OUTER HOUSE, COURT OF SESSION

[2018] CSOH 10

CA6/16

OPINION OF LORD BANNATYNE

In the cause

FEIDHM MARA TEORANTA T/A EFFECTIVE OFFSHORE

Pursuer

against

OPITO LIMITED

Defender

Pursuer: Tanner QC; Addleshaw Goddard
Defender: O'Brien; Ledingham Chalmers LLP

13 February 2018

Introduction

[1] I heard a proof on the commercial roll in which the pursuer sought damages from the defender on the basis of breach of contract.

Agreed background

I General

[2] The pursuer is a health and safety provider specialising in training individuals for employment in the offshore oil and gas and renewable energy sectors based in Ireland. It

made its first application for approvals for training courses to the defender in 2008. It has traded since 2009.

[3] The defender sets oil and gas industry standards in emergency response, industry training and competence. The defender has developed technical and safety training standards which act as the oil and gas industry bench marks and provide best practice guidance and quality assurance for standards and competence management. Employers worldwide use the defender's technical standards to ensure that technician staff within the oil and gas industry have the knowledge and competence to work on and offshore.

[4] Training centres and employers can apply for approval to deliver technical training and assessment in line with these standards. Training providers wishing to apply for approval are required to complete the defender's approvals process which consists of two stages – application and desktop submission and an on-site audit. Following successful completion of the approvals process, training providers are awarded individual approval for those specified standards. Training providers can then enrol candidates on to the defender's technical qualification assessment programmes and request certification of successful candidates from the defender. Only the defender's approved technical qualification centres can request the defender's certification against the defender's technical standards.

[5] The pursuer obtained approvals from the defender which enabled it to provide training. The pursuer was given approval for MIST ("Minimum Industry Safety Training") in August 2009. Approval for BOSIET, FOET and HUET was granted on 18 February 2010. Approval for Banksman Slinger stage one training was granted in June 2011. Approval for Rigger training stage one was granted in December 2011. Approval to deliver Rigger

competence stages three and four was granted in April 2014. The pursuer was able to provide defender approved training courses in the subjects covered by these approvals.

II The contract

[6] The parties entered into a contract dated 11 June 2012 and 23 July 2012 ("the contract").

[7] The material provisions of the contract are:

[8] clause 3 of the contract relates to approval and provides, where relevant:

> "3.1 Approval shall continue for as long as the Approval requirements are maintained, or the relevant standard is withdrawn by the industry.
>
> 3.2 If, following a Monitoring Audit, OPITO is satisfied that the training and/or assessment programmes offered by the Customer conform to the Standards and Approval criteria, OPITO shall confirm on going approval.
>
> 3.3 If at any time either during a Monitoring Audit or following a Monitoring Audit, OPITO notifies the Customer in writing that the Approval requirements are not being maintained by the Customer but are not in the opinion of OPITO sufficiently material to justify an immediate withdrawal of the Approval, OPITO will issue a non-conformance and agree with the Customer a date to rectify the matter. If the Customer fails to rectify the matter and comply with the Approval requirements by the agreed date, OPITO will issue a Warning Letter advising that failure to rectify the problem with immediate effect could result in a potential withdrawal of approval (refer to Termination Clause 11.1.6)
> …
> 3.5 If at any time either during a Monitoring Audit or following a Monitoring Audit OPITO identifies that the Approval requirements are not being maintained by the Customer and are in the opinion of OPITO sufficiently material to justify an immediate withdrawal of the Approval certificate, then OPITO shall give notice to the Customer withdrawing the Approval certificate with immediate effect.
> …
> 3.7 If during a Monitoring Audit, OPITO decides that the training and/or assessment standard and/or approval criteria are not being met and are sufficiently material to justify an immediate withdrawal of approval, OPITO will notify the customer and indicate the scope of the non approval on the audit report."

III The audit

[9] An audit was carried out under the contract between 13 and 15 October 2015. An Audit Report dated 13 – 16 October 2015 relating to that audit was produced. The Audit Report was sent by the defender's Scott Duncan to the pursuer's Khris Veldman by email at 18.11 on 15 October (JP31)

[10] The Audit Report identified *inter alia* an area of non-conformance by the pursuer in relation to the BOSIET training course. The non-conformance was a failure to provide training in using equipment known as LAPP jacket and rebreather. The pursuer had omitted to provide this training from on or about 10 June 2015.

