless otherwise agreed with Bluewater. This meant that the Contract already included an allowance for the full-time work of the relevant personnel for the Project. On this basis I do not consider that Mercon are able to claim for a further percentage of the time for the key personnel.

Change of material specification to PCFW36S [VOR 6]

1074. Mercon refers to VOR 006 Rev 1 dated 3 September 2007 and claims that it was required to procure 130 tonnes of 80mm thick PCFW36S steel plate in Holland to be used in the fabrication of the pile sleeves and claims the difference between the cost of this plate and the rate allowed for in VOR-004. It relies on an instruction issued by Mr de Geus dated 13 August 2007 which required Mercon to procure and supply 5 batches of 4620mm x 7823mm, 80mm thick PCFW36S Type 1 steel plate for the pile sleeves and says that this was not a type of steel covered by the steel specification dated 17 August 2007, referred to in Attachment 6B.

1075. Mercon says that, following the provision of drawings LUK-S-P48-DR-4816 002 rev 2 and LUK-S-P48-DR-4817 001 rev C, Mr de Geus provided a steel specification to Mercon on 18 January 2007, followed by an email of that date. A further instruction about steel procurement was sent on 19 January 2007, following which Mr de Geus asked for confirmation from Mercon that the plate being procured was over 50mm thick. Mercon also refers to Mr de Geus's email of 24 August 2007 in which he asked Mercon when the steel plate was ordered. Mercon says that these documents, read with the instruction given on 13 August 2007, confirm that Bluewater instructed Mercon to procure this steel. Mercon says that if it has been credited in the remeasure (VO-008) then such credit has been wrongly given.

1076. Mercon says that the steel was transported to SIF, Mercon's subcontractor, in Roermond and it relies upon the invoices to evidence this purchase as forming part of purchase order 9500-01/2125 dated 24 August 2007.

1077. In relation to compliance with Clause 14, Mercon says that Bluewater rejected VOR-006 by letter dated 6 September 2007 on the basis that the material claimed was not properly identified and the application was made late.

1078. Bluewater refers to VO-008 and says that it records a credit to Bluewater for 115.65 tonnes for the pile sleeves on the basis that this is in fact free issue steel from Bluewater. Bluewater says that no delivery or installation documents have been disclosed to demonstrate where this material was used and points to the agreed remeasure indicating that the steel for the pile sleeves was procured by Bluewater. Bluewater also draws attention to €124,998.62 being claimed in the remeasure for extra-over 80mm thick plate and says that the rates include for the work to supply, fabricate and erect the equipment. Mercon has therefore been paid within the remeasure. Bluewater therefore disputes the claim.

1079. The quantum experts in their First Joint Statement agree a sum of €73,034.00 on a figures as figures basis.

1080. Whilst it is clear that Bluewater instructed Mercon to supply the steel and Mercon supplied a purchase order for the steel, I am not satisfied that Mercon did in fact supply the steel. First, there are no delivery or installation documents and no invoices to show that the steel was in fact supplied by Mercon. Secondly, the re-measure strongly supports the claim that Bluewater did in fact supply the material and that the work has been measured at the higher rate with an allowance for the steel supplied by Bluewater. For those reasons I do not consider that Mercon has established its claim.

Extra cutting and welding costs for adding Type 1 steel [VOR 34]

1081. Mercon's claim is based on the issue of drawings LUK-S-P43-DR-4311 001 Rev 1 and LUKS- P43-DR-4312-001 Rev 1 which it received in August 2007 and which contained both type 1 and type 2 steel necessitating extra cutting and welding as one single plate could no longer be used.

1082. Bluewater says that the rates agreed in VO-008 (re-measure) were agreed in November 2008 and thus took account of all types of welding and no extra payment is due for this item.

1083. Mercon claimed €37,309.57 for this item but, subject to liability, Bluewater values this item at €6,134.44 which is the figure which the quantum experts have agreed as a reasonable value for this item on a figures as figures basis.

1084. Mercon submitted the VOR on 3 December 2007 and Bluewater requested additional information on 14 December 2007. From the details it is evident that the mixing of the type of steel for the mooring turntable would have increased the amount of cutting and welding over that which would have been involved if the same steel was used. However, rates have been included in the re-measure to cover the use of the two types

of steel and I see no basis on which Mercon can claim an extra sum for this element of the steelwork.

Increased size and required number of guides in pile sleeves [VOR 87]

1085. Mercon claims that the guides for the Pile Sleeves increased in both size and number. Mercon says that the Contract provided for a lump sum for the provision of 4 guides for the pile sleeves. Mercon claims for the additional steel required for 5 larger pile sleeve guides on the basis that this is additional work.

1086. Mercon says that the quantum experts have identified this item in Mercon's re-measure application, but agree it was removed from VO-008 in the final version and does not appear to have been included elsewhere. It says that, contrary to what Bluewater suggests, it was Bluewater and not Mercon who said that VO-087 was closed out as on 15 August 2008 Mr Wickerhoff confirmed that VOR-087 had not been closed out and Bluewater insisted it had been closed out.

1087. In relation to Clause 14 Mercon says that VOR 87 was dated 1 November 2007 and issued on 28 February 2008 and that Mercon reminded Bluewater on 14 August 2008 that it had had no response to VOR-087. It was then rejected on 15 August 2008 on the basis all substructure re-measure work had been agreed as part of VO-008.

1088. Bluewater accepts that there were additional guides but says that this VOR was addressed as part of the re-measure in VO-008 and that Mercon at the time no longer pursued this variation.

1089. The quantum experts have agreed figures for this item, but the figure depends upon the size of the fillet weld. Mercon accepts that it is unable to provide any evidence as to which of the two sizes of weld applies and therefore only seeks the lower valuation agreed by the experts of €19,126.48.

1090. I consider that Clause 14 has been satisfied and, in any case, I do not consider that Bluewater has or can forfeit Mercon's right to an adjustment to the Contract Price. I have considered VO-008 and I am not satisfied that, in fact, there is any allowance for the additional pile guides within the re-measure. I therefore allow the additional sum of €19,126.48 for this item.

Additional machining and cladding [VOR 144]

1091. Mercon seeks the additional costs of machining, including the cost of machining the Yoke Hinge, which was supplied free issue by Bluewater as a casting and delivered to Mercon's premises at Gorinchem on 27 December 2007. Under the original scope of works, Mercon says that it was to provide a field weld as shown in Attachment 6A to the Contract and drawing reference PR-G-800-DR-1281-001 rev B. It says that there was some machining to be done but this was limited to the yoke arm and rotating head geostatic and rotating sections, and to the swivel support facing, as explained by Mr Wickerhoff in his evidence.

1092. Mercon says that Bluewater's failure to issue a proper, workable instruction in writing is a breach of Clause 2.5 of section 2(a) of the Contract. It says that Bluewater realised

by 3 October 2007 that there would be a delay with the rough machining to the Yoke Hinge body by its chosen subcontractor, Lucchini. Mercon says that Bluewater then decided to place the machining work with Mercon around the same time as machining drawings were supplied to Mercon on 11 October 2007, although they were not issued for construction.

1093. Mercon acknowledged receipt in its TQR dated 25 October 2007 and a revised drawing was issued on 5 December 2007 and a further drawing released for construction on 20 December 2007. The Yoke Hinge body was delivered to Mercon on or around 24 December 2007. In February 2008, Mercon had advised that the machining activities were to be subcontracted to MRC.

1094. VOR 144 rev 0 is dated 2 September 2008 and was sent by e-mail. Bluewater complained on 8 September 2008 that VOR 144 was issued out of time but said "notwithstanding the above Bluewater will review the VOR and revert in due time." On 16 September 2008 Bluewater rejected VOR 144 rev 0 on the basis it was unjustified and late. VOR 144 rev 1 is dated 30 January 2009 and was sent by email but there was no further response from Bluewater.

1095. Bluewater accepts that this is additional work, but there is a dispute as to quantum. Bluewater has allowed €92,955.16 for this item, against a claim of €401.294.47 which it says is inadequately particularised. Bluewater says that Mercon has failed to substantiate the quantum of this variation and should recover no more than that agreed by Bluewater.

1096. The quantum experts have been unable to value the claim on the information provided and say that "*Due to the technical nature of the machining and cladding scope of work and the lack of any technical expert evidence in this case we have found it difficult to deal with this claim, in particular because we are not able to ascertain the precise differences between the original and varied workscope from the specifications and drawings.*

We have reconciled the claimed amounts for machining and cladding to the relevant invoices however, because we are not able to identify the precise planned and actual workscopes with any certainty, we are not able to determine whether the costs are reasonable in amount. We have not found any documentary evidence for the miscellaneous supporting costs, although we do note that Mr Wickerhoff in effect gives evidence in this regard by incorporation of the claim into his witness statement. It is a matter for the Court to decide whether it accepts his evidence in this regard."

1097. This was evidently extra work. As Bluewater did not respond to VOR 144 rev 1 I consider that Mercon is entitled to make a claim but I consider that the quantum of the claim has not been satisfactorily dealt with by Mercon for the reasons set out by the quantum experts. In those circumstances, I consider that Mercon is only entitled to recover the sum accepted by Bluewater of €92,955.16.

New design main bearing [VOR 147]

1098. Mercon claims for the cost of the hand hammering of tension bolts following a change to the free issued tensioning jacks. It says that the free issue tensioning jacks were not supplied by Bluewater in accordance with its engineering documentation and Mercon was instructed to tension 39 bolts by hand hammering using an impact wrench, a grease

gun and tooling. Mercon says that no particulars or evidence have been provided by Bluewater to support its contention that this work was done by personnel on its behalf and on 11 June 2008 Bluewater told Mercon that this VOR was justified.

1099. Bluewater denies the claim on the basis that the work was carried out by personnel on behalf of Bluewater on 16 and 19 May 2008.

1100. The quantum experts have accepted Bluewater's figure of €2,511.89.

1101. I am not satisfied that this work was carried out by Bluewater personnel, particularly given that Bluewater accepted this claim as valid on 11 June 2008 after Bluewater says it carried out the work. I allow the sum of €2,511.89.

Additional Cost for Shipments 1 (VOR-161 Rev 2), 2 (VOR-229 Rev 1) and 3 (VOR-266 Rev 2)

1102. VOR-161 relates to Ship 1 (the Volzhskiy 10), VOR-229 relates to Ship 2 (the Alexander Marinesko) and VOR-266 relates to Ship 3 (the Ulus Breeze).

1103. VOR-75 rev 4 was issued on 12 March 2008, following revision by Bluewater of its transport requirements after it had exercised Option 5 (transport) on 29 March 2007. Mercon says that VOR-075 rev 4 did not cover the full amount of Mercon's transport costs and that the parties envisaged that further transport claims would be made and considered in due course.

1104. Mercon claims additional costs which it says it incurred over and above those in VO-005. It says that under the Contract, following Bluewater's exercise of option 5 in Section 3 of the Contract, Mercon was required to deliver the SYMS components from Gorinchem to Astrakhan DDU. It says that delivery to Astrakhan was defined in Clause 1.2 of Section 3 of the Contract as including the removal of sea fastening and deck cleaning but excluding load in and that "Load in" is defined in that section as the physical movement of items from the ship to shore.

1105. Mercon seeks various shipping costs it incurred during delays to the arrival DDU of the three ships at Astrakhan. The claims include the cost of actual fuel usage (bunker) costs, ship laytime (demurrage), securing of cargo (lashings) and transit through customs for each of the three shipments. It is claiming additional charges which it has incurred from Flinter, Snoeck and Vlierodam.

1106. In relation to Clause 14, Mercon says that Bluewater accepted the principle that Mercon was entitled to demurrage for shipment 1 at the rate of €4,500 per day for vessel type BB and that it was liable for 95 hours of delay in its letter dated 28 August 2008 in response to VOR-161-M rev 0. All other claims were rejected. Bluewater told Mercon to issue an update of VOR-161 for review and acceptance by Bluewater. VOR-161 rev 1 was issued on 8 October 2008 and VOR-161 rev 2 on 11 November 2008. On 4 December 2008 Bluewater requested copies of documents supporting VOR-161 and noted it had not received a VOR-266 for Ship 3. Mercon and Bluewater discussed VORs 161, 229 and 266 at a meeting on 10 December 2008. Bluewater did not issue a notice of rejection for VOR-161 rev 2, and was still reviewing the claim on 16 February 2009.

1107. Mercon says that VOR-266 revision 2 is dated 20 January 2009 and provides details of additional costs incurred for Ship 3. It says that Bluewater did not issue a notice of rejection for VOR-266 rev 2, and was still reviewing the claim on 16 February 2009 after the works had been terminated.

1108. I consider that Clause 14 has been satisfied and, in any case, I do not consider that Bluewater has or can forfeit Mercon's right to an adjustment to the Contract Price.

Transit through customs

1109. Parts of the invoices referred to in VORs 161, 229 and 266 relate to costs that were charged to Mercon by Flinter for transit costs through the St Petersburg customs that had to be undertaken in order to gain entry to the Russian waterways system.

1110. Mercon says that under Clause 1.2 of Section 3 of the Contract, it was responsible for export customs clearance at the port of shipment but not for import customs clearance into the port of destination.

1111. I have considered, as part of the delay claim, the allegations of delay during transit through the St Petersburg customs and held that Mercon has not established a delay for which Bluewater is responsible. On this basis, I do not consider that Mercon is entitled to payment for this head of claim.

Stowage and lashing

1112. Mercon claims additional costs of "lashing" for securing cargo which it says included both the provision of the material to lash the cargo to the deck and the labour to apply it. Mercon says that the costs for material including lashing/straps and D rings and sub-contract labour was not included as part of its claim in VOR-075 rev 4 by reference to item 4 nor was it included within VO-005.

1113. Bluewater says that VO-005 was agreed and signed by the parties on 26 June 2008 and provided Mercon with a Lump Sum amount for the exercise of the river/sea transports (Option 5) of €1,391,000. It says that it expressly stated that Bluewater and Mercon had agreed that VO-005 included "*Variation Order Request 1-0445-0-S001-075-M-4*", that is VO-075. Bluewater refers to VOR-075 and says it sets out a list of what the Lump Sum included, referring to "*all labour costs for load out*", "*shipping costs*" and "*load out at [Mercon]*". It is then specified that "*Price excludes Load-in at Astrakhan. Demurrage at €4500/day/rate for BB type and €3500 for ST type*".

1114. Bluewater submits that by providing a list of what the Lump Sum included in general terms, including "*shipping costs*", and then providing a very specific list of what the Lump Sum excludes, Mercon has to pay for any costs which fall outside the exclusion, that is any costs which are not costs of "*load-in in Astrakhan*" or "*demurrage*". Bluewater says that the costs Mercon is seeking for lashing and stowage are "*shipping costs*" as they are necessary costs for the shipping process. It submits that they therefore fall within the Lump Sum and Mercon is not entitled to claim for them under these VORs.

1115. I consider that Bluewater is correct in its interpretation of VOR-074 and VO-005. The references to what was included, in particular "*shipping costs*" and "*all labour costs for*

load out" would, in my judgment, cover the costs of lashing and stowage especially when the exclusions are taken into account.

Demurrage

1116. Mercon claims demurrage charges which it incurred under the terms of the Charterparties that its shipping agent, Flinter, had arranged. I have considered these claims in relation to the claim for an extension of time. As set out there I have found that Mercon is entitled to demurrage of €17,812.50 for Ship 1 but no demurrage for Ships 2 or 3.

Bunker Costs (Fuel)

1117. Bluewater does not dispute that extra bunker costs would be recoverable. However, it maintains that the invoices are insufficient to prove 'extra over' usage and payment and that on and off hire bunker records are needed to establish usage are necessary.

1118. It says that these records have not been produced and all that has been provided are the invoices from Flinter and, in the light of difficulties with the Flinter invoices concerning demurrage, Bluewater says it should have had the opportunity to interrogate the invoices for bunker costs and, in the circumstances, Mercon has failed to prove its entitlement to additional bunker costs.

1119. Mercon says that bunker costs for VO-005 rev 3 were agreed on the basis of $480 per tonne of fuel and that the quantum experts have agreed rates and quantities based upon the statements of facts for each shipment and upon the assumption that the fuel type referred to in VO-005 rev 3 is MDO (marine diesel oil). Mercon says that its claim for additional fuel costs is based upon invoices which it had to pay.

1120. I consider that the Ships' Masters' statements are sufficient evidence of fuel consumption and that the additional bunker costs should be based on them. The rate of US$480 per metric ton included in VO-005 is, on balance, likely to refer to MDO and I consider that the extra bunker costs should be calculated on that basis. On the basis of the calculation derived from V0-005 I do not consider that Mercon is entitled to any mark-up.

1121. On that basis, I allow the sums set out by the quantum experts in Appendix 5.2 of their Joint Statement being €31,505.04 (Ship 1), €25,266.01 (Ship 2) and €13,904.35 (Ship 3). That amounts to a total of €70,675.40.

Summary for VOR-161 Rev 2, VOR-229 Rev 1 and VOR-266 Rev 2

1122. I therefore allow €17,812.50 for demurrage and €70,675.40 for bunker costs and no further sums for these claims. The total is therefore €88,487.90.

Costs for turntable rotation/clash test [VOR 162]

1123. Mercon claims €12,402.00 under this VOR issued on 5 August 2008 for additional work instructed in response to Mercon's procedure QA-2125-152 for a turntable rotation/clash test to verify the turntable design. Mercon says that this was not part of the original scope of work and is distinct from the Main Bearing Rotation Test referred to in Clause 7.25 of Section 3 of the Contract which requires verification that the bearing has been correctly installed.

1124. In relation to Clause 14 Mercon says that Bluewater rejected this VOR on 7 August 2008 on the basis it was in scope work and that Mercon should pay Bluewater, since the yoke arm and pendulum tests were now not needed but had been included in the lump sum. However Mr Brouwer requested Mercon to re-issue the VOR, on 18 August 2008 he said he would reconsider the VOR if Mercon issued its proposals and on 21 August 2008 he said he would consider the VOR on its merits.

1125. Bluewater refers to Clauses 7.27 and 7.28 of Section 3 of the Contract which it says obliged Mercon to do the testing which is the subject of this VOR. It therefore denies this claim and counterclaims €10,000.00 and €15,000.00 as a balance in Bluewater's favour of €12,598.00 for Mercon's failure to carry out a trial fit and rotation test of the Yoke Arm and Pendulums which Bluewater had to carry out itself.

1126. In relation to the claim for an abatement, which was first raised by Mr Brouwer on 7 August 2008 in response to VOR 162, Mercon says that this claim does not make sense as the pendulums were fabricated by FOG and assembled in Baku and the yoke arms were installed in Baku.

1127. The quantum experts have agreed a valuation on a figures as figures basis of €12,402.

1128. I consider that Mercon had to carry out a test which did not form part of the original workscope and therefore it is entitled to be paid for that test. However it is evident that, in valuing that test, Bluewater is entitled to take account of the overall obligation under Clauses 7.27 and 7.28 and determine the extent to which the Contract Price should overall be increased. I do not have the information to assess a proper valuation of the tests in Clause 7.27 and 7.28 and, in the circumstances, assess the value as balancing the claim of €12,402.00 which, if anything, may be generous to Mercon. Overall I therefore allow nil.

Additional piping fabrication and materials [VORs 172, 174, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 244, 245, 254]

1129. The quantum experts set out in Appendix 5.3 to their Joint Statement the points in issue between the parties and their views on each of the VORs which are generally small in value. No VOR with a total pleaded claim value of less than €1,000 is pursued by Mercon. Mercon provides evidence for these VORs by reference to Bluewater issued drawings.

1130. In relation to VOR 245 under which Mercon claims for Additional RT Testing, valued by the experts at €19,983.08, Bluewater says that this claim is based on SI-019 and that the claim should be disallowed on the basis that Mercon has not set out how and why this is additional work.

1131. The issues are clearly set out by the quantum experts in Appendix 5.3. Given that the sums in issue are small and the conclusions follow from a determination of those issues, I shall only include short reasoning for each VOR.

1132. ***VOR-172:*** It is likely that the actuator was delivered late and additional out of sequence labour was required: €1,051.00 allowed.

1133. ***VOR-174:*** There were changes to the U-bolts but the quantity is not clear and I allow Bluewater's figure of €4,629.90

1134. ***VOR-185:*** I consider that there was a change to the temporary support requirements and €3,240.00 is allowed.

1135. ***VOR-186:*** This appears to have been covered in VO-008 and included the machining element. Claim not allowed.

1136. ***VOR-187:*** Less than €1000 and not pursued.

1137. ***VOR-188:*** This appears to have been covered in VO-008 and included the machining element. Claim not allowed.

1138. ***VOR-189:*** There was uncertainty as to the type of gasket and they appear to have been replaced. €2,477.46 is allowed.

1139. ***VOR-190:*** Barred Tee is a valid extra and €1,192.00 is allowed.

1140. ***VOR-191:*** There was an additional pipe support which required supply of a curved plate so €465.75 is allowed.

1141. ***VOR-192:*** Less than €1000 and not pursued.

1142. ***VOR-193:*** There was an additional pipe support which required supply of a curved plate so €667.09 is allowed.

1143. ***VOR-194:*** Less than €1000 and not pursued.

1144. ***VOR-195:*** There was an additional pipe support which required supply of a curved plate so €465.75 is allowed.

1145. ***VOR-196:*** Less than €1000 and not pursued.

1146. ***VOR-197:*** Less than €1000 and not pursued.

1147. ***VOR-198:*** Less than €1000 and not pursued.

1148. ***VOR-199:*** There was replacement of bolts but without dismantling the flanged connection. €1,319.64 allowed.

1149. ***VOR-200:*** Less than €1000 and not pursued.

1150. ***VOR-203:*** Less than €1000 and not pursued.

1151. ***VOR-204:*** Less than €1000 and not pursued.

1152. ***VOR-205:*** Less than €1000 and not pursued.

1153. ***VOR-206:*** Provision of neoprene liner. €4,030.51 allowed.

1154. ***VOR-207:*** Test is likely to have been included in VO-008. No further sum allowed.

1155. ***VOR-208:*** Less than €1000 and not pursued.

1156. ***VOR-209:*** There was an additional pipe support which required supply of a curved plate so €476.20 is allowed.

1157. ***VOR-210:*** There was an additional pipe support which required supply of a curved plate so €476.20 is allowed.

1158. ***VOR-211:*** Supply of bolts and gaskets included in VO-008. No further sum allowed.

1159. ***VOR-212:*** Test is likely to have been included in VO-008. No further sum allowed.

1160. ***VOR-213:*** I consider that only shop test is valid as an additional requirement. €1,324.40 allowed.

1161. ***VOR-214:*** Pipe addition to avoid clash is valid as an addition. €678.24 allowed.

1162. ***VOR-215:*** Claim not established.

1163. ***VOR-216:*** Removal of pipe spools for transportation is a valid claim. €720.00 allowed.

1164. ***VOR-217:*** Removal of pipe spools for transportation is a valid claim. €360.00 allowed.

1165. ***VOR-218:*** Removal of pipe spools and valve for transportation is a valid claim. €1,130.25 allowed.

1166. ***VOR-219:*** Removal of pipe spools for transportation is a valid claim. €46.99 allowed.

1167. ***VOR-220:*** Less than €1000 and not pursued.

1168. ***VOR-221:*** Claim not established and would be included in VO-008.

1169. ***VOR-222:*** Claim not established and would be included in VO-008.

1170. ***VOR-223:*** As-built drawings of field run pipework are additional. €1,787.50 allowed

1171. ***VOR-224:*** Less than €1000 and not pursued.

1172. ***VOR-225:*** Removal of top pipe spool for transportation is a valid claim. €302.07 allowed.

1173. ***VOR-226:*** Less than €1000 and not pursued.

1174. ***VOR-244:*** Forming of bends not included in VO-008. €5,138.10 allowed.

1175. ***VOR-245:*** Claim not established: see RT Waiver claim above.

1176. ***VOR-254:*** All time for packing ship loose items is allowed in the sum of €4,500.00.

Summary

1177. As a result I find that the total sum due for these piping VORs is €36,479.05.

Removal of top part of end plates to comply with transport restrictions [VOR 241]

1178. Mercon claims for this item on the basis that it was necessary to remove the top part of the end plates of the Hose Connection Deck Lifting Frame to comply with transport height restrictions. It says that the height of the lifting frame and end plates had to be reduced, after having been fabricated to Bluewater's design, to enable the Hose Connection Deck to be shipped within the height restrictions under bridges on inland waterways as the structure, as built, was 20cm higher than permitted by the Russian waterways authorities.

1179. Bluewater says that the costs are covered by VOR 108 (VO-012) and, in any event, it was not necessary to undertake these works to comply with height restrictions. Bluewater also says that Mercon failed to comply with the Clause 14 conditions precedent as the events are alleged to have occurred in July 2008 but no VOR was submitted until October 2008.

1180. The VOR was issued on 9 October 2008 and Mercon says that there does appear to have been a response from Bluewater. Mercon disputes that it was covered by VO-012 as that VOR concerns the costs of provision of the lifting frame, not the costs of adjusting the structure to comply with the height restrictions under bridges over Russian waterways.

1181. The hose connection deck was shipped on the second shipment. In an email on 17 July 2008, Mercon was asked if it could reduce the height following evaluation by the river authorities and the nominated master of the Alexander Marinesko.

1182. Mercon reported the need for a 20cm reduction in height in the meeting on 23 July 2008 (item 1.5). The bridge restrictions in Russia are noted in the email of 24 July 2008 and in addition to removing the lifting frame and the end plates, Mercon says that the ship was loaded with additional ballast to help achieve the reduced height.

1183. The experts have agreed a valuation for this item based on Bluewater's assessment in the amount of €2,420.

1184. This was additional work which I am satisfied had to be carried out to the hose connection deck to permit it to be transported. I see no reason why it would have been carried out had it not been necessary. The claim was made in October 2008 and no reaction was received from Bluewater at the time contending that it was out of time. I consider that Mercon is entitled to claim €2,420.00.

Painting repair Central Column Gorinchem [VOR 247]

1185. Under this VOR dated 17 October 2008 Mercon claims invoiced costs plus mark-up for painting (€5,800.20), scaffolding (€9,745.60), plus €2,405.00 for Mercon personnel and equipment for repairs to the Central Column paintwork following damage that was discovered and repaired in Gorinchem in May 2008.

1186. For the reasons set out under NCR1 I have found that the failure in the Central Column paintwork was a matter for which Mercon was responsible. It therefore follows that Mercon's claim for the costs of repairs to the paintwork under VOR 247 fails.

Yoke Hinge House rotation test [VOR 248]

1187. This VOR dated 17 October 2008 is for the costs of executing a rotation test of the Yoke Hinge house around the Yoke Hinge body (casting). Mercon says that as the Yoke Hinge was substantially redesigned this item of work was not included in the Contract and the works are claimed on the basis of Attachment 5C1.

1188. Bluewater says that this is not a variation as the works were included in Section 3 of the Contract.

1189. The quantum experts have given two valuations, €1,032.20 or if Mercon is entitled to claim for the erection and dismantling of the scaffolding, €3,650.00 on the basis of about 150m^3 scaffolding. This depends on whether a scaffold was required to be erected and dismantled specifically for the purposes of this test, or whether Mercon made use of a scaffold which was either already erected, or was always required to be erected for other work. Since erecting and striking scaffolding are integral activities Mercon submits that this part of the claim should be allowed.

1190. I consider that this was an additional test and that the costs of executing this test are recoverable. The claim was made on 17 October 2008 and no point was taken by Bluewater under Clause 14 when it responded on 3 November 2008. I am not satisfied that the scaffolding was specifically required for the test and so I allow €1,032.20.

Installation Yoke Hinge House on to Yoke Hinge Body [VOR 249]

1191. This VOR dated 17 October 2008 is for the cost of installing the Yoke Hinge onto the Yoke Hinge body. Mercon says that, as the Yoke Hinge was substantially redesigned, this item of work was not included in the Contract.

1192. Bluewater says this work was included as part of Mercon's scope of works and relates to Yoke Hinge house work in Section 3 of the Contract.

1193. The quantum experts note that the quantum issue is whether the timesheets, not countersigned by the parties, are reliable evidence of the hours spent on this task. If they are the experts agree that claimed amount of €29,625.00 is properly calculated in accordance with the rates contained in Attachment 5C of the Contract. However, Bluewater says that the project engineer hours on three timesheets on weeks 34, 35 and 37 precede work instruction 21 of 11 September 2008, to which this item relates. Bluewater therefore submits that these timesheets should be removed from this item and that, on that basis, the court should prefer Bluewater's assessment of €17,685.00.

1194. I am not satisfied that this work or equivalent was originally included in the Contract, given the changes which took place to the Yoke Hinge and it should therefore be valued as additional work. The claim was made on 17 October 2008 and no point was taken by Bluewater under Clause 14 when it responded on 3 November 2008. Whilst Bluewater have noted that there are project engineer hours which precede the work instruction, the quantum experts have reviewed the timesheets and consider that these properly reflect preparatory work for this item. I therefore allow €29,625.00.

Temporary placing FMS structures on quay [VOR 255]

1195. VOR 255 was issued on 27 October 2008 and is for the additional costs Mercon incurred as a consequence of the FMS being unloaded onto the bonded area at the Astrakhan quay rather than being loaded on board as instructed by Bluewater.

1196. For the reasons set out below I consider that Mercon is responsible for the costs and I therefore reject this claim for a Variation Order.

Preheating of thick plates [VOR 267]

1197. Mercon claims under VOR 267 issued on 15 December 2008 for the cost of providing additional and more substantial pre-heating for steel of a thickness in excess of 50mm, on the basis that this was not an activity that was included within or provided for as part of the measured work unit rates in Attachment 5G. It says that pre-heating for steel plates over 20mm thick was included as part of the coverage rules for Table 1A part 4.4 of Attachment 5G, but that as the original design in Attachment 6B did not require steel plates in excess of 50mm, pre-heating was not in general required. There is a reference to steel over 50mm thick in Table 1A but Mercon says that the only steel over 50mm thick is plate steel for stiffeners, gusset plates brackets and shims.

1198. Bluewater says that this claim covers all pre-heating costs incurred by Mercon in Gorinchem as invoiced by its sub-contractor, Delta Heat Services, plus an un-particularised allowance for electricity consumption. Bluewater says that the Contract rates include for pre-heating and/or STAR rates have been agreed for the thicker steel in the agreed re-measure in VO-008.

1199. Bluewater says that as noted by the quantum experts in the First Joint Statement, the "coverage" rules on page 5 of Attachment 5G of the Contract provide that rates for fabrication and erection of steelwork shall include, inter alia, pre-heating and so those agreed rates are to be treated as including pre-heating and Bluewater therefore submits that no sums are due under this claim.

1200. I consider that Bluewater is correct and that the requirement for pre-heating the increased thickness of steel for the purpose of welding has been included in the re-measure and that the applicable rates cover the cost of providing pre-heating, including any electricity consumed.

Summary

1201. As a result of the further agreements and the findings set out above, the total value of the relevant disputed Variations is €1,077,118.95 as follows:

VOR Ref	Description	Amount Awarded

VOR 128-M Rev 0 VOR 129-M Rev 0 VOR 227-M Rev 0 VOR 228-M Rev 0 VOR 230-M Rev 0 VOR 239-M Rev 0 VOR 243-M Rev 0 VOR 256-M Rev 0 VOR 258-M Rev 0 VOR 270-M Rev 0	Electrical VORs	61,495.75
VOR 161-M Rev 2 VOR 229-M Rev 1 VOR 266-M Rev 2	Additional Cost of Shipment 1: fuel, laytime and cargo securing Additional Cost of Shipment 2: fuel, laytime and cargo securing Additional Cost of Shipment 3: fuel, laytime and cargo securing	88,487.90
VOR 255-M Rev 0	Temporary Placement and handling FMS structures on quay	0.00
VOR 087-M Rev 0	Increased size and number of pile sleeve guides	19,126.48
VOR 004-M Rev 3 VOR 001-M Rev 1 VOR 017-M Rev 1	Extra sub-structure leg, additional work and indirect costs: Central Column/brace connections	27,210.00
	Additional Fabrication Engineering (Heavy Handling Engineer)	66,150.00
	Additional Fabrication Engineering (Shop Engineering Co-ordinator)	15,000.00
	Extra pile costs	244,406.03
	Shear Key Sleeves	0.00
	Grout System	0.00
	Scaffolding (ASPO)	4,600.00
	Temporary Facilities	8,862.88
	Schedule Recovery – Mercon	98,962.50
	Schedule Recovery – Mercon Recovery Plan	24,762.38
	Schedule Recovery – ASPO	98,104.44
	Supervision Acceleration/Overtime – ASPO	14,376.49
	Additional Management	0.00
VOR 006-M Rev 1	Change of material specification to PCFW36S	0.00
VOR 034-M Rev 1	Cutting and welding type 1 steel	0.00
VOR 267-M Rev 0	Preheating of thick plates	0.00

VOR 172 VOR 185 VOR 189 VOR 199 VOR 207 VOR 212 VOR 214 VOR 215 VOR 216 VOR 217 VOR 218 VOR 219 VOR 225 VOR 254 VOR 174-M Rev 0 VOR 186-M Rev 0 VOR 187-M Rev 0 VOR 188-M Rev 0 VOR 190-M Rev 0 VOR 192-M Rev 0 VOR 194-M Rev 0 VOR 196-M Rev 0 VOR 197-M Rev 0 VOR 198-M Rev 0 VOR 200-M Rev 0 VOR 203-M Rev 0 VOR 204-M Rev 0 VOR 205-M Rev 0 VOR 206-M Rev 0 VOR 208-M Rev 0 VOR 211-M Rev 0 VOR 213-M Rev 0 VOR 220-M Rev 0 VOR 221-M Rev 0 VOR 222-M Rev 0 VOR 223-M Rev 0 VOR 224-M Rev 0 VOR 226-M Rev 0 VOR 244-M Rev 0 VOR 245-M Rev 0 VOR 191-M Rev 0 VOR 193-M Rev 0 VOR 195-M Rev 0 VOR 209-M Rev 0 VOR 210-M Rev 0	Additional Piping Materials, out-of-sequence and special items, Additional piping fabrication and Further piping items	36,479.05.
VOR 126-M Rev 0	Fabrication of Main Bearing Support Rings (Option O6.1)	
VOR 018-M		88,420.00
VOR 019-M		44,210.00
VOR 036-M		6,652.80
VOR 147-M Rev 0	Additional Costs New Main Bearing Design	2,511.89
VOR 144-M Rev 1	Additional Cladding and Machining	92,955.16
VOR 148-M Rev 0	Costs to execute SI 21- Transport bearing brushes for Claimant	748.00
VOR 236-M Rev 0	Handling Claimant's platforms and supports	520.00
VOR 250-M Rev 0	Costs to execute SI 43 – Return of incorrect rope blocks	0.00
VOR 162-M Rev 0	Additional Turntable Rotation Test	0.00
VOR 235-M Rev 0	Slotted holes in Turntable cover ring	0.00
VOR 241-M Rev 0	Removal of Lifting Frame end plates for transport restrictions	2,420.00
VOR 247-M Rev 0	Painting Repair to Central Column after transportation	0.00
VOR 248-M Rev 0	Yoke Hinge House rotation test	1,032.20

VOR 249-M Rev 0	Install Yoke Hinge housing on to Hinge body	29,625.00
Total		€1,077,118.95

Discount on Total Value of VOs

1202. Bluewater seeks a 5% reduction in accordance with Attachment 5G of Section 5 of the Contract on those variations which relate to the measured work, that is VO-001 and VO-008, as the total value exceeds €1,000,000.

1203. I have dealt above with the position in relation to VO-008. Mercon also contends that the discount cannot apply to VO-001 because a "firm and fixed" price was agreed for this Variation Order and it says that the discount only applies to works comprising unit rates. Bluewater says that the value of VO-001 is made up, to a large extent, of unit rates and relates to works covered by the unit rate reimbursable element of the works and that the "firm and fixed" nature of the agreement merely shows that the parties are bound by the assessment. It says that any suggestion that VO-001 is fixed so that it should be deemed to include any discount directly contradicts Mercon's primary case and ignores the fact that, at the time VO-001 was agreed, the total value of variation orders was not ascertained and thus the scale of the discount was also not known.

1204. Alternatively, Mercon contends that the discount on VO-001 only applies to those parts of VO-001 which are made up of unit rates. On this basis Bluewater says that the amount of VO-001 for the HCT and FMS that are made up of remeasurement total €2,281,849.54 as follows:

HCT (Structural Remeasurement) €590,969.82 out of a total of €688,616.89
FMS (Structural Remeasurement) €1,664,627.88
FMS (Padeyes Remeasurement) €3,948.76 out of a total of €1,817,465.54
Ballast Tank (Padeyes Remeasurement) €22,303.08 out of a total of €24,589.42

1205. Bluewater says that Mercon's alternative argument should be accepted and 5% discount should be applied to the whole of this amount, giving a minimum discount to VO-001 of €114,092.48.

1206. Clause 2.5 makes it clear that Attachment 5G only applies to the provisionally estimated Measurement Price and does not apply to Attachments 5C1 and 5C2 Time Rates for Variations and Reimbursable Work. I therefore consider that Mercon is correct and the discount in Table 10 of Attachment 5G does not apply to VO-001 and therefore Bluewater is not entitled to a discount, even one calculated on Mercon's alternative case.

<u>Other Bluewater Claims</u>

Issue 21(a): What sums are due, if any, in respect of LADs for Key Personnel?

Introduction

1207. Bluewater claims €180,000 for the unauthorised "replacement or removal" of Key Personnel under Clause 3 of Section 9 of the Contract. That provision states that Mercon shall not replace Key Personnel without Bluewater's prior approval. It also provides that Mercon "*shall pay the liquidated damages specified in Attachment 9B for each replacement*". The table in Appendix 9B sets out liquidated damages ("LADs").

1208. Mercon says that Bluewater waived any entitlement to complain about the changes of personnel as they were made with its consent and, secondly, that the damages are a penalty.

Contractual provisions

1209. Attachment 9B of section 9 of the Contract - Contractors Key Personnel shows a number of different liquidated damages rates with €50,000 applying to the project manager and the Site Construction Manager and €20,000 for the QS and HSE Engineer.

1210. Clause 9 of Section 2 of the Contract relates to Contractor Personnel. Clause 9.3 provides:

> "*The KEY PERSONNEL shall be provided by [MERCON] and shall not be replaced without the prior approval of BLUEWATER. Any replacement shall work with the person to be replaced for a reasonable handover period.*"

1211. Clause 3 of Section 9 of the Contract provides as follows:

> "*KEY PERSONNEL*
> *[MERCON] shall provide the KEY PERSONNEL as listed in Attachment 9B and as indicated on the Organisation chart within Attachment 9C. KEY PERSONNEL shall be engaged in the WORK on a full-time basis, unless otherwise agreed with BLUEWATER.*
> *KEY PERSONNEL shall not be replaced without the prior approval of BLUEWATER.*
> *[MERCON] shall pay the liquidated damages specified in Attachment 9B for each replacement, unless otherwise agreed with BLUEWATER.*"

1212. Attachment 9B – Contractors Key Personnel, provides as follows:

Name	**Position**	**Liquidated damage in case of Replacement**	
A.C. van den Brule	Project Manager	EURO	50,000.00
Mr. P. Kean	QA Engineer	EURO	20,000.00
Mr. J. Koning	HSE Engineer	EURO	20,000.00
Mr J. Liet	Construction Manager	EURO	40,000.00
[TBC]	Site Construction Manager Astrakhan	EURO	50,000.00
J. Marijnnissen	Transportation & Logistics Manager	EURO	30,000.00
Mr. T. Jordaans	Mechanical Completion and (pre-) Commissioning Manager	EURO	30,000.00

Submissions

1213. Bluewater submits that the type of damages which a party suffers from the disruption caused by changes in Key Personnel cannot easily be quantified, making them a prime area for the agreement of LADs. Mr de Geus explained the impact that Key Personnel

had on the Project and said that, more often than not, Mercon changed its organisation without seeking Bluewater's prior approval but said that they had appointed somebody and had done it without Bluewater's approval.

1214. Bluewater relies on the evidence of Mr de Geus in which he explained how the figures for LADs represented a genuine pre-estimate of loss based on the potential disruption to the Project caused by changes in Key Personnel. He recalled discussions with Mr van den Brule at the time and says that they determined the figures as a genuine pre-estimate of the losses caused by the disruption and delay which may be caused to the work. Mr Van Den Brule in his evidence recalled discussions with Mr de Geus during the tender negotiations and agreed that he discussed, negotiated and agreed the relevant rates with Mr de Geus.

1215. Bluewater says that it was not put to Mr de Geus that the rates were not a genuine pre-estimate of loss and in those circumstances, in light of the evidence of Mr Van Den Brule, it cannot be argued that the LADs for Key Personnel are not a genuine pre-estimate of loss.

1216. Mercon says that the parties amended the Contract by Contract Amendment No 01 on 26 October 2007 and that this substituted the Key Personnel named in Attachment 1 for those named in Attachment 9B. Mercon says that whilst the Contract Amendment appears to be an agreement with Bluewater that liquidated damages will not accrue for the replacement of the originally named individuals, it states that the document does not provide that liquidated damages will also apply to the agreed replacements.

1217. Mercon accepts that it did not strictly operate the procedures for Key Personnel and did not seek Bluewater's prior approval for the replacement of Mr van den Brule with Mr Wickerhoff, nor the replacement of Mr Marijnissen with Mr Hoep. However, Mercon refers to the fact that Bluewater's Mr Heij corresponded with Mr Hoep about transport matters in 2008 without complaint and says that Bluewater's agreement to Mr Marijnissen's replacement is to be inferred from that correspondence. Mercon says that Bluewater was well aware of Mr Wickerhoff's involvement with the works and raised no objection.

1218. Mercon submits that the sums claimed by Bluewater under clause 3 are, in any event irrecoverable as a penalty. It submits that under English law damages are intended to be compensatory and are designed to put the innocent party in the position he would have been had the contract been performed and refers to the recent decision in Omak Maritime Ltd v Mamola Challenger Shipping Co Ltd [2010] EWHC 2026.