[11] The pursuer failed to provide the required training in relation to LAPP jackets and rebreathers from on or about 10 June 2015 to 14 October 2015, in breach of the BOSIET Standard. Certificates issued by the pursuer to individuals during the period of omission of training in relation to LAPP jackets and rebreathers were defective, accordingly.

[12] The pursuer delivered a BOSIET training course for a number of delegates on the second and third days of the audit 14 and 15 October 2015.

IV Events leading to the pursuer's failure to provide training in safety equipment

[13] Training in the use of Category B Emergency Breathing Systems such as the LAPP jacket and rebreather was not a requirement of the defender's standards in respect of: (i) Banksman & Slinger Training Stage 1; (ii) Rigger Training Stage 1; (iii) Minimum Industry Safety Training; (iv) Rigger Competence Stage 3; and (v) Rigger Competence Stage 4.

[14] At the start of 2014 the defender established a Working Group in light of the Civil Aviation Authority safety review of offshore public transport helicopter operations in

support of the oil and gas industry. In particular, the Civil Aviation Authority decided that all persons flying offshore in the United Kingdom Continental Shelf required to be trained in the use of compressed air Category A Emergency Breathing Systems (CA-EBS).

[15] On 27 February 2015 the pursuer, amongst other training providers, received an email from the defender's Gillian Clark which stated that the defender wished "to remove LAPP from the BOSIET/FOET training as soon as possible" and requested that the relevant training providers "get back to me as soon as possible to let me know how quickly you could implement a revised BOSIET/FOET with integrated dry CA-EBS and breath hold HUET escape (ie removing the LAPP)?" (JP23). The pursuer responded to this email on 9 March 2015 stating that "I was away for the past week. Ill come bac to you shortly re this (sic)" (JP25) but did not respond further to Gillian Clark about this issue.

[16] On 24 September 2015 the pursuer received an e-email from the defender's Alan Sharp advising *inter alia* that:

> "[f]ollowing discussions with OPITO, the International Association of Drilling Contractors, Oil & Gas UK, Step Change in Safety and the trade unions; it was agreed that Category A EBS training could be included in the HUET, subject to there being no inversion while using the Category A EBS. There will, however, be an inversion exercise using breath hold only. Oil & Gas UK submitted an application to the Health and Safety Executive for an exemption from the requirements for delegates to undertake full diving medicals prior to undertaking training. On Monday, 14 September, the HSE – after consultation with industry – has now formally issued an exemption which means delegates do not need to undertake a full diving medical prior to undertaking training. The HSE has specified further ear, nose and throat and respiratory health checks; in pool chest depth limitations and incident recording requirements which must also be met as a condition of the exemption. HSE's Chief Inspector of Diving will meet OPITO approved training providers and stakeholders on 1st October to discuss practical implications of the Diving at Work Regulations. You will receive further information regarding this shortly. Thereafter the Industry Work Group will re-convene on 9th October to address the further requirements imposed by the conditions of the exemption and complete the review of the BOSIET/HUET/FOET standards with a target implementation date of 1st January 2016…" (JP30)

[17] The pursuer's Mr Veldman attended a meeting of the Training Provider Advisory Group ("TPAG") in Cork during June 2015. TPAG meetings are facilitated by the defender and this meeting was attended by the defender's Gillian Clark and Mark Neilson.

V Events after the audit

[18] On 20 November 2015 the pursuer received by email from the defender's Alan Sharp (JP53) a letter (JP51) dated 18 November 2015 from the defender's Managing Director, Mr John McDonald, on behalf of Mr David Doig, the defender's Group CEO, stating that "The OPITO Chief Executive…has accepted the audit findings and his recommendation is to non-approve Effective Offshore for delivery of the following OPITO Standards". There then followed a list of all courses for which the pursuer was approved by the defender. This letter withdrew all approvals for the pursuer to undertake any defender approved training.

[19] On or about 24 December 2015 the defender communicated to training providers including the pursuer a joint industry statement on the current status of BOSIET/FOET Category A EBS Training ("The Joint Industry Statement") (JP60) in the following terms:

> "After extensive engagement with industry, regulators, training providers and workforce representatives, agreement has been reached on the new BOSIET/FOET standard to be applied across the UK sector. This new standard, which will be introduced early in 2016, will meet the manufacturer minimum training requirements specified by the CAA. The standard will involve 'dry' Cat A EBS training with in-water HUET breath hold exercises using the Survitec Mk50 life jacket. This will remove the LAPP jacket and re-breather from the existing BOSIET/FOET standard for personnel travelling offshore in the UKCS.
>
> In the longer term, all industry stakeholders wish to work towards providing in-water training exercises using the Survitec Mk50 life jacket and Compressed air Cat A EBS equipment."