1219. Mercon further submits that where parties have agreed in advance the amount of damages to be paid on breach, the damages will be irrecoverable if they are in truth a penalty, intended primarily to deter a party from breach and refers to the recent decision of Blair J in Azimut-Benetti SpA v Healey [2010] 2234 (Comm) where an application for summary judgment on a guarantee was resisted on the basis that the liquidated damages clause upon which it was based was a penalty. At [4] Blair J considered the Court of Appeal decision in Murray v Leisureplay [2005] IRLR 946 at [52] in which Arden LJ held that the negotiations about the liquidated damages clause prior to execution of the contract were admissible for the purpose of showing that the reasons they opted out of the remedies regime provided at common law constitute adequate

justification for the discrepancy between the contractual measure of damages and what the common law provides. Blair J said that a mere assertion that the clause was a genuine pre-estimate of damages did not in itself advance matters and that it was necessary for the court to review the course of negotiations to see how and on what basis the liquidated damages had been assessed and eventually agreed.

1220. At [19-20] Blair J, having reviewed the evidence of the negotiations, considered the law on penalties, including Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co [1915] AC 79 at 87-89 and Lordsvale Finance plc v Bank of Zambia [1996] QB 752 per Colman J. In that latter case, the issue of whether a liquidated damages provision was a penalty was a matter of construction to be resolved by asking whether at the time the contract was entered into the predominant function was to deter a party from breaking the contract or was to compensate the innocent party for breach. The method of identifying whether the contractual function was deterrent is answered by comparing the amount that would be payable on breach with the loss that might be sustained if the breach occurred. Blair J held at [26] that the relevant clause placed obligations on both parties and its purpose was to strike a balance between the interests of both parties and a clause may be commercially justifiable provided that its dominant purpose is not to deter the other party from breach.

1221. Mercon says that applying those principles here, it is first necessary to consider whether the amount of liquidated damages bears, or was intended to bear, any relation to the level of damages Bluewater would have been entitled to for breach of the terms of Clause 3 of Section 9, by Mercon replacing Key Personnel without its prior approval. Mercon refers to the decision in Fitzroy Robinson Ltd v Mentmore Towers Ltd [2009] EWHC 3365 (TCC) where Coulson J found that there was liability where a firm of architects had failed to inform their client that the key person had left the practice and his work was done by others. However Coulson J had said that he was unable to discern any principled basis for assessing an appropriate reduction in the fee as a consequence of the replacement of a key person.

1222. On this basis Mercon submits that as the likely measure of damages for breach of clause 3 of section 9 is a nominal award, it is necessary to consider the negotiations to see whether there was some consensus of the commercial need for such a level of liquidated damages. Mercon says that there is no evidence from Bluewater as to why the levels of liquidated damages are commercially justifiable. It refers to the fact that Bluewater did not provide the relevant further information in November 2010, when requested. Mercon says that Bluewater did not stand to suffer any loss from Mercon's proper and appropriate management of its employees, by allowing them to leave its employment, by requiring them to leave its employment or by redeploying them as appropriate on other tasks, so long as the work was done. It submits that Clause 3 is an un-commercial mechanism for restraining Mercon from dealing with its personnel in the proper exercise of its business and, since there is no discernible loss, it should be held to be unenforceable.

1223. Further Mercon says that the impact of the revised design on the Key Personnel at Mercon was a significant factor which ought to have been brought to Mercon's attention at the time the liquidated damages clause was being negotiated. Mercon submits that, in the absence of any evidence to the contrary, the only discernible purpose of Clause 3 of Section 9 of the Contract was to prevent Mercon from releasing

its Key Personnel without Bluewater's prior approval. It submits that this is a penalty and it is repugnant that Bluewater should seek to control Mercon's management of its employees in this way.

1224. Bluewater submits that the applicability of a liquidated damages provision and its application are to be assessed at the time of contract, not by reference to actual events that transpire. It says that by its nature there will be cases where the actual damages are in reality small because there is subsequent approval and the appointments are acceptable but there will be other instances, such as with Mr Hoep, where the consequences of not seeking and obtaining prior approval will be substantial and far reaching. It submits that the only question for the court is: "were the circumstances required by the LADs provision met?" It says that on Mercon's own case they were because there was no prior approval and none is alleged.

1225. In relation to the authorities relied on by Mercon, Bluewater says that the decision in Azimut-Benetti was that the liquidated damages provision was not a penalty. It refers to the reasoning in [29] which it relies on as showing that the liquidated damages provisions in commercial contracts should normally be upheld.

Decision

1226. It is necessary to consider how the liquidated damages provision in Clause 3 of Section 9 of the Contract operates. It provides that "*[MERCON] shall pay the liquidated damages specified in Attachment 9B for each replacement, unless otherwise agreed with BLUEWATER.*" It is common ground that the liquidated damages clause would only apply when there is replacement without the prior approval of Bluewater. The question is whether the sums which were specified as liquidated damages were a genuine pre-estimate of loss or were unconscionable sums to be paid in terrorem as a penalty.

1227. The law on penalties, particularly in relation to commercial agreements which have been the subject of detailed negotiation, is a clear interference with the freedom to contract. It protects one party from the effect of its agreement with the other party if it has agreed to pay a sum which is a penalty. It is for this reason that cases where a sum has been agreed and has subsequently been held to be a penalty in such a context are rare. The burden is upon Mercon to show that the sum is a penalty and that has to be done objectively by considering the position at the time of the making of the Contract.

1228. The sums which are specified in this case range from €20,000 to €50,000. It is evident that Key Personnel on this and other similar projects are central to the successful performance of the Contract. The opportunity for Bluewater to be able to approve or disapprove the replacement of Key Personnel is therefore an important safeguard for the proper performance of the Contract. If one of the key personnel is replaced in circumstances where approval should have been sought and there is an unsuitable replacement, then this would be capable of causing a great deal of disruption to the project.

1229. In this case the oral evidence from both Mr de Geus and Mr van den Brule was that the rates were negotiated and Mr de Geus explained the matters taken into account in arriving at the figures, in particular, the disruptive effect on the work. Is the figure which the parties agreed a genuine pre-estimate of loss?

1230. I bear in mind that, as Lord Dunedin said in Dunlop v New Garage at 86:

> "*It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties.*"

1231. In the present case it was not possible to put a precise figure on the damages but, rather, the relevant sums needed to be assessed by people who were experienced in such projects, as they were in this case. I have no doubt that this is what Mr de Geus and Mr van den Brule did and they were trying to reflect a pre-estimate of loss in the figures they agreed. I do not consider that in the context of this project the sums of €20,000 to €50,000 can be described as being unconscionable in terms of being extravagant or exorbitant. They were clearly not seen as being a penalty by Mercon at the time when it was deciding to replace Key Personnel. In those circumstances I do not consider that Mercon has come close to demonstrating that these sums were penalties.

1232. I now turn to consider the particular claims for specific personnel.

Exchange of the Project Manager from P van Daele to R. de Jong (€50,000)

1233. Mercon contends that Mr De Jong was approved as recorded in Weekly Progress Report dated 28 March 2008, that Bluewater did not complain contemporaneously and that Bluewater continued to correspond with Mr De Jong in his capacity as project manager. It therefore contends that, as Mr van Daele was an approved replacement, and not a Key Personnel to whom liquidated damages apply, Bluewater's claim for €50,000 must fail.

1234. Bluewater says that it was expressly entitled to give prior approval to the change of personnel and whilst it accepts that it corresponded with Mr De Jong, it says that is irrelevant because, in the absence of anybody else to correspond with in the position of project manager, Bluewater had little practical choice but to correspond with Mr De Jong. It submits that such conduct cannot give rise to a waiver which, in any event, it says requires written notice pursuant to Clause 34.1 of the General Terms and Conditions.

1235. Bluewater says that it is clear Mr De Jong became involved in the Project in early March 2008 and when he was appointed as project manager there was no prior approval and Mr Van Daele has already left his role by this time. In response to being informed of the change of project manager Bluewater requested further information which it says it was entitled to receive as part of a request to change Key Personnel. It says that later documents showed there was still no approval of Mr De Jong's appointment.

1236. I consider that, on the facts, Mercon was not entitled to replace Mr Van Daele without the prior approval of Bluewater but it did so. It was therefore in breach of Clause 3 and Bluewater was entitled to liquidated damages of €50,000.00.

Removal of the Site Construction Manager Astrakhan, P. Van den Brule, without replacement (€50,000)

1237. Mercon accepts that it replaced Mr Van Den Brule with Mr Wickerhoff but says that Bluewater corresponded with Mr Wickerhoff as Site Construction Manager.

1238. Bluewater says that it only allowed Mr Wickerhoff to sign documents because it was told that nobody else was available and Mercon was still waiting for somebody to replace him. It says that the email of 9 October 2008 set out a reasonable basis of refusal by Bluewater, records Bluewater's objection to Mr Wickerhoff and that Bluewater were dealing with him under protest and pending a suitably qualified appointment.

1239. Again I consider that, on the facts, Mercon was not entitled to replace Mr van den Brule without the prior approval of Bluewater but it did so. It was therefore in breach of Clause 3 and Bluewater was entitled to liquidated damages of €50,000.00.

Exchange of Transportation and Logistics Manager from J.Marijnissen to M. Hoep (€30,000)

1240. Mercon says that Bluewater did not complain contemporaneously about the new appointment and continued to correspond with Mr Hoep in his capacity as Transportation and Logistics Manager.

1241. Bluewater refers to Mr de Jong's evidence that Mr Hoep was not a replacement for Mr Marijnissen but refers to the fact that it was part of Mercon's positive case that Mr Hoep was appointed as Transportation and Logistics Manager. Bluewater says that the evidence shows that Mr Hoep performed this role and there is no evidence of Bluewater approving Mr Hoep so that there is no defence to the LADs claim under this heading.

1242. It is evident that, as Mercon originally asserted, Mr Hoep replaced Mr Marijnissen as Transportation and Logistics Manager. Mercon was not entitled to do so without the prior approval of Bluewater but it did so. It was therefore in breach of Clause 3 and Bluewater was entitled to liquidated damages of €30,000.00.

Exchange of Mechanical Completion and (pre) Commissioning Manager from T Jordaans to a person unknown to the Claimant and then to E. van Leliveld (€30,000)

1243. Mercon says that this change was expressly agreed in a letter dated 28 January 2008 where it was said:

> "*In accordance with the provisions of the agreement, Bluewater confirm acceptance of the replacement of Mr Jordaans by Mr Leliveld as key person in the function of completion commissioning manager.*"

1244. Bluewater says that this does not assist Mercon as, even on this basis, there was no prior approval to this appointment as Mercon says that Mr Leliveld started work on 15 January 2008.

1245. There was evidently approval by Bluewater to the replacement of Mr Jordaans by Mr Leliveld. Clause 3 requires prior approval but the letter from Mercon was dated 9

January 2008 for Mr Leliveld to commence on 15 January 2008. Whilst Bluewater's letter is dated 28 January it was giving approval to Mr Leliveld commencing on 15 January 2008 and was therefore approval to him starting then. In my judgment that is sufficient to amount to prior approval and, on those facts, I do not consider that there was a breach of Clause 3 which gave rise to a claim for liquidated damages.

Removal of the HSE Engineer J Koning, without replacement, €20,000.

1246. Mercon says that Mr Koning resigned at the time the work in Gorinchem was completed and did not need to be and was not replaced. As a result Mercon says that this "removal" does not come within the terms of Clause 3 of Section 9 of the Contract and the claim for €20,000 in respect of his "*removal and*" replacement must fail.

1247. Bluewater says that the documentary evidence does not bear this out and that on 12 August 2008 Mercon informed Bluewater that Mr Kean would replace Mr Koning "during his absence". Bluewater asked Mercon the same day to confirm the period during which Mr Koning would be absent. This email was then answered on 18 August 2008 saying that Mr Koning was on holiday until 1 September 2008 but "*unfortunately will not return*" and Mr Kean will replace him until further notice. Bluewater says that no approval was sought or obtained to this change.

1248. On 19 August 2008 Bluewater wrote to Mercon noting that it wished to change to Mr Kean along with changes to other Key Personnel, including Mr De Jong, Mr Leliveld and Mr Hoep. Bluewater noted the lack of formal approval and reminded Mercon of the liquidated damages provision. On the same day but by a letter wrongly dated 25 July 2008, Mercon responded advising Bluewater of the change of personnel to Mr Kean who was expected to start before 1 September 2008 and attaching a revised organisation chart but not seeking approval.

1249. Bluewater says that Mercon's statement in its Defence that Mr Koning resigned at the time work at Gorinchem was completed and there was no further need for Mercon to engage an HSE engineer for the project at Gorinchem but Mr Portnov of ASPO was engaged in Astrakhan to oversee the fabrication and assembly works there, does not accord with the facts. Bluewater says that it is entitled to the LADs it seeks.

1250. On the facts I am satisfied that Mr Kean did replace Mr Koning. Mercon was not entitled to make that replacement without the prior approval of Bluewater but it did so. It was therefore in breach of Clause 3 and Bluewater was entitled to liquidated damages of €20,000.00.

Summary

1251. As a result I find that Bluewater is entitled to liquidated damages under Clause 3 of Section 9 and Attachment 9B in a total sum of €150,000.00 (€50,000 plus €50,000 plus €30,000 plus €20,000) for the replacement of key personnel without the prior approval of Bluewater.

Issue 21(b): What sums are due, if any, in respect of pre-termination damages?

1252. Bluewater claims a total of €1,574,661 in relation to costs which it says it incurred before the termination of the contract because of breaches of contract by Mercon prior to the date of termination. Each claim depends on issues of liability and/or quantum.

Compensation of Expenses – Custom Duties and Charges

1253. Liability for this item depends on a proper construction of VOR-085 which Bluewater maintains required Mercon to return to it any Customs Russian Federation Value Added Tax ("RFVAT").

1254. Bluewater claims reimbursement of €102,638.15 paid on account to Mercon for RFVAT which was payable by Mercon on customs charges and duties. Bluewater says that there was an express or implied term that this sum was to be repaid if RFVAT was reclaimed by Mercon or ASPO. Bluewater says that RFVAT due on import was reclaimable by Mercon and it should have sought to recover it.

1255. Mercon says that it has not reclaimed RFVAT which it paid on invoices to ASPO and does not understand the relevance of ASPO invoices 2009-01, 2009-05 or 2009-06. It says it has no means of knowing whether or not ASPO has reclaimed the RFVAT on those invoices or not and denies liability for this claim.

1256. On 21 February 2008 Mercon submitted a Variation Order Request VOR-085-M in which they sought import duties, VAT, customs fees, truck storage, transport costs and a handling fee on certain items. Bluewater responded on 5 March 2008, after a meeting on 4 March 2008, confirming "provisional acceptance" of that VOR in the sum requested of €276,470.61 for Import Customs Duties and associated VAT for equipment transported from outside the Russian Federation to ASPO in Astrakhan. In that response Bluewater reserved the right to deduct or offset any incorrect advance if it was, for instance, not in line with the provisions of the Contract and/or Russian Federation legislation.

1257. It seems that Lukoil then queried with Bluewater the back-up documentation which Mercon attached to invoice V7080081 and Bluewater asked Mercon on 22 July 2008 for the applicable Customs Declarations in relation to the customs clearance of tubular sections and grout seals.

1258. On 8 August 2008 Bluewater made an additional request in accordance with Clause 27 of Section 2(a) of the Contract to provide evidence that amounts of RFVAT related to Customs Duties and Fees had been successfully reclaimed by ASPO. The relevant sums were €64,794.40 and €37,844.75, totalling €102,639.15 in Invoice V7080081 which had been provisionally reimbursed to Mercon.

1259. Bluewater sent reminders to Mercon and then on 10 October 2008 wrote to Mercon as follows:

> "*According to Russian Law (Articles 171 and 172 of the Russian Federation Tax Code) ASPO can file for reclamation of CUSTOM VAT.*
> *As such, BLUEWATER consider that MERCON/ASPO can not claim compensation for associated costs, which BLUEWATER have conditionally reimbursed already.*
> *As a consequence and without further information from MERCON, BLUEWATER will retain EURO 102,638.15 from future invoices of MERCON.*"

1260. Bluewater's reference to ASPO Invoices 2009-01, 2009-05 and 2009-06, all of which were paid by Bluewater to Mercon, is not understood by the quantum experts or Mercon and is not properly explained.

1261. In the absence of evidence by Bluewater that shows that sums paid by it to Mercon and subsequently paid to ASPO for RFVAT have been recovered or that under Articles 171 and 172 of the Russian Federation Tax Code should have been recovered, I am not persuaded that there is any claim to recover RFVAT on customs duty or fees under Clause 27 of Section 2(a) of the Contract. Whilst that provision obliged Mercon to import items which are subject to customs control so as to take maximum advantage of customs procedures, I am not clear that this gives rise to any claim on the facts. Accordingly the claim fails.

Additional Sailing costs for optimisation of FMS stowage and shipment of piles

1262. Bluewater seeks to recover €84,000 paid to Mercon and included in VOR-075 rev 4 dated 12 March 2008 for the additional handling costs for a change to the load-in sequence for shipment 1. The sum was claimed for loading equipment on board Ship 1 at Astrakhan prior to sailing to Baku. Bluewater says it related to the need to move the FMS on board at Astrakhan.

1263. Bluewater says that the FMS only needed to be moved because Mercon, in breach of contract, failed to optimise the stowage requirements but says that, as Mr de Geus explains in paragraph 70 of his fourth witness statement, this did not occur.

1264. Mercon says that €84,000 was agreed as part of VO-005 and was compensation for the further shipment from Astrakhan to Baku which Bluewater requested Mercon to undertake in March to May 2008, as confirmed by an email from Flinter dated 16 June 2008. Mercon says that Bluewater agreed to pay this sum to Mercon and there is no basis for that agreement to be rescinded or the amount repaid to Bluewater.

1265. Mr de Geus refers to a note of a meeting on 19 June 2008 to support his recollection that €84,000 was a sum for the moving of the FMS. In fact the reference to €84,000 in that meeting is a reference to the "Piles Price, incl transport" which it says "[Bluewater] com accept 84K" and "[Mercon] confirm acceptance Flinter" leading to VOR-005 Rev 3 being "+84K". In my judgment the evidence does not support the claim that €84,000 related to the moving of the FMS.

1266. Equally, though, apart from the note of that meeting I do not find it easy to ascertain where the figure of €84,000 comes from and the email from Flinter of 16 June 2008 does not assist on this.

1267. As a result, I am not persuaded that a sum of €84,000 was included within VOR-005 for the cost of moving the FMS and therefore Bluewater's claim to recover that sum fails.

Engineering Costs for relocation of Drain Tank due to Changed Transport Split

1268. Bluewater seeks €60,320 in compensation for the costs it incurred as a consequence of its decision to split the Topsides. Liability for this item depends primarily on responsibility for the split in the Topsides for transportation but there is also an issue as

to which party was responsible for the location of the split as that required the drain tank to be relocated.

1269. As set out above I have held that Bluewater is responsible for the split in the Topsides and this also related to the location of the offshore weld and the location of the drain tank. I consider that these costs were matters for which Bluewater was responsible and note that it was the view of Bluewater at the time that it was responsible for the engineering costs. This claim therefore fails.

Failure to deal with Customs clearance for "free issue" equipment temporarily Imported

1270. Bluewater claims €37,925.74 as costs incurred in respect of import duties because Mercon wrongfully failed to obtain clearance in respect of free issue items. Mercon contends that Bluewater did not make it aware of the need to obtain clearance for these items. Bluewater says that Mercon wrongly relied on Bluewater to advise it of the shipping requirements, when Mercon had responsibility for this.

1271. There are two demands and two invoices from the customs authority which were paid, according to NCR-058, amongst other things, for anodes and winches. Whilst the documents refer to some general obligations under the Contract I have not been referred to legislation that permits the temporary import of materials and how this is dealt with. As the quantum experts say the documents are not in English and therefore the basis of the claim is not clear. As a result, I am not persuaded that there was a breach of contract by Mercon and the claim fails.

Sorting mix-up of Project Materials in Container

1272. Bluewater claims €11,920.14 on the basis that Mercon mixed up project materials thus causing a reloading of a container. Bluewater says that it had to pay ASPO to import additional materials and pay import charges as a result of this. Mercon denies that it is liable and says that the issue related to free issue items wrongly labelled by Bluewater.

1273. Bluewater says that there was an error in the shipping documents where there was a discrepancy of 1 kg in the weight of the umbilicals between the bill of lading and the packing list. Mr de Geus says that another container was en route to Russia when concerns were raised as to its contents based on problems with the second shipment so it was returned to Rotterdam. It was unloaded, the transport documents were updated, the container reloaded and then transported by road to Astrakhan.

1274. It is not clear why the decision was taken to return the container to Rotterdam or whether, in fact, there was any discrepancy or error in the shipping documents once it was unloaded. I am not persuaded that this was caused by an error by Mercon or was a reasonable response to any previous difficulties. The claim therefore fails.

Management & Engineering Costs

1275. Bluewater claims €37,925 under its Project Management and Engineering costs claim as particularised in Schedule 7 and claimed in Schedule 7A NCRs.

1276. Mercon says that Bluewater was always going to require management and engineering input for performance of its own obligations under the Contract and to consider,

monitor and evaluate the performance of Mercon. It says that Bluewater's claim makes no distinction between time spent on the original scope of Mercon's works, time spent as a consequence of variations to the scope of Mercon's works and the time it alleges was spent dealing with Mercon's breaches of contract. It submits that unless Bluewater can demonstrate the amount of time spent on a particular breach by Mercon, its claim cannot succeed.

1277. The quantum experts agree in principle that there would be management and engineering input to the resolution of legitimate pre-termination issues. They have considered the claim and note that the hours claimed are authenticated from internal documents, but that Bluewater's rates are high.

1278. Bluewater relies on the evidence of Mr de Geus who prepared the claim at Schedule 7A of the Re-Amended Particulars of Claim. Bluewater says that if the court is not satisfied that the entirety of the sums claimed by Mr de Geus are valid then, given the experts' agreement that there would be management and engineering costs, the court should make an assessment based, for example, on a reasonable percentage of the sums claimed.

1279. The quantum experts are clearly correct that, in principle, there would be management and engineering input to the resolution of legitimate pre-termination issues. However, given my findings on the pre-termination claims I do not consider that I am in a position to assess what if any charges should be recoverable under this head. Accordingly, the claim fails.

Loss of Profit on Management & Engineering Costs

1280. Bluewater's primary position is that it does not pursue this claim for lost profit on the basis that Clause 25 of the Contract precludes a claim for profit. If contrary to Bluewater's primary position, the court were to find that Mercon's claim for loss of profit was made out then Bluewater would seek to recover loss of profit on management and engineering costs. It submits that if the court awards a proportionate amount for the underlying management and engineering costs then a similar approach can be taken to profit.

1281. Mercon refers to the view of the quantum experts in their second joint statement where they note the lack of evidence of Bluewater's ability to use its staff profitably elsewhere and says that the claim is not established.

1282. As I do not consider that Bluewater has made out its claim for management and engineering costs, this claim also fails. In any event I have found below that Mercon's claim for loss of profit fails and therefore the claim does not arise on Bluewater's primary position.

Steve Osmond Costs - Remeasure Database

1283. Bluewater claims the cost it incurred in engaging Mr Osmond to set up and maintain the database for remeasurement and reviewing remeasurement. Bluewater says that this was necessary because of the absence of information and input from Mercon and the computer illiteracy of Mercon's remeasurement Engineer.

1284. Mercon denies this claim and contends that its remeasurement Engineer was experienced and competent. Mercon says that Mr Osmond's charges (and those of Mr Glazenburg) in setting up the re-measure database for Bluewater were costs Bluewater was always going to have to bear once it agreed in principle to a system of rolling interim measurement and payment and was always going to need the input of a quantity surveyor to enable it to create and sign off revisions to VO-008.

1285. It is evident that the task of remeasurement was a complex one on this project and, in any case, would have required Bluewater to be involved. I am not persuaded that there was any failure by Mercon which could justify Bluewater in engaging separate resources rather than using the project staff who would be involved in any event. The claim therefore fails.

Bluewater Welding Expert Costs

1286. Bluewater claims the costs of additional costs in relation to the review and control of welding because it contends that Mercon failed to perform proper AC/QC welding control of its subcontractors. The costs relate to the involvement of Mr Spelt.

1287. Mercon denies that its AC/QC control was inadequate. It says that Bluewater was always going to have to provide welding expertise to assist it with the certification and approval of fabrication and to consider monitor and evaluate the performance of Mercon. It notes that Bluewater's claim makes no distinction between time spent on the original scope of Mercon's works, time spent as a consequence of variations to the scope of Mercon's works and the time it alleges was spent dealing with Mercon's breaches of contract.

1288. I have reviewed the documents referred to by Mr de Geus in his fourth witness statement, consisting of exchanges between himself and Mr Spelt. The headings which Mr de Geus mentioned in his email of 9 October 2008 and for which Mr Spelt then identified hours in his email of 7 October 2009 do not, in my judgment, fall within a category of matters for which Mercon would be liable in terms of welding procedure qualification, fabrication control or attendance at meetings. In those circumstances I do not consider that the claim for the time spent by Mr Spelt is properly founded on matters for which Mercon was responsible. Accordingly the claim fails.

J Glazenburg Costs - Remeasure Database

1289. This claim relates to extra hours expended by Mr Glazenburg which are claimed to be the result of Mercon's breaches of contract. This claim fails for the same reasons that I have held that the claims for Mr Osmond's time failed.

Costs for provision of HSE Plan

1290. Bluewater claims €6,487.20 (80 hours of Mr Donker's time) on the basis that, in breach of contract, Mercon failed to provide an acceptable HSE plan and so Bluewater's HSE engineer drafted a plan on Mercon's behalf.

1291. Mercon says that no particulars are given as to how Mercon's HSE documents were said to have been defective or what additional work was undertaken by Mr Donker. In addition it says that there is no explanation as to what hours he was expecting to spend for "review" of the HSE documents and there are no timesheets or diary records. It submits that, in the absence of any evidence, claim should be dismissed.

1292. I have already considered the claim by Bluewater for Mercon's failures in HSE management but concluded that, whilst there were some failures, it did not justify removing Mercon's allowance for that item. For the same reason I do not consider that any failures by HSE justified some 80 hours of Mr Donker's time and certainly Bluewater has not established that claim. The claim therefore fails.

Personnel at SEC - Additional involvement

1293. Bluewater claims €6,637.50 for the additional involvement of SEC after 15 September 2008 because of Mercon's delay in completing the work. Mercon denies this claim.

1294. This claim is clearly a delay claim and any recovery would depend on Bluewater's overall delay claim and the recovery of liquidated damages. I do not consider that there is a viable additional head of claim.

Costs for provision of Commissioning Plan

1295. Bluewater claims €7,952.00 on the basis that Mercon failed to prepare an acceptable Commissioning Plan and Mr Nagel had to spend 56 hours drafting a Commissioning Plan for Mercon.

1296. Mercon denies this allegation. It says that no particulars are given as to why or in what respects the Commissioning Plan was not acceptable, or what additional work Mr Nagel did and no timesheets or diary records have been produced. In the absence of any substantiation it says that the claim should be dismissed.

1297. Bluewater has not established how the Commissioning Plan was unacceptable or what Mr Nagel did. In those circumstances I am not in a position to make either findings of breach by Mercon or assess the need for Mr Nagel to be involved. On that basis the claim fails.

Chairing "kick-off" meeting at EEW in Germany

1298. Bluewater claims €2,520.00 for the attendance of Mr Nijboer and Mr Koppe at the kick-off meeting with Mercon's sub-contractor EEW. It says that Mercon failed to comply with the provisions of the Contract concerning Procurement and Subcontracting by failing to chair or even attend kick-off meetings with its subcontractors.

1299. Mercon accepts that it had an obligation to hold pre-production meetings as required by Clause 5 of Section 12 of the Contract and says that it did arrange such a meeting with EEW on 7 November 2007. It denies an obligation to chair such a meeting. Mercon also alleges that no loss has been suffered as the individuals who attended the meeting would have attended in any event.

1300. From an email sent by Mr Nijboer to Mr Brouwer of 11 November 2007 it is evident that the complaint was not that nobody from Mercon attended the kick-off meeting on 7 November 2007 but that the person who attended was from Mercon's procurement and subcontracting department and not from Mercon's QA/QC or fabrication department. Whilst Bluewater sent representatives to the meeting I do not consider that Mercon is liable for that. Mercon attended and Bluewater chose to attend. The claim therefore fails.

Welding Procedures - Costs of specific advice

1301. Bluewater claims €1,987.50 for the involvement of Mr Spelt and SEC in relation to Mercon's preparation of welding procedures that complied with the project requirements. Mercon denies that it was unable to produce welding procedures which complied with the project requirements.

1302. Bluewater has not particularised the deficiency in the welding procedures or how that was remedied by SEC. The claim fails.

Chairing "kick-off" meeting at MRC, Schiedam

1303. This item is similar to the claim for chairing the kick-off meeting at EEW but relates to the cost of the kick-off meeting for MRC.

1304. Mercon contends it organised a meeting on 15 May 2008 and attended the meeting. The fact that Mercon attended the meeting is confirmed by Mr Nijboer's email of 17 May 2008. The claim fails.

Chairing "kick-off" meeting at SIF, Roermond

1305. This item is similar to the claim for chairing the kick-off meeting at EEW but relates to the cost of the kick-off meeting for SIF.

1306. Mercon contends it organised a meeting on 27 November 2007 and attended and there is nothing in the evidence to contradict that. Further this is consistent with the position on the meetings at EEW and MRC. Whilst Bluewater sent representatives to the meeting I do not consider that Mercon is liable for that. The claim therefore fails.

DNV Additional and extended costs - Fabrication Witness

1307. Under this heading Bluewater claims €27,527.00 for the cost of DNV witnessing fabrication at ASPO beyond 15 September 2008 and the need to carry out re-work both in Gorinchem and at ASPO which required review and witnessing.

1308. Mercon denies this claim on the basis that the DNV attendance was extended due to Bluewater delays. Mercon says that Bluewater's late and haphazard release of design information and the delay and disruption to Mercon's fabrication process may well have caused it to incur additional DNV costs. Mercon says that unless Bluewater can demonstrate in relation to each of the defects that required rework, the hours spent by DNV in witnessing fabrication and the attendant cost, Bluewater's claim should be dismissed.

1309. During the concurrent evidence session with the quantum experts I consider Issue G, "Are there any delay-related costs wrongly included Bluewater's claims for 'Non-Conformance' and 'Pre-termination Damages'?". This claim was reviewed in the light of that issue. Mr Dixon said that this claim might arise because of NCRs or delay, but he could not ascertain one way or another. Mr Simons agreed and said that there were some items such as office facilities, for example, which may be a delay-related item but could also be for a separate office specifically to deal with defects. Mr Dixon said that there was a possibility that there was an element of prolongation in the sums.

1310. Whilst Bluewater refers to re-work it is not clear whether that re-work arose from breaches of contract by Mercon or whether it was part of the inevitable working process. In addition I consider that the involvement by DNV after 15 September 2008 relates to delay in carrying out the work, which would include any delay caused by breaches of contract by Mercon in carrying out the work leading to re-work. That is a matter for consideration as part of the prolongation claim and any such costs would be recovered as liquidated damages for delay.

1311. Given the lack of particularisation, I do not consider that Bluewater has made out its case that DNV costs after 15 September 2008 are recoverable. The claim therefore fails.

DNV Additional and extended costs - Design Review

1312. Bluewater claims €5,712.00 for the cost of design review by DNV beyond 15 September 2008 caused by re-work.

1313. Mercon says that this was a review of Bluewater's revised design and that under the Contract Bluewater had to provide AFC drawings that had been certified by DNV and this is a cost it was always going to have to bear. It says that Bluewater has failed to identify any additional work caused to DNV as a consequence of default by Mercon and the claim should be dismissed.

1314. I consider that the issues relating to this item are the same as for the other claim for the costs of DNV after 15 September 2008. Given the lack of particularisation, I do not consider that Bluewater has made out its case that DNV costs after 15 September 2008 are recoverable. The claim therefore fails.

Failure to return surplus free-issue steel

1315. Under the Contract Bluewater was to free issue steel over 50mm to Mercon. It contends that 86.359 tonnes of free issue steel was not used by Mercon and should have been returned. It claims €194,951.38 for this item.

1316. Mercon denies liability for this claim on the basis that there was no surplus material and, in any event, on the basis of quantum.

1317. Mercon relies on the evidence of Mr Leenheer who has taken figures from Mr de Geus' evidence and sought to carry out reconciliations of the free issues steel. Bluewater says that Mercon is responsible for the existence of a dispute because it failed to follow its own procedure in relation to the treatment of steel.

1318. There is evidence, relied on by Bluewater, that Mercon was not dealing properly with the surplus free issue steel:

(1) In February 2008 Bluewater wrote a number of times to complain that scrap was not being dealt with properly. At a meeting on 14 February 2008 between Bluewater and Mercon it was stated at item 1.4:

> "*[Bluewater] wants reporting weekly of the rest/ scrap materials in accordance of [Mercon] procedure. Scrap container of [Bluewater] rest materials left [Mercon] yard. NCR still outstanding. [Mercon] has to follow up their own procedure for return left over materials and scrap.*"

(2) On 18 March 2008 at a meeting it was noted that at item 3.3 that "*NCR for Scrap-container that disappeared from [Mercon] site without [Bluewater] approval. This NCR is now 13 weeks outstanding.*"

(3) At a meeting on 8 April 2008 it was recorded:

> "*[Mercon] are requested to issue Steel Reconciliation, including weights, differentiated by WORKSITE.*
> *[Mercon] shall exclude Scrap Materials, according to procedure (i.e. with [Bluewater] approval) from Reconciliations.*"

(4) At the meeting on 11 April 2008 it was noted "*At [Mercon] - 2x containers with scrap materials are ready for transport. [Bluewater] to advise [Mercon] how to proceed.*"

(5) At a meeting on 21 August 2008 it was noted that

> "*[Bluewater] received the reconciliation of all redundant steel but without steel weights and copies of left over nesting plates >1x1m*
> *OUTSTANDING since week 20*
> *Information of the 3 scrap containers are still outstanding. The 1st container since 21/12/07!!"*

(6) On 21 August 2008 Bluewater wrote to say that despite requests and instructions Mercon had failed to provide any steel reconciliation register since the beginning of the project and there was still "*no close out for re-use of possibilities of un-used materials.*"

(7) On 18 September 2008 the note of 21 August 2008 was repeated except that it was recorded "*[Mercon] indicate that they will submit the list of redundant steel to [Bluewater] within a week allowing them to clean up the storage area.*"

(8) On 1 October 2008 again the note of 21 August 2008 was repeated but it said "*[Mercon] promised to mark-up all plates with charge numbers allowing traceability towards available material certificates. When no proper traceability can be provided all redundant steel is downgraded to scrap. [Mercon] to start re-stamping urgently.*"

(9) On 27 November 2008 Mr Brouwer said that he had 40.5 tonnes of redundant steel plates that could be re-stamped and transported elsewhere. By an internal Bluewater e-mail dated 27 November 2008 it was noted that the drawings and dimensions would be checked and delivery of the surplus steel arranged.

(10) On 11 December 2008 Bluewater confirmed internally that all of the surplus plates "ex Mercon" had arrived at Rotterdam.

1319. Given that background the main question is how much free issue steel was not used by Mercon and should have been returned to Bluewater? It is clear that Mercon did not properly deal with this issue but from the calculations produced by Mr Leenheer there does not appear to be any dispute over the overall figures although the way in which the surplus steel is to be treated is in issue. Mr de Geus' calculation takes the steel supplied of 364 tonnes and deducts the material used of 235 tonnes. He then calculates that, of the balance of 128 tonnes, 42 tonnes was returned to Bluewater leaving 86 tonnes

unaccounted for. He says that 90% (77.7 tonnes) of the steel not returned would have been re-used and 10% (8.6 tonnes) would have been scrapped.

1320. Mr Leenheer has assessed the cutting drawings and concludes that 2 to 3% (10 tonnes) would have been lost from the cutting arc and that around 77 tonnes of scrap steel would have been generated from the cutting process. Whilst I accept that an allowance has to be made for loss due to the cutting process, I consider that an element of the 77 tonnes would not have been scrap but would have been valuable steel for re-use. Whilst I consider that Mr de Geus's figure of 90% is too high, somewhere over 50% would be re-used and somewhere under 50% would be scrap. My assessment would be that 37 tonnes would be scrap and 40 tonnes would be re-used.

1321. In relation to Bluewater's calculation, there are a number of issues raised by the quantum experts:

(1) One plate is shown on the relevant drawing "to be delivered to [Fabricom Oil and Gas] ". On that basis I do not consider that Mercon is liable for the return of any surplus from that plate. It should therefore be deducted from the calculation.
(2) The quantum experts note that the weight calculations for three of the plates seem to be incorrect in the table attached to Mr de Geus' first witness statement and have made a recalculation to correct this. I consider that the correction should be made.
(3) There is an issue as to the extent to which surplus steel was re-usable or scrap. As set out above I consider that the calculation should be based on 77 tonnes overall made up of 37 tonnes of scrap and 40 tonnes reused.
(4) The quantum experts say that the rate which Mr Leenheer states has been obtained by Mercon for the scrap steel appears to be below the relevant market rate at the relevant time and they have agreed an alternative reasonable market rate. I consider that the quantum experts' rate should be applied.
(5) There is an issue whether Mercon is entitled to 5% commission for selling the scrap metal. I consider that it is entitled to 5% commission under Clause 4.4 of Section 5 of the Contract.

1322. In Appendix 12.2A and 12.2B the quantum experts have provided a range of figures based on the claimed tonnages and the corrected tonnages. I have therefore used the table in Appendix 12.2b, excluding the plate delivered to FOG, applying reasonable scrap rates less 5% but have based the calculation on my finding as to reuse using €630/tonne for scrap and €2010/tonne for reused steel. This gives a total of €103,710 (€23,310 plus €80,400).

Additional Costs to Make Pendulums transportable by Rail and Additional Costs for Transportation of Pendulums

1323. Bluewater originally made claims based upon the need to transport the pendulums by alternative means and contended that this was Mercon's responsibility as it was caused by delays to Ship 3. However Bluewater now accepts that it cannot maintain that there was a causal connection between the delays to Ship 3 and the decision it took in relation to the pendulums. As a result, Bluewater no longer pursues its claim for the cost of modifying and transporting the pendulums.

Additional Procurement Costs, Ballast Tank Materials

1324. In the light of the observations of the quantum experts in relation to this claim it is no longer pursued by Bluewater.

Summary

1325. As a result I find that Bluewater is entitled to €103,710.00 in respect of pre-termination damages as follows:

Item	Description	Allowed
1.	Compensation of Expenses – Custom Duties and Charges	€0.00
2.	Additional sailing costs for optimisation of FMS stowage and shipment of piles	€0.00
3.	Engineering costs for relocation of Drain Tank due to changed transport split	€0.00
4.	Failure to deal with Customs clearance for "free issue" equipment temporarily imported	€0.00
5.	Sorting mix-up of project materials in container	€0.00
6.	Management & engineering costs (Schedule 7A)	€0.00
7.	Loss of profit on management & engineering costs	€0.00
8.	Steve Osmond costs - remeasure database	€0.00
9.	Bluewater welding expert costs	€0.00
10.	J Glazenburg costs - remeasure database	€0.00
11.	Costs for provision of HSE Plan	€0.00
12.	Personnel at SEC - additional involvement	€0.00
13.	Costs for provision of Commissioning Plan	€0.00
14.	Chairing "kick-off" meeting at EEW in Germany	€0.00
15.	Welding Procedures - costs of specific advice	€0.00
16.	Chairing "kick-off" meeting at MRC, Schiedam	€0.00
17.	Chairing "kick-off" meeting at SIF, Roermond	€0.00
18.	DNV additional and extended costs - fabrication witness	€0.00
19.	DNV additional and extended costs - design review	€0.00
20.	Failure to return surplus free-issue steel	€103,710.00
21.	Additional costs to make pendulums transportable by rail Additional costs for transportation of pendulums	€0.00
22.	Additional procurement costs, Ballast Tank materials	€0.00
	Total	**€103,710.00**

Issue 21(c): What sums are due, if any, in respect of post-termination damages?

1326. Having found that Bluewater was entitled to terminate the Contract, Bluewater claims post-termination damages.

1327. Bluewater says that following termination of the remaining work it was imperative for Bluewater to find a means of fulfilling its obligations under its contract with Lukoil in the most cost effective and efficient fashion. In those circumstances it says that its best, if not only, prospect of completing its obligation to Lukoil was to engage ASPO to undertake the outstanding work, including rectification works. It says that moving the partially fabricated work from ASPO would have been very costly in terms of time and money even if ASPO would have been willing to release the equipment without further payment.

1328. Bluewater says that, at the time of the termination, significant sums were outstanding to ASPO from Mercon and ASPO was unwilling to undertake any obligations for Bluewater without payment for the remaining work and payment of the sums which were outstanding from Mercon at the time. Bluewater refers to the need to pay the sums outstanding from Mercon a "ransom" payment. As a result it says that Bluewater Group's Russian arm, Bluewater Technical Support N.V, acting on behalf of Bluewater, entered into two contracts with ASPO. Bluewater refers to these contracts as the Payment Contract and the Work Contract. Under the Payment Contract there was an agreement to pay the outstanding sums due from Mercon and under the Work Contract ASPO was engaged to undertake remaining works. Whilst Mercon disputes Bluewater's entitlement to recover costs spent by a different entity, Bluewater says that it has reimbursed all payments and has incurred the losses itself.

1329. Bluewater says that the sums paid under the Payment Contract amounted to €2,217,043.98, exclusive of RFVAT. It says that ASPO was undertaking work for Mercon which was reimbursable under the Contract together with work for which Mercon was remunerated under the lump sum or re-measure items. Bluewater accepts that is not entitled to recover sums from Mercon where those sums were due to be paid by Bluewater to Mercon for reimbursable work. However, as regards the remaining sums which consist of sums claimed to be reimbursable but not properly reimbursable and other costs not claimed to be reimbursable, Bluewater says it had to pay considerable sums to discharge Mercon's debts to secure ASPO's co-operation, as a direct result of the termination.