[20] Without the approvals the pursuer was unable to continue to provide the defender's training courses.

[21] The pursuer made eight employees redundant on 25 November with effect from 8 December 2015. The employees who were made redundant were Jenny Collum, Jason Foody, James Michael Kane, Hugo (Hugh) Paul McFadden, Shaun Boylan, Michael Joseph O'Reiley, Dennis Veldman and Francis (Frank) Aloysius McNeill. The total cost of redundancy payments to these employees was €30,582.53. These redundancy payments were initially met by the Irish Government. The Irish Government seeks reimbursement of these payments from the pursuer comprising claims for €6,355.78 for Jenny Collum; €3,624.00 for Jason Foody; €5,076.00 for James Michael Kane; €4,103.02 for Hugo (Hugh) Paul McFadden; €3,322.72 for Shaun Boylan (JP74); €5,187.81 for Michael Joseph O'Reilley (JP75) €1,998.00 for Dennis Veldman and €915.20 for Francis Aloysius McNeill (JP76). The pursuer's obligation to reimburse the Irish Government is a statutory one imposed by sections 32 and 38B of the Irish Redundancy Payments Act 1967, as amended. The pursuer will require to reimburse the Irish Government the sum of €30,582.53 accordingly.

[22] On 22 January 2016 an order was granted by the Court of Session suspending ad interim the decision dated 18 November 2015 by the defender to withdraw with immediate effect the pursuer's approvals for delivery of OPITO Standards Training.

[23] Following reinstatement of its approvals on 22 January 2016, the pursuer re-hired six of the employees made redundant, re-employment commencing on 25 January 2016. Offers of employment were sent to the said employees, including letters to Hugo (Hugh) Paul McFadden, Michael Joseph O'Reiley and Jenny Collum on 28 January 2016 (JP80, JP81 and JP82). A further previously redundant employee was re-hired on 25 July 2016. Between 10 and 12 February 2016 a second audit of the pursuer was carried out by the defender. The

pursuer's approvals were all withdrawn of new on 15 February 2016. This second withdrawal of approvals was not challenged by the pursuer.

Legal context of the dispute

[24] It was not contentious that where the defender identifies that approval requirements are not being maintained the question of whether to pursue the clause 3.3 or the clause 3.5 route depends on the defender's assessment of the materiality of the non-performance.

[25] The wording "in the opinion of (the defender)" makes clear that the question of materiality is primarily one to be determined by the defender, and not by the court. This approach is particularly appropriate for a contract of this sort. The defender's function is to monitor and approve training facilities. People around the world rely on the defender's assessments. The whole point of the exercise is the defender brings its judgement to bear on the question. It would not be expected by either party or by others relying on the integrity of the training system, that the defender's assessment could be supplanted by the courts own view of matters.

[26] The Supreme Court considered terms of this nature in *Braganza* v *BP Shipping Limited* [2015] UKSC 17. It was observed that contractual terms in which one party was given the power to form an opinion were extremely common, and that it was not for the courts to re-write the party's bargain or to substitute themselves for the contractually agreed decision maker (see: Baroness Hale at paragraph 18 and Lord Hodge at paragraph 52). The risk of abuse was addressed by "implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision making power is given" (see: Baroness Hale at paragraph 18). There was an "obvious parallel" with "Judicial Review" and comparable standards of review

applied (see: Baroness Hale at paragraph 19; Lord Hodge at paragraphs 52 and 53 and Lord Neuberger of Abbotsbury PSC at paragraph 103). Thus such a power should be exercised not only in good faith but also without being arbitrary, capricious or irrational (in the public law sense); and such a decision can be impugned not only where it was one that no reasonable decision maker could have reached but also where the decision making process had failed to exclude extraneous considerations or failed to take account of all obviously relevant ones (the "Braganza Duty").

The issue

[27] The primary issue before the court in light of the legal background became this; first was the defender's decision made in good faith, second, was the decision arbitrary, capricious or irrational, in the public law sense and third had all relevant considerations been taken into account and extraneous considerations excluded?