1330. There is also reference to a "balancing payment" of €130,680.20. When Mercon in its letter dated 30 January 2009 sought to re-allocate its payment of €600,000, incorrectly as I have held, to different invoices Mercon paid an additional amount of €130,680.20 to ASPO. The total of the ASPO invoices against which Bluewater made payment was €2,347,724.18 but the sum of €130,680.20 was deducted so that Bluewater only paid €2,217,043.98.

1331. Of that sum of €2,217,043.98 Bluewater claims a total of €749,716.63, together with any further sums which, as I have held above, was paid by Bluewater to ASPO for reimbursable work but should not have been paid to ASPO. This claim consists of the value of the ASPO invoices paid by Bluewater under the Payment Contract, excluding those invoices which are properly credited against Mercon's Reimbursable Work claim. There is then a claim for a further €24,344.00 for some insulation work.

1332. There are therefore essentially three elements to this claim: the claim for €749,716.63 paid to ASPO not for reimbursable work; the sums for reimbursable work which Bluewater paid ASPO but which I have held above was not properly payable for reimbursable work and the claim for insulation works in the sum of €24,344.00.

1333. Mercon says that Bluewater's claim could only be advanced under clause 30.6(c) of the contract as one for the payment of "additional costs reasonably incurred by Bluewater as a direct result of [Mercon's] default or other events giving rise to termination". Mercon says that the obligation to pay the sums to ASPO would not have arisen had Bluewater taken an assignment of Mercon's rights under the Mercon/ASPO Contract pursuant to clause 30.3(c) of the Contract.

1334. In relation to the "ransom" payment, Mercon refers to Bluewater's case that it agreed to pay that money as a result of irresistible commercial pressure by ASPO. It says that this suggestion is implausible in the light of the communications between Bluewater and ASPO from as early as 12 November 2008, when Mr Brouwer met Mr Marisov of ASPO. Mercon says that Bluewater's decision to pay ASPO's invoices seems to have been largely motivated by the fact that it could do so using Mercon's money and it refers to Mr van Aller's evidence and points to the absence of evidence that Bluewater negotiated with ASPO over the payments that would be made in respect of its Mercon invoices. It says that Bluewater's plan and what it did was to pay off ASPO using Mercon's money.

1335. Mercon says that there was a notable lack of consultation about the ASPO invoices and Mercon's true indebtedness. Bluewater took no steps to check whether ASPO had a valid claim in respect of the invoices, or whether there were any errors or other reasons why they should not be paid. On this basis, Mercon says that the payments to ASPO, particularly the ransom payment, were paid at Bluewater's risk. It submits that the only relevant invoices for consideration as part of this head of claim should be the non-reimbursable work invoices, that is work covered by re-measure or lump sum payments, and then only if Mercon had refused to pay them.

1336. Mercon also says that the decision to engage ASPO directly was not a direct result of Mercon's default but arose because of concern that, if it did not do so, Lukoil would itself contract directly with ASPO, bypassing Bluewater.

1337. I consider that Bluewater acted reasonably in engaging ASPO to complete work in Astrakhan after it was entitled to terminate the Contract. I do not consider that Bluewater can be criticised for entering into discussions with ASPO at the end of 2008 or in January 2009 in advance of the termination to find out ASPO's position. By late 2008 Bluewater had taken some painting work away from Mercon and the commercial relationship between Bluewater and Mercon appears to have been deteriorating. In those circumstances, the only real choice for Bluewater was to engage ASPO who was, at the time, in dispute with Mercon as to payment but in a strong commercial position because the SYMS structure was at its yard.

1338. Against that background, I do not consider that Mercon's suggestion that Bluewater should have taken an assignment of the Mercon/ASPO sub-contract was realistic. ASPO was contending that Mercon owed it large sums and might have terminated that agreement for non-payment. In any event, I do not consider that an assignment would, in practical terms, have made any difference as Bluewater would have had to discharge Mercon's debt to ASPO and Bluewater would then have been in the same position as it found itself under the Payment Contract and the Work Contract.

1339. Rather, as part of the reasonable solution of engaging ASPO to complete the work, Bluewater had to pay ASPO sums which, on analysis, Bluewater would not otherwise have had to pay Mercon. That might be because they related to matters for which Mercon was being paid on a re-measured or lump sum basis or might be sums which ASPO had invoiced but which, on analysis, were not properly payable on a reimbursable basis or otherwise. In the circumstances as they prevailed at the end of January and early February 2009 I do not consider that consultation with Mercon or

negotiation of invoices with ASPO was a realistic commercial position. It is clear that there was commercial pressure on Bluewater and that the potential for Lukoil to deal directly with ASPO put more pressure on Bluewater to act but was not the real reason why Bluewater engaged ASPO.

1340. I consider that the need for Bluewater to pay the "ransom" payment arose as part of the necessary and reasonable steps which Bluewater took to complete the work after the termination and is recoverable under Clause 30.6(c) of the Contract as part of the additional costs reasonably incurred by Bluewater as a direct result of Mercon's defaults giving rise to the termination. I am satisfied on the basis of the evidence of Mr de Geus and the documents to which he refers, that Bluewater has incurred the sums paid by Bluewater Technical Support NV under the Payment and Work Contracts.

Sums paid to ASPO

1341. The quantum experts have analysed Bluewater's claim and determined that, of the ASPO invoices included in the Payment Contract, only invoices 2008-23A (€113,000.00), 2008-23B (€30,240.00), 2008-24A (€6,160.00), 2008-50 (€37,001.32), 2008-65 (€9,590.00), 2008-70 (€6,459.00), 2008-55 (€587,025.00), 2008-56 (€61,839.00), 2009-2 (€2,876.00) and 2009-8 (€2,206.31) are claimed in Bluewater's primary claim, with the balance relating to the credit which Bluewater seeks against Mercon's Reimbursable Work claim, subject to that being properly due to ASPO.

1342. Of those invoices, as the quantum experts state, Mercon admits that it would have become indebted to ASPO for all of them except invoices 2008-23A, 2008-23B and 2008-24A totalling €149,410.00. In addition Mercon says that it paid invoice 2008-56 in full on 3 February 2009.

1343. The three disputed invoices are all dated September 2008. Invoice 2008-23A was for "*Compensation of expenses on the rent of the floating crane "Volgar" that was involved during loading and unloading of FMS-structures*", invoice 2008-23B was for "*Compensation of expenses on the rent of tug boats that were involved in loading and unloading works executed by the floating crane "Volgar"*" and Invoice 2008-24A was for "*Compensation of expenses on the operation of tug boats during installation of the central column according to the item 11.3 of the contract #07.1661*."

1344. The first two invoices appear to relate to the need to offload and re-load the FMS which is the subject of VOR-255. As I have already said, I consider that Mercon is responsible for the need to off-load and re-load the FMS and therefore, on this basis, Mercon would be liable for the use of the Volgar and tugs for that purpose. As a result, I consider that invoices 2008-23A and 2008-23B are properly included within Bluewater's claim and discharged Mercon's liability to pay ASPO. The third invoice relates to work which Mercon was obliged to carry out as part of the reimbursable work. As such, I consider that it should be deducted from sums claimed as Bluewater would have had to reimburse Mercon for that cost and on the limited information I have the full sum should be allowed.

1345. So far as Invoice 2008-56 is concerned that invoice is dated 19 November 2008 and was for "Payment according to PM12.2 of *Appendix 5A (rev05) schedule of payments of the contract 07.1661.*" This related to "SYMS completely painted including touch-up." The evidence that Mercon paid this on 3 February 2009 is not clear or adequate.

Rather it is clear that Bluewater paid that sum as part of the Payment Contract in the circumstances that I have set out above and I consider that, in the circumstances, Mercon are liable for the sum of €61,839.00 paid by Bluewater.

1346. On that basis, I do not deduct €113,000.00 or €30,240.00 (Invoices 2008-23A and 2008-23B) from the overall figure but I do deduct €6,160.00 (Invoice 2008-24A). Further I do not deduct €61,839.00 for Invoice 2008-56 from the overall figure. It follows that the overall figure of €749,716.63 is reduced by €6,160.00 to €743,556.63.

Sums paid to Mercon not for properly reimbursable work

1347. In relation to sums which were paid to ASPO for invoices for reimbursable work and which I have found were not properly due to ASPO then I have already taken those sums into account by deducting them from sums otherwise due to Mercon in relation to invoices.

Insulation work

1348. In relation to the invoice for insulation work in the sum of €24,344.00, Mercon says that there was no outstanding insulation to be completed at the date of termination. The relevant insulation work involved two employees of Atlas Inexco travelling to ASPO to complete the insulation of the Topsides because of what Bluewater says was Mercon's failure to complete the Topsides in one piece prior to departure from Gorinchem. On that basis it forms part of the additional work necessary as a result of the split of the Topsides and, as stated above, Bluewater is responsible for the costs arising out of the split. I therefore do not allow any sum under this head.

1349. Accordingly Bluewater is entitled to recover €743,556.63 from Mercon for post-termination damages.

Issue 21(d): What sums are due, if any, in respect of NCRs?

1350. Bluewater makes claims in respect of a number of Non-Conformance Reports ("NCRs") which were issued during the course of the Contract. Bluewater says that Mercon failed to operate the NCR procedure during the course of the works and did not accept the NCRs issued to it or undertake works to correct the NCRs which were raised before termination. Schedule 7 to Bluewater's Re-Amended Particulars of Claim sets out details of the individual NCR claims.

1351. Having found that Bluewater was entitled to terminate the Contract certain issues which would have arisen if there had been a repudiatory breach by Bluewater do not arise. I will therefore deal with each of the NCRs below using the relevant NCR numbers.

Miscellaneous NCRs (NCR-2, 4, 5, 6, 8, 9, 10, 55, 64, 66, 69, 71, 72, 73)

1352. Bluewater claims €157,570.00 which is the amount paid to ASPO under the Work Contract in respect of invoices 2009-15, 2009-22, part of 2009-28 and 2009-35, together with €31,784 "*for the engagement of third party contractors (including an element for loss of profit) and further the losses caused to [Bluewater] (including loss of profit)*" .

1353. Mercon says that this global claim is un-particularised and that the evidence of Mr de Geus that the Work Contract included these NCR items does not address the lack of

evidence on the quantum of these claims. Mercon says that the quantum experts have not been able to identify the amounts claimed for the individual NCRs or assess the value of this global claim. Mercon says that it is impossible to work out from the documents or witness evidence whether or how the ASPO invoices relate to the matters complained about in the NCRs. On that basis Mercon submits that the claim should be rejected.

1354. Bluewater says that a number of the NCRs making up this claim have been addressed specifically in Bluewater's witness evidence which generally remains unchallenged. In relation to Mercon's contention that the claims are global in nature and there is a lack of detail in ASPO's invoices, Bluewater says that its main priority was to have the works completed and it did not anticipate the number of NCRs which arose. It says that dealing with them on a piecemeal basis would obviously have increased the costs. In relation to Mercon's submission that, because no precise amount can be quantified for each particular NCR, Bluewater should recover nothing, Bluewater says that the court can and should make an assessment for these items. In relation to ASPO's invoices, Bluewater says that the invoices are similar to those which Mercon relies on to support its claim

1355. The NCRs dealt with under this combined claim relate to a number of different matters. First NCR-002 related to pile grout beads which Bluewater said did not comply with the drawings as they were not circumferential and were not the correct height or width. This NCR was signed off on 20 January 2009 but, as Mercon accepts, Bluewater had identified further defects on 30 January 2009 and Mercon had instructed ASPO to carry out remedial work at the date of termination. There was therefore an element of remedial work to be done by Bluewater after termination for which Bluewater is entitled to claim.

1356. NCR-004 related to cable tray which Mercon accepts was damaged during sandblasting and Mercon says that in its response on 6 January 2009 it agreed to clean or replace it where needed but had not done so at termination. There was therefore an element of remedial work to be done by Bluewater after termination for which Bluewater is entitled to claim.

1357. NCR-005 relates to a failure to install heat tracing and a junction box below the drain tank. Mercon refers to PL CC 3.1 and says that this was reimbursable work which it would have completed had the Contract not been terminated and would have been entitled to be paid for it. I accept that this was incomplete work for which Mercon would have been reimbursed, by Bluewater. I therefore do not consider that Bluewater is entitled to claim the full cost of this and it has not identified any additional costs over the costs which would have been reimbursable to Mercon.

1358. NCR-006 relates to splatter damage on three escape lights which Mercon had agreed to clean off in its response of 5 January 2009 but had not done so at termination. There was therefore a small element of remedial work to be done by Bluewater after termination for which Bluewater is entitled to claim.

1359. NCR-008 relates to a failure to fabricate the pin and bucket system to the correct tolerance. Mercon acknowledged that the system was fabricated slightly out of position but says that there was still sufficient tolerance which it understood was accepted by

Bluewater and no work was carried out. As I have already set out there was a defect and I accept that Bluewater had remedial work carried out for which it is entitled to claim.

1360. NCR-009 relates to defects in the pile sleeve beads and this NCR was signed off by Bluewater on 29 January 2009. Again it seems that further defects were found which Mercon had instructed ASPO to carry out but had not been done at the date of termination. There was therefore an element of remedial work to be done by Bluewater after termination for which Bluewater is entitled to claim.

1361. NCR-010 relates to a failure to complete the pile guides or centralisers. Mercon says that this NCR was raised on 23 January 2009 and signed off by Bluewater on 29 January 2009, as stated on the face of the NCR. On the evidence I do not consider that there was remedial work to be done at the date of termination. Bluewater is not therefore entitled to claim for this NCR.

1362. NCR-055 relates to the installation of safety signs. It is duplicated as a separate claim below. I therefore exclude it from this global claim.

1363. NCR-064 relates to an allegation that Mercon incorrectly wired flame detectors on the Topsides and Central Column by failing to install a jumper wire between terminals 18 and 19. From the documents attached to NCR-064 there would appear to be a wire required between those terminals and there was therefore an element of remedial work to be done by Bluewater after termination for which Bluewater is entitled to claim.

1364. NCR-066 relates to an allegation that Mercon failed to complete heat tracing to the Topsides and Central Column before departure from Gorinchem. Mercon says that the extent of this is not clear. It appears to relate to thermostats which should not have been provided and to junction boxes left open and termination kits missing. The relevant drawing appears to show thermostats (note 8 of LUK-B-840-DP-4003-001). It is not clear how or when junction boxes were left open or termination kits went missing on this NCR dated 17 October 2009. I am not satisfied that this is an NCR for which Mercon is responsible.

1365. NCR-069 relates to an allegation that Mercon delivered BFOU emergency cable to Astrakhan not Baku. Mercon says it correctly delivered the cable for the Topsides and Central Column to Astrakhan but that under VO-001 dated 16 December 2008 the work to the FMS was removed from Mercon's work scope and that, as shown on the NCR, it was the BFOU cable for the FMS which was required in Baku. I am not satisfied that this is an NCR for which Mercon is responsible.

1366. NCR-071 relates to supports under the Central Column prior to water testing the watertight floor. Mercon says that there was no requirement under the contract for the test or the supports and that in response to TQR-280 Bluewater did not stipulate any requirement for supports. I am not satisfied that this is an NCR for which Mercon is responsible.

1367. NCR-072 relates to incomplete painting work by Mercon to damaged areas, with the first grey layer showing in many areas. Mercon says that it was unable to complete this before termination but it was reimbursable work and so would have to be paid for in

any event. There was therefore an element of painting work to be done by Bluewater but as it would have been reimbursable work and, as set out under NCR-005 above, I do not consider that Bluewater is entitled to make a claim.

1368. NCR-073 relates to an allegation that on 24 April 2009 during assembly of the Yoke Hinge it was found that the bolt holes on the covers did not line up. Mercon says that the Yoke Hinge covers were fitted in December 2008 without a problem and suggest that the photographs attached to the NCR shows the right hand cover fitted on the left hand side. I am not satisfied that this is an NCR for which Mercon is responsible.

1369. Having considered the individual NCRs I have found that only some of them are justified. Given that the claim has been made on a global basis in the total sum of €157,570.92 and I have no certain basis for knowing the cost of remedying an individual NCR, I am not in a position to assess an accurate sum for the NCRs which I have found to be justified. However by reference to the costs for the other NCRs at an absolute minimum I assess a sum of €8,000.00 to cover the NCRs which I have found to be justified.

NCR 1 – Rectification Work Ice Resistant Zone

1370. Bluewater claims €35,240.50 for remedial work to the paint work in the Ice Resistant zone of the Central Column. Bluewater claims for costs associated with the defective application of paint but Mercon says that the issue relates to the specification. The NCR itself records that "*After transport of the Centre Column to the ASPO yard it was noticed that the special abrasive coating (Inerta) was damaged and adhesions failures were observed between the two coats*".

1371. Bluewater served a notice of default on Mercon dated 31 October 2008 and on 11 November 2008 served a notice of partial termination removing the paint from the scope of Mercon's works as Mercon had failed to remedy the default.

1372. There is an issue as to the cause of the defects. Bluewater says that it was caused by the faulty application of the two coat painting system by Mercon and also by the way in which the slings and transport fixings were applied to the Central Column. Mercon says that the problem was caused by Bluewater's specification requiring two coats of paint, alternatively that Lukoil damaged the paint in unloading the Central Column at Astrakhan.

1373. I did not hear any expert evidence on this issue but I was referred to reports produced by JeKaCe who provide coating inspection and consultancy services and to reports produced by the paint manufacturer, International Paints. I obviously bear in mind that the paint manufacturer is not independent and therefore I must be cautious in assessing that evidence.

1374. However, the overwhelming conclusion of those reports is to the effect that there were problems in the application of the Intershield 163 Inerta 160 coating by Mercon. In particular there were defects in the preparation of the surface but more importantly, there is evidence that the problem lay in the application of the second coat. If the first coat was too thick or if insufficient drying time was allowed or if water was allowed on the first coat then the second coat would not adhere properly to the first coat. Those were the findings here and, in particular there was solvent entrapment. In my judgment

the way in which the second coat was applied was the fundamental cause of the painting problem in this case. All of those matters would be the responsibility of Mercon under the Contract. I do not consider that a two coat system in itself was the cause, as Mercon submits. Whilst a single coat might have been specified I do not consider that the fault lies in two coats. Any comments on the two coat system were made in the context of the need to take care with the thickness, curing and weather protection of the first coat prior to the application of the second coat.

1375. As a result the coating was damaged when it had slings and other fastenings attached for transport. Whilst the nature of the fastenings attached by Mercon resulted in the particular damage, I do not consider that they can be said to be the cause. The intention was to have a robust coating on the Central Column but because of the failure in the way in which the two coats were applied it was vulnerable and failed when the fastenings were attached and it was lifted.

1376. It follows that I consider that the failure in the paint coating system in this case was caused by a defect in workmanship for which Mercon was responsible under the Contract.

1377. The total cost of carrying out the work which is the subject of this NCR was covered by insurance and Bluewater only claims the insurance excess of €35,240.50 although the costs were higher. Whilst the quantum experts identified two invoices about which they raised queries, as those invoices form part of an insurance claim which greatly exceeds the excess I do not consider that there is any basis for reducing the claimed excess. I therefore allow €35,240.50.

NCR 051 – Missing Stud Bolts / Gaskets to Pipework

1378. Bluewater claims under this NCR dated 3 August 2009 the sum of €1,161.88 for the cost of buying stud bolts and gaskets for the pipe work which were found to be missing at Baku.

1379. Bluewater relies on the evidence of Mr Herman who says that after a stock take of items at the Baku yard he discovered that several items were missing, including several special nuts, bolts and gaskets, despite them being included in the design drawings. He says that this was because they had not been delivered by Mercon.

1380. Mercon disputes liability and says that at handover during transportation, Bluewater provided lists of equipment to be shipped for Mercon to prepare the shipping documents. As a result Mercon says any missing equipment from the packing list would be detected when the equipment lists were reviewed and each page signed off. Mercon points to the lapse of time between the transportation of ship loose items from Gorinchem to Astrakhan and says that it is not possible to tell whether, in fact, the items were not supplied by Mercon or whether they were not supplied by Bluewater as free issue material or have been lost, stolen or misplaced during the months between leaving Gorinchem in 2008, arrival at Astrakhan and shipment on to Baku in 2009.

1381. Whilst Mr Herman says that Mercon did not deliver the items, that appears to be an inference from the fact they were not found on a stocktake. There are, as Mercon says, other inferences which could be drawn and on the evidence I am not satisfied that Mercon failed to provide these items. The claim therefore fails.

NCR 077 – Non-Supply and Installation of Connection between Swivel Leak Tank and Grease System / Bearing

1382. This is a claim for €1,840.42 for connectors for the tubing and the swivel leak ports which were found to be missing at Baku. Bluewater says that in March 2009 it appeared that these items had not been supplied. Bluewater says that liability for this item appears to turn on whether the drawings referred to in NCR-077 do or do not specify the connectors in dispute and it refers to annotated copies of the drawings provided with the NCR which show the connections marked up.