Evidence

[28] I heard from the following witnesses on behalf of the pursuer:

- Mr Khris Veldman, a director of the pursuer, who at all material times was in charge of the day to day running of the pursuer.
- Mr Jason Foody, who at the material time worked for the pursuer.
- Mr Jim Luby, a chartered accountant, who gave expert accounting evidence in respect to the issue of damages.

[29] I heard from the following witnesses for the defender:

- John McDonald
- Alan Sharp
- James Hamilton

- Scott Duncan
- Michael Brown, chartered accountant, who gave expert accounting evidence in respect to the pursuer's damages claim.

[30] I firstly heard from Mr Veldman. He adopted as his examination-in-chief his statement and supplementary statement and second supplementary statement. In cross-examination he accepted that LAPP jacket and re-breather training is an important part of the standard. He explained in his evidence that through 2014 and 2015 there had been discussions and correspondence regarding the continued use of the LAPP jacket and re-breather and about possible changes in the standard in respect to this item (see his statement at paragraphs 13-26). He was asked about changes in the standard and how these were intimated by the defender:

> Question: "Expect change to be formulated and published in a formal way?"
> Answer: "what expected".

Turning to the meeting in June 2015 following which he advised his trainers that LAPP training had been removed from the BOSIET, FOET and HUET courses. He said this: "Everyone was saying LAPP was obsolete". He came to the view that: "UK/ROI training providers were to use their discretion when doing refresher training with delegates so as to not make them train with what was an obsolete piece of equipment". He accepted that this understanding which he had reached was mistaken. He now understood that: "no decision had been taken to remove LAPP from the BOSIET, FOET and HUET courses for those working in the UKCS" (see: paragraph 25 and 26 of his statement). In oral evidence in cross-examination he described his understanding from the said meeting as being this: the defender would turn a blind eye to the pursuer not carrying out in individual cases the

LAPP jacket and re-breather training where people worked in the UK Sector. He accepted, however, that these standards were global standards and did not simply apply to the UK.

[31] He was also asked this in cross-examination:

> "What at the meeting left you with the impression that OPITO would turn a blind eye if people were resistant to doing LAPP training and worked in the UK sector, thus not requiring to use it, your position went further, you changed it for all persons so you went further than what had been the impression you had got from OPITO."
> Answer: "That would be fair to say".

[32] He was asked this:

> "If you wanted to find out what the standard said you simply had to ask OPITO."
> Answer: "yes".
>
> "The standards were on their website it was easy to find out what standards say if you were in any doubt?"
> Answer: "yes".

[33] Finally he was asked this about the changes which he had instituted:

> "No other training provider was under same impression as you?"
> Answer: "Not aware of any others under same impression as me."

[34] When shown audit forms completed by members of the pursuer's staff he admitted that boxes had been ticked showing that LAPP jacket and re-breather training had been carried out when in fact that was not the case. Accordingly these were false records.

[35] As regards to the seriousness of the problems identified by the audit Mr Veldman was asked this:

> "There were two dimensions to the problem: (a) not training people properly, 118 people (not trained) and (b) a serious breakdown in business procedures to see that standards being complied with?
> Answer: I agree with you trying to deal with this…"

[36] He accepted that he knew by 5 November that OPITO wanted him to stop training.

[37] Jason Foody adopted his statement and supplementary statement as his evidence-in-chief.

[38] In cross-examination he was asked this about the seriousness of the failings identified by the audit:

> "LAPP re-breather accept fact something missed out in the training brings up concerns about how that could have happened and the companies systems generally?"
> Answer: "yes".

[39] He accepted that he was aware of what procedures were followed by the defender when standards were changed. He stated that in those circumstances the defender's website was updated and emails were sent to training providers advising as regards the changes.

[40] He was asked about the meeting in Cork at which Mr Veldman thought some change had been indicated relative to the need to train in terms of the standard in respect of the LAPP jacket and re-breather. He was also in attendance. He said that he had come away with the same impression as Mr Veldman. However, he gave no evidence as to precisely what had caused him to reach this conclusion. His position following that meeting was this: whether LAPP jacket and re-breather training was carried out as part of the standard was "a matter for the discretion of trainers".

[41] He also accepted that LAPP jacket and re-breather training was ticked on forms as having been done when not in fact carried out. He said he would not have done this.

[42] Jim Luby adopted his statement and the terms of his report.