1383. Mercon disputes liability for this item. I have considered the drawings and cannot find reference to the connectors, elbow or drop size tee on those drawings. It is not evident that the items claimed were to be supplied by Mercon or that there was any failure to supply them for similar reasons to those given in respect of NCR-051 above. Again, on the evidence I am not satisfied that Mercon failed to provide these items. The claim therefore fails.

NCR 012 – Non Conforming Bolting of Grating of Chain Stopper and Non-Conforming Bolting and Grating of Hose Connection Tower

1384. Bluewater claim €1,992.08, now reduced by the quantum experts to €1,573.74 for the cost of dealing with loose supplied grating as a result of the absence of a special tool to fix the grating and buying bolts, nuts and washers that were found to be missing at Baku. Mr Herman again explained that bolts and a special tool were missing.

1385. I did not find Mr Herman's explanation of this item in oral evidence clear and he appeared to explain a different defect. The drawing does not obviously show that a special tool would be required to fit the standard metric bolts identified on the documents. Mr Herman also confirmed he did not check the equipment list when items were found to be missing.

1386. Whilst I do not think that Mercon are correct to rely on VO-001 in relation to this item, as it seeks to do, I accept its other submissions and I am not persuaded that there was a missing special tool or that Bluewater has established that there was missing bolts. Accordingly the claim fails.

NCR 055 – Warning Signs

1387. Bluewater claims €2,256.06 for the supply and installation of signs which it says Mercon failed to supply under Clause 7.11 of Section 3 of the Contract. This provided that Mercon was to "*provide and install safety signs, walkway indicators and safe working load signs in accordance with the provisions of the health and safety standards, regulations and laws applicable to offshore structures and installations in Russian waters*."

1388. Mercon says that Bluewater was obliged to provide sign posts as free issue on which Mercon was to fix signs. It says that there was uncertainty as to the supply of the signs and Mercon raised TQR-287 on 18 December 2008. In response Bluewater confirmed it would supply the signs. By 3 February 2009, Mercon says that Bluewater had not

provided six of the signs and two of the sign posts so that Mercon could not complete that work.

1389. In his evidence Mr Herman says that is not true and the signs and posts had been supplied. I accept that evidence and consider that Bluewater is entitled to claim for this NCR.

1390. The experts have only been able to verify the claim in respect of €1,249.10 because they query two further invoices. I am unable to take the quantum further and I allow €1,249.10.

NCR 014 – Non-Conforming Tubing, Braces, Handrailing of Yoke Arm, Platforms

1391. Bluewater claims €52,162 for the cost of rework carried out by CSC in Baku. It says that the yoke arm platforms did not fit with the handrails, tubing, bracing or the flag block on the ballast tank. This was discovered in May 2009 although the NCR was not issued until September 2009.

1392. Mr Herman in his evidence criticises Mercon for not carrying out a trial fit. Mercon says that it had no obligation under the Contract to trial fit sub-assemblies and it refers to Clause 1.2(d) of Section 3. Mercon says that the assembly of the yoke system, including the yoke arms, was removed from Mercon's scope when, as a result of the change in design, it was decided to move the assembly operations for this part of the SYMS from Astrakhan to Baku. It says that "trial fitting" of components, if instructed, is to be undertaken as part of the erection, installation and assembly of components under Clause 1.2(c) not as part of the supply/fabrication/erection under Clause 1.2(d)).

1393. Bluewater says that Mercon was responsible for the correct manufacture of all components to ensure that they were fitted correctly without major re-work. It says that Mercon was provided with drawings showing the dimensions of the components and the discrepancies went far beyond what might be expected under design tolerance. Bluewater refers to the photographs recording the issues encountered and also relies on the magnitude of costs claimed.

1394. Mr Herman says that in order to correct the discrepancies Bluewater had to design and construct pieces of ladders to fit the platform heights; design and construct new tubular supports; design and construct fill plates to fix unsupported braces to the ballast tank; adapt the flag block supports to avoid clashes with the platform tubulars; construct hand railing pieces to connect platforms to each other; repair the painting after welding and adapt the as-built drawings as required.

1395. However Mr Herman says that "*as long as the drawings Bluewater provided were correct, then it is out of the question that Bluewater should have to pay for any problems thrown up by the trial fit. If there were any issues with drawings, that is to say that if Mercon had followed the provided drawings exactly and there were errors outside of normal engineering tolerance, then Bluewater would have to pay for the alterations….I have seen no evidence that Mercon manufactured the components to the design drawings within tolerance.*"

1396. Mercon says that whilst Bluewater describes the discrepancies as going "far beyond any allowance provided under design tolerance", it does not define the degree to which

the works were out of tolerance. Further it points out that Mr Herman said he had not checked the component dimensions given in the signed equipment list. It also points to marked-up drawings referred to in a project query from CSC, Bluewater's Baku subcontractor, which have not been provided and which are not the same revisions as the drawings issued with the NCR. Mercon says that there is a complete absence of proper particulars of the scope and extent of the defects. It says that Bluewater has not demonstrated by reference to the design on the drawings and as-built drawings the extent of the discrepancy to show that this was not as a result of a design defect.

1397. It is clear from what Mr Herman said in his statement and in his oral evidence that there is no evidence which shows that the particular components were wrongly fabricated. I accept that, as Mercon submits, this is not a case where Mercon had an obligation to carry out a trial fit. Therefore if there is to be liability there would have to be an error in manufacturing or in shop drawings prepared by Mercon. No check has been made of the actual components to compare them to the components which were shown on the design or shop fabrication drawings to see where and how the evident discrepancies have occurred. Mr Herman presumes that the design drawings were correct and says he has seen no evidence that Mercon manufactured the components to the design drawings but he had not given evidence that they were not manufactured to the design drawings.

1398. On that basis, Bluewater has failed to prove that there was a fabrication error rather than a design error which, as Mr Herman accepts, would be a matter for which Bluewater would be responsible. I have carefully considered the drawings, the equipment lists, the photographs and the project query from CSC but there is simply no evidence for me to be able to conclude that the evident problems arose from manufacturing or other errors for which Mercon was responsible. As a result the claim fails.

NCR 015 – Non-conforming Sheave Supports and Keep Plates on Chain Stopper (CS) Platform.

1399. Bluewater claims for remedial work caused because the Sheave Supports and Keep Plates did not fit onto the Chain Stopper Platform. Mr Herman explains that the sheave support and keep plate assembly did not fit and says that this is Mercon's responsibility because it failed to carry out a trial fit either by holding the plate against the support or checking the shop drawings. In order to rectify this problem, Bluewater issued Site Instruction number 007 to CSC to modify the keep plates and machine the diameter of the guide bar to avoid the clash.

1400. Mercon denies that it is liable on the basis that the items were free issue items provided by Bluewater. It refers to TQR-167 which it issued on 21 February 2008 annexing a number of drawings and asking whether the "clouded" items were free issue. Bluewater confirmed that they were free issued on 24 February 2008. Mercon says that if it was out of tolerance, then Bluewater would have had to pay Mercon to remedy the defect, in any event.

1401. I have considered TQR-167 and the drawings attached to it and they include the relevant supports and keep plates and show that they were to be free issued by Bluewater. If therefore the free-issued components were improperly manufactured then I accept that, as Mercon submits, those would have had to be repaired at Bluewater's cost. Even if a trial fit had taken place then that would still have meant that Bluewater

would have had to be responsible for the costs of remedying the defects. On that basis I do not consider that Mercon is liable and Bluewater's claim fails.

NCR 016 – Ballast Tank Openings

1402. Bluewater claims for the cost of rework carried out by CSC in Baku because the openings to the yoke ballast tank were not in the correct position. Bluewater says that the tanks were not fabricated with the relevant opening was at 30 degrees and therefore did not comply with the design drawings.

1403. Mr Herman says that the opening of the ballast tank was to be used to pour liquid concrete through to counterweight the installation. He says that the Bluewater design set out the openings at top plus 15 degrees so that the opening would be exactly on the highest point which was necessary to fill-in the tank properly. He says that Mercon took the top to mean the operating position and not the construction position which meant that the opening was out by 30 degrees and had to be amended and re-worked. New openings were made in the ballast tank, the "old" wrongly positioned holes were closed by welds and the paint system had to be re-applied after welding.

1404. Mercon says that this requires a comparison between the design and as-built drawings to show that this was the result of a manufacturing and not a design defect. It says that the design drawings were amended so that the opening was changed from 15 degrees to 50 degrees and finally 30 degrees. It says that the shop drawing (2006.082-602 Rev C) showed the opening at the correct position of 30 degrees.

1405. The design drawing attached to NCR-016 (LUK-S-P47-DR-4709-001 Rev 4) shows the opening at 30 degrees and not as Mr Herman says 15 degrees. The opening was in fact constructed at 30 degrees in the location shown on both the design and the fabrication drawings. There does not appear to have been any defect. In fact it seems that the original SI to CSC on 15 June 2009 requested all holes to be at top dead centre but this was changed in the SI on 15 July 2009 asking for the holes to be reinstated. In those circumstances there appears to have been some confusion in the position of the opening when Bluewater were dealing with this in 2009. I do not consider that Bluewater has a claim for this item.

NCR 017 - Non-Conforming Connection between Winch arm and HPU (Yoke Arm)

1406. Bluewater claims the cost of missing items for the connections for the winches and HCT. Mr Herman says that several items were missing from the bill of materials when they arrived in Baku and Bluewater tried to source replacements locally but could not find the tubing and so changed the design to hoses.

1407. Mercon denies this claim on the basis it formed part of the full and final settlement in VO-001. Mercon says that although there was a punch list for the HCT issued on 21 August 2008 which referred only to damaged painting, the settlement agreed was for all of the work, including, but not limited to, the HCT punch list as Bluewater had decided to complete parts of the FMS/HCT at Baku. Mercon says that, on this basis, it was not feasible for Mercon to remedy any defects found once the components had been shipped to Baku, nor was it possible for Bluewater to demonstrate that missing items were as a result of Mercon's failure to supply, and not as a result of the goods having been mislaid at Baku and so the parties agreed to draw a line under this element of the work by signing VO-001. Mercon also notes that Bluewater substituted the tubing with

hydraulic hoses when Bluewater could not obtain the materials identified as missing in Baku.

1408. Bluewater says that under VO-001 the parties' agreement was limited to specific work. It says that the particular list of "Punch List and Action List Items" did not include the absence of tubing connections as it was not known about at the time of V0-001.

1409. It is not challenged that, subject to the question of liability being settled in VO-001, the connections were missing and Mercon was otherwise responsible for the supply. I do not consider that there is any defence because hoses rather than connections were used.

1410. However VO-001 states that the Variation Order "*is the full and final settlement of the WORK related to the FMS and HCT, including full and final settlement of Punch List and Action List Items.*" On this basis I consider that the effect of VO-001 was to act as a full and final settlement of all matters except those included in the "*Punch List and Action List Items*". As a result I consider that Mercon is correct and Bluewater settled any claims in relation to the Work related to the FMS and HCT and that would include the connections in this claim. Bluewater's claim therefore fails.

NCR 060 – Non-Supply of Lighting Materials

1411. Bluewater claims that Mercon was obliged to but failed to provide lighting as set out, inter alia, in drawing numbers LUK-E-415-DG-1501-004, LUK-E-415-DG-1501-005, LUK-E-415-DG-1501-006 and LUK-E-415-DG-1501-007 and that, as a result, a considerable amount of lighting was not provided, in breach of Mercon's obligations.

1412. Mercon says that it did not claim the cost of supplying lights, and has not been paid for supplying lights so that Bluewater was always going to have to pay for this item itself and has not suffered any loss.

1413. The claim is based on Mercon having an obligation to supply certain lighting which they failed to do. However, unless it is shown that Mercon was paid to supply the lighting then the only claim Bluewater might have would be for the additional cost over the sum which it was obliged to pay Mercon. In the absence of any proof of payment then I do not consider that Bluewater's claim can succeed.

NCR 076 and 003 – Non supply and Installation of Hydraulic Connections between the HPU (FMS) and Winch (HCT)

1414. Bluewater claims for the cost of hydraulic connections which it says Mercon did not supply prior to departure from Gorinchem and therefore were missing when the FMS/HCT was being assembled in Baku.

1415. Mercon denies liability for this item on the same basis as NCR-017 because the parties agreed a full and final settlement under VO-001.

1416. For the reasons set out in relation to NCR-017 I consider that the effect of VO-001 was to act as a full and final settlement of all matters except those included in the "*Punch List and Action List Items*". As a result I consider that Mercon is correct and Bluewater settled any claims in relation to the Work related to the FMS and HCT and that would include the connections in this claim. Bluewater's claim therefore fails.

NCR 052 – Incorrect Orientation of Substructure at Quay ASPO

1417. Bluewater says that Mercon wrongfully and in breach of contract placed the integrated substructure at Astrakhan "in an incorrect orientation making it impossible to load out the Substructure onto the STB-1 without additional handling". It says that additional lifting points had to be added to the centre column and it led to the need to undertake an additional site move of the substructure prior to load out. Bluewater claims €275,720 for the cost of additional handling which, it says, was needed in July 2009 as a result of Mercon laying the "integrated substructure", consisting of foundation piles and substructure including, Central Column, pile sleeves, bracings and mud mats at ASPO in an incorrect orientation at ASPO's yard, necessitating new lifting eyes being designed and fabricated and further lifting operations.

1418. Mr Konijn was present in Astrakhan for the load out of the integrated substructure from ASPO's quay to Lukoil's transportation barge from 13 to 20 July 2009. He says that there were a number of issues relating to the load-out.

1419. First he refers to the upgrade of the fabrication site and load-out site. He says that in the area of ASPO's yard known as Little Holland 2, Mercon arranged for 6 foundation support points to be created for the integrated substructure which weighed about 1,000 tons. However the local reinforcement of the fabrication floor left very little room for alternative ways of moving the substructure by skidding, relocation by bogies or weighing operations. He says that the reinforcement support points were of a similar diameter to the pile sleeves, leaving no room for additional activities such as weighing. This meant, first, that the integrated substructure was fixed in position and orientation and moving it or even rotating it would mean that the pile sleeves came to rest on an unsupported, unreinforced part of ASPO's fabrication floor. Secondly, he says that Mercon failed to make the concrete support slabs large enough to incorporate both the pile sleeves and the jacks necessary to allow for the integrated substructure to be weighed with load cells.

1420. Secondly Mr Konijn refers to the build position and orientation of the integrated substructure. He says that it is apparent that Mercon decided that a lifted load-out was the only viable option and that the Volgar floating shear leg crane was capable of doing this. As a result, given that the lifting radius of the crane needs to be as small as possible to maximize the lifting capacity and lifting height, the structure should have been close to the quay side. He says that both sides of the integrated substructure were the same distance to the quay side and it would have been better if one had been closer to reduce the lifting radius. He says that Mercon had built the integrated substructure not only too far away from the quay wall and consequentially too far away from the lifting crane but also in the worst possible orientation with respect to the lifting lugs and Centre of Gravity (COG), to allow for an effective load-out.

1421. In his evidence Mr van den Brule accepted that the integrated substructure was not built so that it could be loaded out onto the barge as shown on drawings. Bluewater says that Mercon in TQR-229 dated 20 May 2008, asserted that the orientation of the base meant the Volgar crane would be overloaded. Bluewater says that there was an alternative location for the structure which would have enabled the load out onto the barge had it been shifted closer towards the quay edge or moved further to the right avoiding a substation and giving a greater working area at the shorter quay edge.

1422. Bluewater says that Mercon did not turn its mind to this problem until the issue was already unavoidable. It says that Mercon could have explored further options and has not established that it was impossible. Rather it says that Mercon ignored the load out drawing when it selected the location of the structure on the quay and that was entirely its responsibility. The substantial costs that this caused should then be borne by Mercon.

1423. Mercon says that its obligation under the Contract was to assemble the substructure at Astrakhan and whilst Mercon would be required to do what it reasonably could to facilitate final load out, Bluewater has not identified or established a breach of contract by Mercon for the claim to be made out.

1424. Mercon says that part of the final load out depended upon the design of the barge provided by Lukoil and this changed from the one which Bluewater had used as the basis of its sea fastening design given to Mercon on 14 March 2008. It says that until it was provided with details of the barge, it could not reasonably be expected to accommodate the requirements for final load out onto the barge when assembling the substructure.

1425. Mercon says that it is not alleged that it failed to follow the LOC guidelines for marine operations which set out requirements for lifting Topsides, substructures and jackets and for barge transportation. In any event, Mercon says that those documents do not show that the orientation for the substructure assembly chosen by Mercon at Astrakhan was negligent or constituted a breach of contract. Rather, as emphasised in these documents, the loading out of structures depends in part on the dynamics of the barge. Mercon says that there was no defined contractual or agreed orientation and Mercon had carried out lifting studies during the project and, by TQR 229 dated 20 May 2008, had warned Bluewater that the orientation of the base meant the Volgar crane would be overloaded but no objection was raised by Bluewater at that stage.

1426. Bluewater identifies a number of contractual obligations which are relied on to establish this claim: Clause 13 of Section 2, Clauses 2.1 and 3 of Section 3, Clause 8 of Section 8, Clauses 1 to 5 of Section 12 and VO-008. The allegation is that Mercon placed the integrated substructure in an incorrect orientation. However there was no contractually defined position or orientation and the un-particularised breaches of the clauses of the Contract relied on do not establish breach of any obligation which relates to the orientation of the integrated substructure whilst work is being carried out at Mercon's sub-contractor's yard in Astrakhan.

1427. I consider that Bluewater has failed to identify or establish a relevant breach of contract to give rise to the claim. Indeed, it would be surprising if a contractor was limited in the way in which it organised the location of the work whilst it was being carried out at a sub-contractor's site. I therefore do not consider that Bluewater has established a breach of contract in relation to the orientation of the integrated substructure.

1428. On the evidence there were obviously difficulties in orientating the five-legged integrated structure given the need for access and working space and the location of other facilities such as the sub-station. There was unlikely to be an optimal solution and Mercon may have had to incur expense to orientate the integrated substructure for load-

out when they may have saved money in relation to the way it was built in the given location.

1429. In the circumstances I consider that Bluewater has not established a claim for the incorrect orientation of the integrated substructure at ASPO's yard, either as a matter of breach of a contractual obligation or as a matter of fact.

Additional Costs for ASPO office facilities

1430. Bluewater claims for the additional cost of ASPO office facilities needed as a result of Mercon "*failing to timely deliver the SPM System and execution of re-work under the Work Contract*" with ASPO. The claim is calculated on the basis of 50% of the rent payable for office facilities from 4 February 2009 onwards for the ASPO offices.

1431. Mercon contends that the office facilities were required over this period as a result of the late provision of the barge and says that there is no link provided by Bluewater showing how this cost was incurred as a consequence of a non-conformity by Mercon. Mercon submits that the claim should be rejected.

1432. There are difficulties with this claim. Bluewater accepts that 50% relates to the extended time and it does not seek to claim that in the light of the liquidated damages claim. The other 50% it ascribes to the execution of re-work which would depend on the NCRs. Given the findings I have made in relation to the NCRs, I do not consider that a claim for additional office facilities can be sustained.

Additional Costs for ASPO Progress Reporting

1433. Bluewater claims the additional costs for ASPO progress reporting based on the 50% of the cost of the additional involvement of the Bluewater project team from week 07 of 2009 to week 21 of 2009 because of Mercon's failure properly to complete the work and to carry out remedial measures for the NCRs.

1434. Mercon contends that ASPO progress reporting was required over this period as a result of the late provision of the barge and says that there is no link provided by Bluewater showing how this cost was incurred as a consequence of failures by Mercon. Mercon submits that the claim should be rejected.

1435. Again there are the same difficulties with this claim as with the claim for ASPO office facilities. The claimed 50% is based on the execution of re-work which would depend on the NCRs. Given the findings I have made in relation to the NCRs, I do not consider that a claim for additional progress reporting can be sustained.

Costs of Bluewater Project Management and Engineering

1436. Bluewater claims €1,014,437.20 of "project management and engineering" which it says was caused as a result of Mercon's "failure in properly completing the Work including failure to rectify Non-Conformances" during the period from week 7 of 2009 to week 21 of 2009. This item relates to the Bluewater's internal project management costs incurred in administering the various NCRs.

1437. Bluewater relies on the evidence of Mr de Geus who says that the claim is for Bluewater's management and engineering costs incurred in dealing with the various

NCRs and related rectification work. He also explains how he calculated the sum claimed. He gave further details in his fourth witness statement.

1438. Bluewater says that the Court should make an assessment of the costs under this item if it does not accept Mr de Geus's assessment as some engineering and management costs were incurred in organising the rectification of the various NCRs and a percentage assessment might be applied.

1439. Mercon says that the claim is unparticularised and that the costs relate to the alleged delay in load out not the NCR work or the discharge of Bluewater's own obligations to Lukoil. It says that there is no evidence beyond Mr de Geus's assertion showing that the time claimed related to the claimed issues, and no evidence at all as to which issues it related to. Mercon says that it is impossible to allocate the time charged to any particular event and Bluewater must have incurred significant management expenses in administering the contract generally including the redesign of the SYMS, the delay to load out, the Yoke Hinge design and managing its relationship with Lukoil. Mercon refers to the sums claimed and says that the amount is manifestly excessive compared to the direct cost of rectifying defects in NCRs and submits that the claim should be rejected.

1440. Given my findings on the NCRs, I do not consider that this claim by Bluewater can succeed. It is a global claim and I cannot assess any figure for any project management and engineering which Bluewater might have spent in relation to the limited NCRs which I have held are substantiated. The sum claimed is also disproportionate to the sum claimed for the NCRs and this raises great concerns as to the credibility of the figures claimed. In the circumstances I am unable to assess any figure and Bluewater's claim fails.

Loss of Profit on Bluewater Project Management

1441. Bluewater primary position is that Clause 25 precludes a claim for loss of profit both in relation to the claims by Mercon and also the claims by Bluewater. Bluewater only pursues this claim to the extent that it is held that Clause 25 does not preclude Mercon's claim for loss of profit. As set out below Mercon's claim does not succeed. In any event this claim depends on the recoverability of the claim for management and engineering costs set out above.

1442. Both on Bluewater's primary case and having held that the claim for management and engineering costs fails, I do not consider that Bluewater is entitled to maintain this claim for loss of profit.

NCRs 7, 20, 21, 53, 54 & 79 Failure to provide the MRB/As-Built documentation

1443. Bluewater claims the cost (agreed by the quantum experts to be €5,000) of procuring a manufacturing record book and as-built documents from ASPO.

1444. Mr Herman says that at the end of the project Mercon was supposed to prepare and provide Bluewater with a manufacturing record book under Clause 11.1 of Section 3 of the Contract but did not do so. Instead, it provided two boxes of as-built and marked up drawings which he had to sift through and organise. He says that Mercon should have collected the relevant information and documents over the course of the project and, if

it had done so, there would have been a far more organised and complete set of documents when the work was terminated.

1445. Mercon says that it was not obliged to provide a manufacturing record book by the time of the termination and that it was the termination of the remaining work which resulted in the need for others to complete the manufacturing record book. It says that there was no breach by Mercon because Mercon's obligation to provide as-built documentation came under Milestone A4 and Bluewater terminated its work before it had an obligation to comply with Milestone A4. Mercon says that Bluewater would, in any case, have had to pay Mercon for the manufacturing record book and its right to be paid for as-built documentation, including the manufacturing record book, did not arise until payment Milestone 10 which had not been reached at termination.

1446. Mercon's obligation under Clause 11 of Section 3 of the Contract was to provide an "As Built" package which consisted of a Manufacturer Record Book. That had to be provided to Bluewater as part of Milestone A4 for which the key date was, as amended under VO-005, Milestone C9/C12 +8 weeks. Mercon also had various obligations in relation to Audit and Storage of Documents under Clause 31 of Section 2 of the Contract.

1447. By the date of termination Mercon's obligations under Clause 11 of Section 3 had not yet arisen and it seems that Mercon did provide information which Bluewater says it had to organise. Mercon were not entitled to payment for the obligations which formed part of Milestone A4 and Bluewater can only claim under Clause 30.6(c) of Section 2 of the Contract for the additional costs incurred over and above what they would have had to have paid Mercon. That is not the basis of the claim and Bluewater cannot claim for the costs of producing the Manufacturer Record Book for which they have not had to pay Mercon.

Summary

1448. As a result I find that Mercon is liable to pay Bluewater €44,489.60 in respect of NCRs, as follows:

Item	Description	Sum allowed
1.	Miscellaneous NCRs (NCR-2, 4, 5, 6, 8, 9, 10, 55, 64, 66, 69, 71, 72, 73)	€8,000.00
2.	NCR 1 – Rectification Work Ice Resistant Zone	€35,240.50
3.	NCR 051 – Missing Stud Bolts / Gaskets to Pipework	€0.00
4.	NCR 077 – Non-Supply and Installation of Connection between Swivel Leak Tank and Grease System / Bearing	€0.00
5.	NCR 012 – Non Conforming Bolting of Grating of Chain Stopper, Non-Conforming Bolting and Grating of Hose Connection Tower	€0.00
6.	NCR 055 – Warning Signs	€1,249.10
7.	NCR 014 – Non-Conforming Tubing, Braces, Handrailing of Yoke Arm, Platforms	€0.00
8.	NCR 015 – Non-conforming Sheave Supports and Keep Plates, Chain Stopper (CS) Platform.	€0.00
9.	NCR 016 – Ballast Tank Openings	€0.00
10.	NCR 017 - Non-Conforming Connection between Winch arm	€0.00

	and HPU (Yoke Arm)	
11.	NCR 060 – Non-Supply of Lighting Materials	€0.00
12.	NCR 076 and 003 – Non supply and Installation of Hydraulic Connections between the HPU (FMS) and Winch (HCT)	€0.00
13.	NCR 052 – Incorrect Orientation of Substructure at Quay ASPO	€0.00
14.	Additional Costs for ASPO office facilities	€0.00
15.	Additional Costs for ASPO Progress Reporting	€0.00
16.	Costs of Bluewater Project Management and Engineering	€0.00
17.	Loss of Profit on Bluewater Project Management	€0.00
18.	NCRs 7, 20, 21, 53, 54 & 79 Failure to provide the MRB/As-Built documentation	€0.00
	Total	€44,489.60

Issue 21(e): What sums are due, if any, in respect of other costs to complete?

1449. Bluewater makes a number of claims in respect of the costs to complete under Clause 30.6(c) of the Contract, alternatively as damages. Clause 30.6 provides:

> "*In the event of termination of all of the WORK or the CONTRACT in accordance with Clause 30.1(b) or Clause 30.1(c) the following conditions shall apply:*
> *(a) the CONTRACTOR shall cease to be entitled to receive any money or monies on account of the CONTRACT until the expiration of the DEFECTS CORRECTION PERIOD specified in Clause 29 and thereafter until the costs of COMPLETION and all other costs arising as a result of the CONTRACTOR's default or other events giving rise to the termination have been finally ascertained;*
> *(b) thereafter and subject to any deductions that may be made under the provisions of the CONTRACT the CONTRACTOR shall be entitled to payment only as set out in Section 5 – Compensation and Payment for the part of the WORK completed in accordance with the CONTRACT up to the date of termination; and*
> *(c) any additional costs reasonably incurred by BLUEWATER as a direct result of the CONTRACTOR's default or other events giving rise to termination shall be recoverable from the CONTRACTOR.*"

1450. Mercon contends that under Clause 30.6(c) Bluewater is only entitled to recover "additional costs" and that, to be additional, they have to be over and above those costs that Bluewater would have incurred had it allowed Mercon to complete the Works.

1451. The quantum experts have noted that, when seeking to value the additional cost of completing project works following termination, it is normal practice to calculate the total cost of performing the work and then deduct a notional account of what the contractor would have been entitled to be paid had it completed the same work. Any balance then represents the additional cost of completing the work. They note that Bluewater has not approached the claim on this basis but instead is seeking to claim additional costs associated with a few discrete activities. They raise the issue that there may be areas of work where it cost Bluewater less than it would have cost had Mercon completed the work but equally there might be areas where a further loss was incurred which is not claimed.

1452. Bluewater says that there is no pleaded allegation by Mercon that Bluewater's presentation of the claim is inappropriate. It submits that Mercon is likely to have benefited from the fact that only limited claims for completion costs have been made.

1453. Bluewater states that Mercon has taken a similar approach in relation to its loss of profit claim and that just as Bluewater has selected those parts in respect of which it wishes to claim additional costs so Mercon has selected parts on which it wants to claim profit. Bluewater says that neither party sought to prepare a notional final account and it is no part of Mercon's pleaded case that the costs to complete overall were less than would have been spent had Mercon completed the work.

1454. This point raised led to an issue, Issue H, which was dealt with in a concurrent evidence session with the quantum experts. Issue H was in these terms: "*Does the agreed figure for Bluewater's costs to complete claim represent the true overall position compared with the amounts that would have been paid to Mercon if the termination had not occurred?*"

1455. The starting point was an analysis which Mr Simons had given at paragraph 4.4.4 of his report and a schedule at DS3 where he set out a calculation which he said indicated that the costs to complete were less than the costs which Mercon would have been paid. That calculation was the subject of comments from Mr Dixon who had, he said, not initially realised the relevance of the figures and therefore had not had the opportunity properly to consider matters. The issue has been made more complex because of the findings which I have made, particularly, in relation to the NCRs and the Seafastening. Overall, taking account of Mr Simon's analysis and the other evidence and my findings, I have come to the conclusion that Bluewater is likely to have paid more to complete the work. However I shall bear the point in mind when I have come to my conclusion on the total value of Bluewater's claim for costs to complete.

1456. So far as pleading is concerned whilst the detail was not set out until Mr Simons' report the importance of the need for Bluewater's claim to reflect additional costs was something pleaded and that is the essence of the point made by Mr Simons.

1457. I therefore now turn to the individual claims.

Incentive Payment

1458. An incentive payment of €50,000 was agreed between Bluewater and ASPO for works to be completed by Key Date A1 namely 30 April 2009. Mercon denies this claim but does so on the basis that the costs flowed from a wrongful termination. The quantum experts have agreed in their First Joint Statement that there is an invoice for this amount and it has been paid and therefore no quantum issues arise in relation to this item.

1459. Having held that Bluewater was entitled to terminate and paid the incentive payment so as to have the work completed I consider that this was an additional cost which it was reasonable for Bluewater to incur and which was incurred as a direct result of the termination. Bluewater is therefore entitled to €50,000 for this claim.

Seafastenings (certificates 1,5,6,14,17 and 21)

1460. The quantum experts have agreed that Bluewater paid ASPO less to complete the work than they would have paid Mercon. No claim therefore arises.

Customs Charges and Duties (certificates 7, 13, 15, 18 and 26)

1461. Bluewater claims a total of €11,007.85 against five ASPO invoices as additional costs to complete. It says that they resulted from the failure to complete the Topsides in one piece prior to transport to ASPO which would have avoided customs duties. The liability for this item therefore depends on this issue.

1462. Mercon denies that the items on the invoices relate to the Topsides and contends that customs duties would have been incurred in any event. Mercon also puts Bluewater to proof that the sums were not reimbursed by Lukoil. Bluewater says it has discharged the costs and they have not been reimbursed and the position as between Bluewater and Lukoil is irrelevant.

1463. Given the finding I have made that Bluewater was responsible for the split of the Topsides I do not consider that Bluewater is entitled to recover the additional customs charges and duties arising from that split.

Provision of Warranty Services

1464. Bluewater claims €100,000 in relation to a lump sum cost agreed with ASPO to provide warranty services because the remaining works were terminated before warranty had been provided.

1465. Mercon also denies this claim on the basis that the costs flow from a wrongful termination. Mercon also puts Bluewater to proof that it was not reimbursed by Lukoil. Bluewater says the sum has not been reimbursed and the position as between Bluewater and Lukoil is irrelevant.

1466. I consider that, given my finding on termination, this is an item of additional cost which was incurred as a direct result of the termination. Whilst the quantum experts have not formed a view on whether the amount is reasonable, I accept Bluewater's submission that this was a commercially agreed amount and, taking account of the evidence of Mr de Geus in paragraph 45 of his fourth witness statement, I consider that it was reasonable in the light of the commercial position of Bluewater following the termination. The position of Lukoil is irrelevant but, in any event, I accept that the sums have not been reimbursed. I therefore allow Bluewater €100,000.

Area Rent

1467. Bluewater claims €83,048.40 for rental charges paid to ASPO for care and custody until mechanical completion. Mercon denies this claim on the basis that it disputes the termination and also puts Bluewater to proof that it was not reimbursed by Lukoil. Bluewater says that it has discharged the costs, they have not been reimbursed and the position as between Bluewater and Lukoil is irrelevant.

1468. The experts have agreed the sum claimed but have also provided a time based charge which could be used should the court find that Bluewater is only entitled to some of this item based on delay related issues.

1469. This relates to the extended rental of ASPO's yard from February to April 2009. If the Contract had not been terminated it seems likely that Bluewater would have had to pay this rental for a further period which would have been covered either by liquidated

damages or at Bluewater's cost as a result of delays before termination. I therefore consider that the additional cost caused directly by the termination was the rental for two months in the sum of €55,365.60 and that it is reasonable.

Delivery of Load Out Procedure

1470. Bluewater claims €10,000 for the production of a load out procedure by ASPO. Mercon denies this claim on the basis that it disputes the termination and also puts Bluewater to proof that it was not reimbursed by Lukoil. Bluewater says that it has discharged the costs, they have not been reimbursed and the position as between Bluewater and Lukoil is irrelevant.

1471. It is common ground that Mercon was required to deliver a load-out procedure under the Contract, however there is an issue as to whether it is included in the Contract Price as a lump sum or was reimbursable work. The quantum experts agree that, if the work is included in Mercon's Contract Price, the claimed amount of €10,000.00 is additional. If the work was intended to be paid on a reimbursable basis, it is unlikely that any, or any significant, additional cost will have been incurred.

1472. I do not consider that this item, which is not separately priced in the Contract, is part of the reimbursable work which Mercon was to carry out and which involved integration work. It was more likely to come, as Mr de Geus says, within the load out item in the preliminaries and therefore I consider that this was an additional sum which Bluewater incurred as a result of the termination and was reasonably incurred. I therefore award €10,000.00.

Conclusion

1473. The above would indicate that Bluewater is entitled to €215,365.60 as costs to complete, as follows:

(1)	Incentive Payment	€50,000.00
(2)	Seafastenings	Nil
(3)	Customs Charges and Duties	Nil
(4)	Provision of Warranty Services	€100,000.00
(5)	Area Rent	€55,365.60.
(6)	Delivery of Load Out Procedure	€10,000.00
		€215,365.60

1474. I do not consider that a figure of €215,365.60 can be said to represent an overall figure which is outside the range of additional costs which would have been incurred by Bluewater under Clause 30.6(c) had a complete analysis been carried out of the type referred to in paragraph 14 of the quantum experts' First Joint Statement. As a result I consider that Bluewater is entitled to €215,365.60 as costs to complete.

Issue 21(f): What sums are due, if any, in respect of Russian Federation VAT?

1475. As set out in the Re-Re-Amended Reply and Defence to Counterclaim at paragraphs 132 to 139 and in Schedules 8(a) and 8(b) Bluewater claims €518,973.01 as RFVAT from Mercon as follows:

(1)	RFVAT on the Payment Contract	€364,150.87

(2)	RFVAT on the Work Contract	€143,100.42
(3)	RFVAT on Reimbursable Cost Invoice 2008-73	€590.70
(4)	RFVAT on Invoice 2008-56	€11,131.02
		€518,973.01

1476. Before dealing with those claims there are some general matters which arise. First, there is a question over whether Bluewater is claiming for RFVAT which it has recovered from Lukoil. Bluewater submits that it is not claiming such RFVAT.

1477. In their Third Joint Statement the quantum experts analysed the RFVAT position comparing what had been reimbursed by Lukoil to Bluewater with what was being claimed by Bluewater from Mercon. On the basis of disclosed documents they identified that €915,952.51 was received as RFVAT by Bluewater from Lukoil on 7 August 2009. The experts reviewed the documentation to see whether the claims made against Mercon by Bluewater for RFVAT overlapped with the sums paid within that payment of €915,952.51 received from Lukoil.

1478. Following that review the quantum experts concluded that: "*Based on our review of the Lukoil disclosure it is apparent that none of the RFVAT claimed from Mercon was included in the payment of €915,952.51. It follows therefore that, if Bluewater did not receive any further payment from Lukoil in respect of RFVAT, then Bluewater is not claiming any RFVAT from Mercon which has been recovered from Lukoil.*"

1479. At about the same time as the quantum experts were signing off their Third Joint Statement, Bluewater served its Re-Re-Amended Reply and Defence to Counterclaim in which it radically revised its claim for RFVAT. It indicated that recent investigations had revealed that Bluewater had in fact received reimbursement of RFVAT from Lukoil in respect of certain items. Bluewater also said that as a consequence of a review which Bluewater undertook it had found that Lukoil has off-set an amount equivalent to the amount paid to Bluewater for RFVAT and Bluewater had not appreciated that in fact Lukoil had paid relevant amounts of RFVAT. As Bluewater says, the detail of the RFVAT case is complex. It also says that this led to confusion as to the amounts received from Lukoil for RFVAT.

1480. In Schedule 8(a) Bluewater pleads its case in respect of a number of invoices relating to reimbursable cost. For example, for Invoice 2008-36 under which it claims €44,514.71 of RFVAT of total RFVAT of €48,997.79, it accepts that some part of the invoice and RFVAT of €4,483.08 was properly due and says:

> "*Bluewater were paid 48,997.79 for this invoice by Lukoil and therefore the 44,514.71 claimed as payment to Mercon is now nil and the remaining 4,483.08 of the Lukoil payment is deducted from the 48,997.79 claimed as paid to ASPO resulting in a claim of 44,514.71 remaining of the amount paid to ASPO.*"

1481. On that pleaded basis, there was an invoice from ASPO to Mercon under which ASPO claimed €48,997.79 of RFVAT. Bluewater was paid €48,997.79 by Lukoil which was paid to Mercon and by Mercon to ASPO. On that basis it is difficult to see how Bluewater has suffered a loss in terms of RFVAT because they have been reimbursed for that RFVAT by Lukoil. At the very least the position is not properly explained and I

am not satisfied that Bluewater has properly accounted for the sums it was reimbursed by Lukoil for RFVAT. The quantum experts were alive to the point because in their joint statement they expressly stated that their view was on the basis that Bluewater had not received any further payment from Lukoil in respect of RFVAT. I do not consider that in relation to the claims where Bluewater pleads as it does in respect of Invoice 2008-36 that I can find that Bluewater had not received further payment.

1482. In relation to the sums paid by Bluewater to Mercon in respect of RFVAT on ASPO's work, at paragraph 15.24(d) of the Re-Amended Defence and Counterclaim Mercon admits that it has been paid €867,710.79 by Bluewater for RFVAT. Mercon admits in Appendix 5.4(a) of that pleading that it has only paid €815,052.72 RFVAT to ASPO. Mercon therefore admits, on the basis that ASPO will not purse Mercon for the sum, that it did not pass on €52,658.07 of RFVAT to ASPO from that payment and that, in the circumstances, admits that Bluewater is due a credit for that amount.

1483. In their Fourth Joint Statement the quantum experts have noted that Mr de Geus, in his fourth witness statement, has referred to the fact that after the payment of €867,710.79 on 7 February 2009 Bluewater has paid Mercon a further sum of €82,908.07 for RFVAT on 7 May 2009 in relation to Invoices RFVAT7 and RFVAT8. Based on the fact that Mercon accepts that it has only paid ASPO €815,052.72, then the quantum experts say that the figure admitted by Mercon of €52,658.07 may have to be increased by €82,908.07 to €135,566.14.

1484. Bluewater submits that the principle of Mercon's earlier admission means that the credit to which Bluewater is entitled by virtue of the double payment of VAT which Mercon failed to pass on to ASPO is now €135,566.14.

1485. Bluewater has pleaded its case in relation to the Payment Contract on the basis that it has paid ASPO directly for sums which were not reimbursable to Mercon under the Contract and for sums which it says it had to pay as a Ransom Payment. It does not directly say that it has paid Mercon sums by way of RFVAT which Mercon has failed to pay to ASPO. I shall have to consider the effect of Mercon's admission when I have reviewed the claims which Bluewater makes for RFVAT.

1486. On the basis that the termination was valid, Mercon says that Bluewater would have had to pay the RFVAT on ASPO's invoices in any event as Mercon was entitled to pass on RFVAT charged by ASPO to Bluewater, who would in turn pass it on to Lukoil under Clause 2.3.2(a) of Section 5 and Attachment 8H of the Contract. Mercon says that this provision applied whether or not Mercon was entitled to be reimbursed by Bluewater for the net value of the invoice and therefore Bluewater has incurred no additional cost in relation to RFVAT.

1487. Clause 2.3.2 (a) of Section 5 of the Contract provides:

> "*The following is excluded from the provisional TOTAL CONTRACT PRICE, however, shall be added as appropriate to any invoice payable to CONTRACTOR:*
> *(a) INTEGRATION YARD VAT (Russian Federation VAT) at INTEGRATION YARD SPM SYSTEM…*"

1488. I consider that this provision does have an effect on Mercon's liability for RFVAT. If Bluewater has paid RFVAT on ASPO invoices which relate to work carried out by Mercon and which would have been payable by Bluewater to Mercon if invoiced by Mercon, then that element of RFVAT is not recoverable from Mercon because Bluewater would have had to pay that RFVAT to Mercon in any event under Clause 2.3.2(a). However, where Bluewater has paid RFVAT on other ASPO invoices which would not have been payable to Mercon under 2.3.2(a), then if Mercon is liable to Bluewater for the sum invoiced, it is also liable to Bluewater for the RFVAT on that sum invoiced.

RFVAT on the Payment Contract

1489. In relation to RFVAT on the Payment Contract Bluewater claim the sum of €364,150.87 being €229,201.87 in respect of Reimbursable cost invoices and €134,949.00 (€158,471.43 less €23,522.44) in respect of the ransom payment.