[43] On behalf of the defender the court first heard from Mr McDonald who adopted his affidavit as his evidence-in-chief. He was at the material time managing director of the defender. On the death of the defender's CEO, David Doig, some time after these events he had become CEO. In cross-examination he advised he had taken an active part in the decision making process although the decision was ultimately for the CEO, Mr Doig. His position was that during the material period he believed that the pursuer's failures in the

training which they provided amounted to a material breach. He described the breach as being one which was "safety critical". He had identified it as a safety critical matter by 24 October. He described the audit as showing underlying quality issues. He felt approval or approval with corrective action was out of the question. He said that the CEO (Mr Doig) had when the matter was referred to him pressed the pause button. He described the situation of the defender's failure as a unique one. There were 118 people who were untrained and the view of the defender was that it wanted the pursuer to fix that particular situation.

[44] Secondly, I heard evidence from Mr James Hamilton (a director of the defender and the person who was Mr Sharp's line manager). He adopted his affidavit and supplementary affidavit as his evidence-in-chief. In cross-examination he described the internal system in respect to decisions following upon an audit as this: the auditor made a recommendation to Mr Sharp; he decides whether that is an appropriate recommendation, and he then makes a recommendation to Mr Hamilton. The matter is then passed to Mr Doig for a final decision. It was his position that from when the matter was first reported to him by Mr Sharp only one option namely immediate withdrawal of approval was open. However, there was an issue, namely: the re-training of the large number of people, who had received defective training and it was believed that the pursuer should address that issue which required them to retrain those persons. That required their approval to remain in place whilst that re-training was done. Thus the issue of suspension had arisen. He described the seriousness of the pursuer's failures in this way:

> "The pursuer's quality system had entirely failed over a number of months – a directive from the pursuer's managing director which ran counter to the standard (had been implemented by the pursuer) – no one at the centre had stood up and said no – providing the training was necessary for the standard. Internal verification (within the pursuer) not picked this up".

[45] He recommended immediate non-approval to Mr Doig.

[46] Alan Sharp was also a director of the defender. He adopted his affidavit and supplementary statement as his examination-in-chief. In cross-examination he set out his position in respect to the email to Mr Hamilton advising as to the outcome of the audit:

> "My thoughts at the time, trying to give senior management an understanding that not 100% sure what to recommend. Three recommendations highlighted the unusual position."

[47] Following this passage in his evidence he was asked:

> "(You were) not recommending one over the others?"
> Answer: "I was putting down my thoughts."

[48] Scott Duncan was the person who carried out the audit of the pursuer which led to the withdrawal of approvals. He adopted his affidavit as his examination-in-chief.

[49] In cross-examination he described the pursuer's failure in this way:

> "A vital piece of training in relation to a piece of equipment had been omitted (that training could) save life when offshore."

[50] Lastly Mr Michael Brown CA adopted his witness statement as his evidence-in-chief. He was not cross-examined.

Submissions on behalf of the pursuer

[51] Ms Tanner's broad contention was this: the defender's decision of 18 November 2015 was not taken in good faith. In addition she submitted that in acting as it did in relation to the decision to withdraw all approvals the defender exercised its discretionary powers arbitrarily, capriciously and irrationally, in the public law *Wednesbury* unreasonableness sense, and that no reasonable CEO tasked with making such a decision would have reached the decision which he did.

[52] The above position was based on a detailed analysis of the correspondence and discussion between the pursuer and defender between 15 October and 20 November 2015.

[53] Her analysis of the evidence was as follows:

[54] After Khris Veldman sent the letter (JP35) to Alan Sharp on 15 October he was involved in further email correspondence and telephone calls with him.

[55] On 28 October 2015 Alan Sharp spoke to Khris Veldman. In Alan Sharp's affidavit (para 34) he states that he "made clear in that discussion that Effective Offshore required to put forward an appropriate action plan, to include the re-training of delegates with defective certification." Alan Sharp also said that he "made clear that there should be no further training undertaken while a possible way forward was explored." This was the first point at which the defender made a proposal to the pursuer that would have the effect of being a "suspension" of training against the standards despite ongoing approval for the standards.

[56] Khris Veldman sent a letter to Alan Sharp on 29 October 2015 (JP36), the day after the telephone call, as referred to in Khris Veldman's witness statement (tab 5, para 38.) The letter included a proposal for an action plan which included the pursuer contacting each of the affected delegates by Friday 6 November at the latest to arrange re-training at the expense of the pursuer, with weekly updates being provided to the defender; as well as the appointment of an external auditor.

[57] Thereafter there was a further discussion between the two men the same day and a revised proposal was submitted by Khris Veldman on Alan Sharp's request on 30 October 2015 (JP38) (Khris Veldman's witness statement tab 5, para 39), with the additional proposals being shown in lighter text. The additional proposals relate to internal audit and organisation of management and the proposals relating to re-training remained the same.

[58] Six days later on 5 November 2015, Alan Sharp responded to Khris Veldman by telephone. The call is summarised in Khris Veldman's statement at (tab 5, para 40) and Khris Veldman prepared a note of the call (JP39) as well as making a note in his desk diary (JP40). Khris Veldman's evidence was that Alan Sharp stated to him that David Doig had given Effective Offshore a "lifeline" by not immediately withdrawing the approval for BOSIET/FOET/HUET. Khris Veldman noted Alan Sharp's statement that all approvals were still in place. Alan Sharp requested that Khris Veldman submit a 3-part plan by 6 November which included all approvals remaining in place; a plan/schedule for re-training of the affected learners which was realistic and achievable; the pursuer must stop all other training and agree to monitoring/spot audits. Khris Veldman's response (witness statements tab 5, para 41) was that it was not possible for the pursuer to suspend all training and have no revenue stream while it worked to correct the problem. Alan Sharp agreed to speak to James Hamilton and David Doig and revert on 6 November 2015 with an update.

[59] On 6 November 2015 Khris Veldman submitted a revised proposal for re-training (JP41). Attached to the letter were two class calendars for re-training in November and December 2015; an example email to be sent to the affected delegates; and a list of all of the affected delegates. Khris Veldman suggested a compromise in relation to other training in that only pre-booked training, including Government contracts, would proceed alongside the re-training.

[60] Seven days later Alan Sharp responded by email on 13 November 2015 (JP45). By this letter the re-training agreement was reached. The full terms of that email are referred to. It included the following in relation to the re-training agreement:

> "David and James are aware of the situation and are pleased you will correct the mistake you have made. We wish to move forward and repair the problem. The schedule and communication proposal looks achievable and we now need you to

> action this immediately. What we need to see is all your clients are contacted and scheduled at the earliest possible dates to carry out the missed training and assessment of the standard. Once you have all the delegates scheduled we need to see evidence of this. … Once we have the schedule and you begin training we will carry out unannounced audit(s), all charges will be invoiced to Effective Offshore… The actions are clear and are now with Effective Offshore to carry out. If you have any questions you can contact me…".

[61] Both Alan Sharp and James Hamilton accepted in evidence that the re-training agreement had been reached on that date.

[62] The email from Alan Sharp (JP45) also included a response to the two training proposals which the pursuer had proposed and stated:

> "After internal discussions it was decided we need you to stop all OPITO approved training until such time [sic]. The decision around your approvals have [sic] not been decided and will be reviewed once all training is carried out successfully."

This was a further instruction from the defender to the pursuer to suspend all training other than re-training, while approval was ongoing, despite there being no contractual provision allowing them to make this decision.

[63] Khris Veldman responded to confirm that he would commence the re-training and to ask for clarification on other matters and there was a further response from Alan Sharp, both of which are referred to (JP45). In relation to the re-training agreement Khris Veldman confirmed that he would "begin to make contact ASAP" with all of those affected. Alan Sharp requested the training schedule before training commenced. Khris Veldman asked for confirmation as to the meaning of the words "until such time" in relation to other training and also whether all of the approvals were under consideration or only BOSIET/FOET/HUET. Alan Sharp responded by saying that other training would be "discussed as you are near the end of completing all the re-training" and "at this time both options are being considered but nothing concrete has come from senior management".

[64] On 16 November 2015 Khris Veldman contacted James Hamilton by email copied to Alan Sharp (JP46), attaching Alan Sharp's email from the previous day and stating that the request to suspend other training was "tantamount to commercial suicide".

[65] James Hamilton responded by email two days later on 17 November 2015 (JP48) stating that:

> "Alan is your focal point for rectifying the resultant situation and it is appropriate at this time that you use him as your contact point for this. He has accurately communicated the company position, which we have discussed at some length internally."