Payment Contract: Reimbursable cost invoices

1490. In relation to RFVAT claimed in respect of reimbursable cost invoices then I have reviewed the underlying invoices in the light of the comments I have set out above.

1491. In relation to invoices 2008-036, 2008-048, 2008-049 and 2008-057 Bluewater appear to have been reimbursed the RFVAT by Lukoil or at least I am not satisfied that it has not been reimbursed and I therefore disallow those claims.

1492. In relation to invoice 2008-040 (Lifting link/lug for Central Column) I have found that this is part of the reimbursable work and so Bluewater would, in any event, be responsible for the RFVAT under Clause 2.3.2(a) of Section 5 of the Contract. Bluewater's claim for RFVAT on this invoice therefore fails.

1493. In relation to invoice 2008-052, Bluewater says that the payment of the RFVAT amount is subject to Mercon providing justifiable evidence that the Work was duly and satisfactorily executed. This item is for work to assemble temporary supports for upper bracings link for Central Column. I have found that this is part of the reimbursable work and so Bluewater would, in any event, be responsible for the RFVAT under Clause 2.3.2(a) of Section 5 of the Contract. Bluewater's claim for RFVAT on this invoice therefore fails.

1494. In relation to invoice 2008-053 this was for work integrating the Topsides and therefore reimbursable by Bluewater to Mercon and so Bluewater would, in any event, be responsible for the RFVAT under Clause 2.3.2(a) of Section 5 of the Contract. Bluewater's claim for RFVAT on this invoice therefore fails.

1495. In relation to invoice 2008-069, this was work for integration of the Central Column which was reimbursable. The total invoice was for €184,384.50 and Bluewater has paid ASPO €184,384.50 and, as set out above, Mercon has also paid ASPO €13,879.99. Bluewater claims RFVAT on €165,790. It says it has paid RFVAT of €33,189.21 on the sum of €184,384.50 under the Payment Contract. It says that €3,347.11 RFVAT is claimed as damages. It says that the €33,189.21 paid to Mercon is also claimed as damages. Bluewater says that it was paid €10,244.58 by Bluewater and credits this against the sums claimed as damages so only claims €26,291.84 from Mercon. These figures conflict with other evidence. However, this was integration work and therefore

reimbursable under the Contract so that no RFVAT is recoverable from Mercon as Bluewater would, in any event, be responsible for the RFVAT under Clause 2.3.2(a) of Section 5 of the Contract. However there is a "Ransom Payment" element as Bluewater has paid RFVAT on €13,879.99 twice so I consider that it is entitled to claim 18% of €13,879.99 which is €2,498.40.

1496. In relation to Invoice 2008-071 this related to the integration of the Topsides and was paid by Bluewater. Although Mercon contended that it had paid 80% of this invoice on the reallocation on 30 January 2009 I found that reallocation to be ineffective. It follows that Bluewater would, in any event, be responsible for the RFVAT under Clause 2.3.2(a) of Section 5 of the Contract. Bluewater's claim for RFVAT on this invoice therefore fails.

1497. In relation to invoice 2008-72 relates to customs expenses which I have held that Mercon is entitled to recover. It follows that Bluewater would, in any event, be responsible for the RFVAT under Clause 2.3.2(a) of Section 5 of the Contract. Bluewater's claim for RFVAT on this invoice therefore fails.

1498. In relation to invoice 2008-73 this covers office and phone call costs and I have held that it is not reimbursable to Mercon. As a result I consider that Bluewater is entitled to be paid RFVAT of €590.71 (18% of €3,281.70).

1499. In relation to invoice 2009-1 this related to labour for the Central Column and was therefore reimbursable. Bluewater paid this invoice for €120,714.20 and would, in any event, be responsible for the RFVAT under Clause 2.3.2(a) of Section 5 of the Contract. Bluewater's claim for RFVAT on this invoice therefore fails.

1500. In relation to invoice 2009-3 this relates to labour for the turntable which was necessary because of the splitting of the Topsides for which I have held that Bluewater is responsible. It follows that this invoice paid by Bluewater was reimbursable and so Bluewater would, in any event, be responsible for the RFVAT under Clause 2.3.2(a) of Section 5 of the Contract. Bluewater's claim for RFVAT on this invoice therefore fails.

1501. In relation to invoice 2009-4 I have held that Mercon are not entitled to recover more than the €600,000 in total and therefore are not entitled to be paid this sum of €331,325. I therefore allow Bluewater RFVAT of €59,638.50 (18% of €331,325).

1502. In relation to invoice 2009-5 this related to miscellaneous cranes for the integration of the Topsides. Bluewater paid this invoice for €389.00 and would, in any event, be responsible for the RFVAT under Clause 2.3.2(a) of Section 5 of the Contract. Bluewater's claim for RFVAT on this invoice therefore fails.

1503. In relation to invoice 2009-6 this related to labour for the Central Column and was therefore reimbursable. Bluewater paid this invoice for €31,697.40 and would, in any event, be responsible for the RFVAT under Clause 2.3.2(a) of Section 5 of the Contract. Bluewater's claim for RFVAT on this invoice therefore fails.

1504. In summary therefore for the claim based on invoices for reimbursable work I consider that Bluewater is entitled to €62,727.61 (€2,498.40 plus €590.71 plus €59,638.50).

Payment Contract: Ransom Payment

1505. In respect of these invoices, Bluewater says that it should not have paid these but only did so because after termination they were obliged to do so to ensure that ASPO continued with the work. I have already dealt with the underlying claim for the sums invoiced. The sum claimed for RFVAT is €134,949.00 (€158,471.44 less €23,522.44 on the €130,680.20 paid by Mercon and credited in the Ransom Payment).

1506. As set out above, the quantum experts have found that the ASPO invoices included in the Payment Contract are invoices 2008-23A (€113,000.00), 2008-23B (€30,240.00), 2008-24A (€6,160.00), 2008-50 (€37,001.32), 2008-65 (€9,590.00), 2008-70 (€6,459.00), 2008-55 (€587,025.00), 2008-56 (€61,839.00), 2009-2 (€2,876.00) and 2009-8 (€2,206.31). Of those invoices, as the quantum experts state, Mercon admits that it would have become indebted to ASPO for all of them except invoices 2008-23A, 2008-23B and 2008-24A totalling €149,410.00. In addition Mercon says that it paid invoice 2008-56 in full on 3 February 2009.

1507. In relation to invoices 2008-50 (€37,001.32), 2008-65 (€9,590.00), 2008-70 (€6,459.00), 2008-55 (€587,025.00), 2009-2 (€2,876.00) and 2009-8 (€2,206.31) I have held that Bluewater is entitled to the sum invoiced. It is also entitled to RFVAT on those sums.

1508. In relation to Invoices 2008-23A, 23B and 24A, as I have held above invoices 2008-23A and 2008-23B related to charges which Mercon had to pay and which Bluewater was not responsible for but invoice 2008-24A related to work which Mercon was obliged to carry out as part of the reimbursable work. It follows that Bluewater is entitled to RFVAT for invoices 2008-23A and 2008-23B but not €1,108.80 for invoice 2008-24A.

1509. In relation to invoice 2008-56, I have held above that this was not paid by Mercon and that Bluewater is entitled to the sum of €61,839.00 invoiced, so Bluewater is entitled to the RFVAT claimed.

1510. Bluewater also claims RFVAT in respect of invoice 2008-59 which is not set out in the quantum experts' analysis and was not the subject of a previous claim. I am not therefore satisfied that Bluewater is entitled to the RFVAT of €4,320.00.

1511. In summary, therefore, I allow Bluewater's claim in respect of RFVAT on all invoices paid in respect of the Ransom Payment, except invoices 2008-24A and 2008-59 and therefore deduct €5,428.80 (€1,108.80 plus €4,320.00) from the claim of €134,949.00. Bluewater is therefore entitled to €129,520.20 for RFVAT on the Ransom Payment.

RFVAT on the Work Contract

1512. In relation to RFVAT on the Work Contract claimed in the sum of €143,100.42 that is made up of €26,220.73 for Rectification Work, €23,905.59 for Seafastening and grillage, €19,872.11 for Completion Work (excluding seafastening and grillage), €9,000.00 for an Incentive Payment, €14,948.71 for Area Rent and €49,153.28 for Orientation of the SYMS sub-structure.

1513. Rectification Work relates to the NCRs dealt with above and, in particular, the sums of €157,570.92 claimed for NCR-02, 04, 05, 06, 08, 09, 10, 55, 64, 66, 69, 71, 72, 73;

€6,674.50 claimed for NCR-76 and 03; €35,240.50 for NCR-01; €2,100.00 for office facilities; €11,656.00 for the manufacturers record book; €1,500.00 for progress reporting.

1514. As set out above I have held that Bluewater is entitled to €8,000.00 in relation to the claim of €157,570.92 claimed for NCR-02, 04, 05, 06, 08, 09, 10, 55, 64, 66, 69, 71, 72, 73. I have held that Bluewater is not entitled to any payment for the €6,674.50 claimed for NCR-76 or in relation to €2,100.00 for office facilities, €11,656.00 for the manufacturing record book or €1,500.00 for progress reporting. I have held that Bluewater is entitled to €35,240.50 for NCR-01 but in this claim Bluewater only claims RFVAT on €805.00 and €3,804.00 within that sum, being €144.90 and €684.72.

1515. Although Bluewater has not claimed RFVAT for the whole of the sum of €157,570.92, I consider it should be entitled to RFVAT on the sum of €8,000.00 which I have assessed, that is I allow RFVAT of 18% of €8,000.00 or €1,440.00. The total RFVAT due for Rectification Work is therefore €2,269.62 (€1,440.00 plus €144.90 plus €684.72).

1516. In relation to Seafastening I have not allowed this claim and therefore no RFVAT is due.

1517. The Completion Work includes part of the sum of €35,240.50 for NCR-01 which I have dealt with above but no VAT is claimed. The Completion Work also includes a claim for part of the customs charges in the total sum of €11,007.85 which I have not allowed for the reasons set out above and therefore no RFVAT is due on that element. It is also claimed for the €100,000.00 for warranty services which I have allowed. It follows that for Completion Work Bluewater is entitled to €18,000.00 RFVAT (18% of €100,000.00).

1518. I have allowed the claim for the incentive payment in the sum of €50,000.00 and RFVAT of €9,000.00 is due. For the Area Rent I have allowed a reduced figure of €55,365.60 and RFVAT at 18% in the sum of €9,965.81 is due. I have disallowed the claim for the orientation of the SYMS sub-structure and so no RFVAT is due on that.

1519. In summary Bluewater is entitled to RFVAT of €44,749.10 in relation to the Work Contract as set out in this table:

Description	**Sum Claimed**	**RFVAT on Sum Claimed**	**Sum Awarded**	**RFVAT on Sum Awarded**
Rectification work	€145,670.37	€26,220.73	€43,240.50	€7,783.29
Seafastening	€132,808.84	€23,905.59	€0.00	€0.00
Completion Work	€110,400.63	€19,872.11	€100,000.00	€18,000.00
Incentive Payment	€50,000.00	€9,000.00	€50,000.00	€9,000.00
Area Rent	€83,048.40	€14,948.71	€55,365.60	€9,965.81
Orientation of SYMS	€ 273,073.78	€49,153.28	€0.00	€0.00
Total	€795,002.02	€143,100.42	€248,606.10	€44,749.10

Invoice 2008-73

1520. In relation to Invoice 2008-73 RFVAT of €590.70 is claimed. Bluewater says that it paid ASPO 100% of invoice 2008-73 under the Payment Contract and I have dealt with that claim above. Bluewater also claims this money back as RFVAT paid to Mercon. I consider that this would be recoverable as part of the overall sum for RFVAT which was paid to Mercon but not paid by Mercon to ASPO.

Invoice 2008-56

1521. In relation to Invoice 2008-56 Bluewater claims €11,131.02 paid to Mercon in respect of that ASPO invoice. As I have set out above Bluewater paid that sum as part of the Payment Contract and I have dealt with that claim above. Bluewater also claims this money back as RFVAT paid to Mercon. I consider that this would be recoverable as part of the overall sum for RFVAT which was paid to Mercon but not paid by Mercon to ASPO.

RFVAT paid to Mercon but not paid to ASPO

1522. As stated above there is the sum of €52,658.07 RFVAT which Mercon admits it has not paid to ASPO and the sum of €82,908.07 which Bluewater paid to Mercon for RFVAT later. I consider that both those sums are recoverable and the total sum of €135,566.14 is therefore recoverable by Bluewater.

Summary: RFVAT Claims

1523. As a result I award Bluewater €372,563.05 as follows for RFVAT:

(1)	Payment Contract: Reimbursable cost invoices	€62,727.61
(2)	Payment Contract: Ransom Payment	€129,520.20
(3)	Work Contract	€44,749.10
(4)	Payments to Mercon not paid to ASPO (Includes invoices 2008-73 and 2008-56)	€135,566.14
		€372,563.05

Other Mercon Claims

Issue 22: Is Mercon entitled to claim for lost profit (if Bluewater wrongly terminated the contract) and, if so, in what sum?

1524. Mercon's claim for lost profit depends on the termination issue. As I have held that Bluewater properly terminated the Contract under Clause 30, Mercon's claim for lost profit fails. Bluewater also denies the claim for lost profit on the basis that Clause 25 of the Contract prevented any party from advancing a claim for loss of profit. Bluewater submits that the claim is excluded by Clause 25 of the Contract because it is "consequential loss", defined in that clause as "*loss and/or deferral of production, loss of product, loss of use, loss or revenue, profit or anticipated profit (if any), in each case whether direct or indirect*". Each party agreed to hold the other harmless from its own consequential loss.

Clause 25

1525. Mercon contends that Clause 25 does not apply to profit arising from a wrongful termination and/or repudiatory breach of contract. It submits that Clause 25 is a confusing and internally inconsistent definition because "consequential loss" is

generally understood as synonymous with "indirect loss" and means loss within the second limb of Hadley v Baxendale as set out in Croudace Construction Ltd v Cawoods Concrete Products Ltd [1978] 2 Lloyd's Rep 55. Mercon says that direct consequential loss is an oxymoron.

1526. Mercon says that "loss of profit" must be understood as referring to lost profit on transactions between the parties and others, not as excluding claims for loss of the profit on the Contract itself otherwise Bluewater would have been free to repudiate the contract at any time without allowing Mercon any real remedy.

1527. Bluewater submits that Mercon's reliance upon Croudace v Cawoods is misplaced. It says that, as Mercon notes, "consequential loss" is generally understood as being synonymous with "indirect loss" within the second limb of Hadley v Baxendale. Bluewater submits that Clause 25 should be construed in the context of the clause as a whole and, if a particular meaning ascribed to the term "consequential loss" does not fit with the clause as a whole, then that meaning should not be preferred. It submits that, unlike the clause in Croudace v Cawoods, the clause here does not purport simply to exclude "consequential loss" but makes express reference to excluding "loss of profits" "whether direct or indirect".

1528. Bluewater says that if, as Mercon contends, "direct" consequential losses is an oxymoron then the meaning ascribed to it by Mercon cannot have been what was intended by the parties. It submits that any interpretation of the clause which seeks to avoid the express reference to "loss of profits" is unsustainable as it distorts the parties' agreement. Bluewater further says that there is no support within Clause 25 for limiting it, as Mercon contends, to loss of profit on transactions with other parties. Bluewater submits that if the clause does not relate to profit from this particular transaction then the benefit of the clause would be much reduced.

1529. Bluewater says that Mercon's submission about being left without a remedy for repudiation is irrelevant as Mercon may not like the consequences of the bargain but that does not mean it did not make that bargain.

1530. The relevant wording of Clause 25 is as follows:

> "*For the purpose of this Clause 25 the expression "Consequential Loss" shall mean loss and/or deferral of production, loss of product, loss of use, loss of revenue, profit or anticipated profit (if any), in each case whether direct or indirect, and whether or not foreseeable at the EFFECTIVE DATE OF COMMENCEMENT OF THE CONTRACT.*
>
> *Notwithstanding any provision to the contrary elsewhere in the CONTRACT and except to the extent of any agreed liquidated damages provided for in the CONTRACT, BLUEWATER shall save, indemnify, defend and hold harmless the CONTRACTOR GROUP from the BLUEWATER GROUP's own Consequential Loss and the CONTRACTOR shall save, indemnify, defend and hold harmless the BLUWATER GROUP from the CONTRACTOR GROUP's own Consequential Loss.*"

1531. I consider that the parties have sought to agree their own definition of "Consequential Loss" for the purpose of Clause 25. In my judgment it follows that the meaning of consequential loss in decided cases such as Croudace v Cawoods is of no assistance. The parties have also broadened the definition to avoid any distinction between direct or indirect loss and have therefore eliminated any requirement or the loss to be foreseeable. The parties carefully chose that definition which, on its face, clearly applies to loss of profit or anticipated profit by Mercon which arises from a wrongful termination of the Contract or by Bluewater which arises from Mercon's breach of contract. In those circumstances, even if I had found that there was a repudiatory breach arising from the wrongful termination of the Contract I do not consider that Mercon could recover loss of profit or anticipated profit. Equally, I do not consider that Bluewater can claim any loss of profit arising from Mercon's breach of contract.

Unpaid Balance of RFVAT

1532. Mercon's claim for RFVAT has been dealt with above as part of the overall calculation involved in Bluewater's claim for RFVAT.

Overall summary and conclusion

1533. For the reasons set out under Issue 20 above, Bluewater was entitled to and did terminate the Contract under Clause 30.

1534. For the reasons set out under Issue 17 above, Mercon has not established that it was entitled to an extension of time by way of an adjustment to the Schedule of Key Dates.

1535. On the basis of the findings set out above, there is a balance due to Bluewater of €961,324.66 calculated as follows:

Ref	Description	Sum Awarded	Sub-Total	Basis
1	ORIGINAL CONTRACT PRICE	10,468,233.37		Agreed
1.1	Deduct PS Remeasure	-5,373,670.68		Agreed
1.2	Deduct PS Reimbursable	-2,137,320.00		Agreed
1.3	Agreed Variation Orders (Excluding VO-008)	4,277,428.06		Agreed
1.4	Deduct Admitted Lump Sum Work Not done	-68,580.00		Agreed
	Sub-Total	7,166,090.75	7,166,090.75	
2	MERCON CLAIMS			
2.1	Remeasurable Work VO-008 Adjusted	12,860,826.03		Issue 3
2.2	Reimbursable Work (Contract Rates)	1,075,965.67		Issue 11
2.3	Mark-up	88,896.49		Issue 8
2.4	Yard Improvement	0.00		Issue 9
2.5	Reimbursable work (Star Rates)	454,899.87		Issue 13
2.6	VO-003 and Bluewater offer of €15,000	89,200.00		Issue 15
2.7	VORs (Out of Scope Works)	1,077,118.95		Issue 15
	Sub-Total	15,646,907.01	15,646,907.01	
	REVISED CONTRACT PRICE			
	Determined part of CONTRACT PRICE		15,646,907.01	
	Agreed part of CONTRACT PRICE		7,166,090.75	
	TOTAL CONTRACT PRICE		22,812,997.76	
2.8	Loss of Profit on Outstanding Works	0.00		Issue 22

2.9	Loss of Profit on Seafastening	0.00		Issue 22
2.10	Loss of Profit on Load-out works	0.00		Issue 22
2.11	Unpaid balance of RFVAT	0.00		Issue 21(f)
	Sub-Total	0.00	0.00	
3	PAYMENT			
3.1	Paid Milestones	-12,822,563.29		Agreed
3.2	Court Order Settlement	-3,000,000.00		Agreed
3.3	Escrow Account	-3,000,000.00		Agreed
3.4	Instalments Settlement	-3,059,075.42		Agreed
3.5	Performance Bond drawn by Bluewater	1,795,235.00		Agreed
	Sub-Total	-20,086,403.71	-20,086,403.71	Agreed
4	BLUEWATER CLAIMS			
4.1	Credit for Reimbursable Costs paid (included above)	0.00		
4.2	Lump Sum not done at all	-71,581.36		Issue 1(a)
4.3	Lump Sum Work partly not done	-15,385.00		Issue 1(b)
4.4	VO-008 Re-measure Discount	-374,357.77		Issue 4
4.5	VO-001 Re-measure Discount	0.00		Issue 4
4.6	Non-conformance claims	-44,489.60		Issue 21(d)
4.7	Pre-termination damages	-103,710.00		Issue 21(b)
4.8	Post-termination damages	-743,556.63		Issue 21(c)
4.9	Costs to complete	-215,365.60		Issue 21(e)
4.10	RFVAT Not Related to Contract	-372,563.05		Issue 21(f)
4.11	LADs – late delivery	-1,596,909.70		Issue 19
4.12	LADs – Key Personnel	-150,000.00		Issue 21(a)
	Sub-Total	-3,687,918.71	-3,687,918.71	
	OVERALL SUMMARY			
	REVISED CONTRACT PRICE		22,812,997.76	
	PAYMENT		-20,086,403.71	
	BLUEWATER CLAIMS		-3,687,918.71	
	SUM DUE TO BLUEWATER		-961,324.66	