In relation to the proposed suspension of other training, James Hamilton stated that:

> "until such time as Alan presents [objective evidence from audit that Effective Offshore are conducting the required assessment against all standards for which you hold approval..] we will not allow OPITO approved training to be conducted at Effective Offshore."

The Company position as referred to by James Hamilton, included Alan Sharp's statement that the question of approvals would only be considered on completion of the re-training agreement.

[66] On 17 November 2015 Khris Veldman sent an email (JP48) to Alan Sharp to provide an update on progress including an update on those contacted in respect of the re-training agreement; an update on the action plan for mentoring and an intimation that the directors and shareholder of the pursuer had instructed Mr Veldman to obtain legal advice on behalf of the pursuer. The initial advice received was summarised by Mr Veldman. This was the first written or oral communication between the parties when the contract was mentioned, including reference to the fact that the purported "suspension" of training was *ultra vires* and the relevant contractual Clauses which applied in relation to the question of Approval, in particular clause 3.3.

[67] Khris Veldman contacted nearly all of the affected delegates between 18 and 20 November to advise them of the error and arrange the re-training at the expense of the pursuer. Most of them agreed to return for the re-training. Schedules were prepared showing those who had been contacted and confirmed re-training dates, those with whom messages had been left and those who were still to be contacted. Thereafter further updates in relation to the re-training agreement, with the Schedules of those contacted and booked for re-training, were sent by Khris Veldman to Alan Sharp by email on 18 and 19 November 2015 (JP50 and JP52).

[68] Four of the delegates were retrained on 19 and 20 November 2015.

[69] Ms Tanner went on to submit that there was limited evidence about the decision-making process including the matters which were taken into account and the matters which were left out of the account, in reaching the decision on 18 November 2015 to withdraw all of the pursuer's approvals.

[70] The individual who ultimately made the decision to withdraw all of the pursuer's approvals was the late David Doig, who died before the present action was raised.

[71] The Audit Report (JP9) was sent by Scott Duncan to Alan Sharp, then approvals Manager of the defender, cc Lisa Donald, at 1816 on 15 October 2015 (JP186).

[72] The Audit Report (JP9) was sent by Alan Sharp to James Hamilton, on 19 October 2015 (JP185).

[73] A further nine days elapsed before James Hamilton responded to Alan Sharp on 28 October 2015. In the interim there had been communication between James Hamilton and David Doig.

[74] There is evidence from John McDonald and James Hamilton that Mr Doig first had sight of the Audit Report (JP9) on 27 October 2015, when it was sent to him by email from

James Hamilton, copied to John McDonald (JP186). There is no explanation in the evidence about why the Audit Report was not sent to Mr Doig until 12 days after it was produced and eight days after it was received by James Hamilton, particularly if the defender is intending to rely on the "safety critical" nature of the omitted training to justify formation of the opinion on 18 November that the non-conformance was "sufficiently material to justify an immediate withdrawal of [all] approval[s]" in terms of clause 3.5 of the Contract.

[75] Mr Doig responded to Mr Hamilton by email. Later on 27 October (JP187) seeking clarification on certain matters and identifying the fact that it could cause a:

> "major stir and probably put this company out of business as the recompense will be large if the numbers not trained are [sic]. I have a call scheduled with john for tomorrow James perhaps you can join us at the end and we will look at this in more detail. One thing for certain right now is no more training".

[76] On the evidence, this statement on 27 October 2015 from Mr Doig to Mr Hamilton copied to Mr McDonald appears to be the first suggestion that the pursuer should be instructed to "suspend" or "stop" training despite ongoing approvals for all standards. No apparent regard appears to have been had to the terms of the contract between the parties. As a matter of fact, no request or instruction of that nature was made by the defender to the pursuer on or about 27 October 2015. There is no evidence about whether Mr Doig was informed that no such request or instruction had been made at that time.

[77] There is evidence from John McDonald (witness statements, tab 10 , para 31) that he is "aware from subsequent discussions with Mr Doig"(no date given) "that although he immediately recognised the seriousness of the situation and the limited options available to him", "he did not feel that he necessarily had all the facts at his disposal".

[78] In the said email of 27 October (JP186) Mr Hamilton recommended "non-approval for all their approvals" "based on the fact that the issues identified with their BOSIET

training are of a nature that could easily affect their non-ER training." In the email, Mr Hamilton asked David Doig to let him know how he wished to proceed. Mr Hamilton did not inform Mr Doig of the ongoing communications between the pursuer and Alan Sharp of the defender between 14 and 27 October 2015, nor did he tell Mr Doig that Mr Sharp had outlined 3 possible recommendations by email of 19 October (JP185). Mr Hamilton did not inform Mr Doig that the BOSIET training including all learning outcomes had been observed by Scott Duncan as being completed during the audit. Mr Hamilton did say that "We (i.e. OPITO) now have to pull these certificates" (issued in the period since 11 June 2015) "out of CR" (which is the defender's Central Register) "and ensure the delegates are informed that they need to retrain". (Mr Hamilton's oral evidence included an admission that as at the date of the proof in October 2017 the training records for all affected delegates remain in the defender's Central Register and are available to delegates, their employers and prospective employers, for four years from the date of issue, despite the delegates having omitted part of the BOSIET standard during their training. His explanation appeared to be that the pursuer has not asked for them to be removed which does not accord with what he said to David Doig on 27 October 2015 about OPITO pulling them. Further it is submitted that the defender's failure to remove the defective certificates weakens any argument that they viewed the breach as "safety critical" and therefore sufficiently material to justify immediate withdrawal of the approvals.)

[79] Alan Sharp gave evidence (witness statements, tab 12, para 33) that on 28 October 2015 he was advised by Mr Hamilton that following Mr Doig's instructions he was to commence a dialogue with the pursuer with a view to dealing with the issue of correcting the defective certifications which had been issued by Effective Offshore since June 2015 and also exploring whether there was any possibility of a way forward which would perhaps

provide justification to Mr Doig to overturn recommendations of non-approval, while still recognising the breach which had been identified.

[80] Evidence was led from the defender's witnesses in relation to a Skype call on 28 October 2015, which involved David Doig, John McDonald and James Hamilton. However, it is submitted that the affidavits from the defender's witnesses on this point, as well as others, should be treated by the Court with a degree of caution as they raise fundamental issues with the witnesses' credibility and reliability, given the circumstances in which the affidavits were said to have been prepared in that they were drafted by the defender's then solicitor with "cutting and pasting" of material as between the respective affidavits; there was a failure to properly review the content a year later when they were produced for signature; Alan Sharp said that he "didn't have a lot of time to consider it in any detail" and signed it without reviewing it; the fact that none of the witnesses were put on oath or affirmed; and the fact that in the week prior to and during the proof there was deletion or amendment of important passages of evidence, such as the evidence as to whether there was any discussion between the defender's witnesses about the Contract, specifically Clauses 3.3 and 3.5. Reference is made to John McDonald's affidavit (witness statements, tab 10, paras 32-33); James Hamilton's affidavit, (witness statements, tab 11, para 33) as well as Alan Sharp's affidavit (witness statements, tab 12, para 20) and Alan Sharp's supplementary statement (witness statements, tab 15, para 5). Ms Tanner submitted that the way in which the affidavits were originally framed was intended to convey the impression to the court that the contractual provisions were uppermost in the minds of the defender's senior management and approvals Manager, perhaps in an effort to show that the defender had regard to due process, and it now appears that that evidence

was completely fabricated by one or more of those witnesses, with the same evidence being copied into the other affidavits and signed by the those witnesses.

[81] On the evidence of the defender's witnesses there was a further Skype call on 3 November 2015 involving David Doig, Mr McDonald and Mr Hamilton, during which the proposals which had at that stage been advanced by the pursuer were considered. In Mr McDonald's affidavit (witness statements, tab 10, para 36) he states that the outcome of that meeting was that an instruction was given to Mr Sharp to "go back to Effective Offshore again with a view to them providing additional proposals and that, in the meantime, Mr Doig would hold fire on any final determination". There is no evidence that there was any internal discussion about the terms of the Contract.

[82] Mr McDonald relates a further conference call with Mr Doig, Mr Sharp and Mr Hamilton on 11 November 2015 (witness statements, tab 10, para 37) in which the pursuer's latest proposal was summarised:

> "It was agreed that whilst the latest letter from Mr Veldman justified further investigation and dialogue, a clear message now needed to be sent to Effective Offshore in terms of their desire to carry out currently booked training. Mr Doig was firm that this simply should not happen. Mr Sharp was instructed to relay this message to Mr Veldman".

[83] Again, the evidence shows that there was no discussion about the terms of the Contract.

[84] It does not appear to be disputed by the defender (following the recent revisal of its witnesses' affidavits and production of Alan Sharp's supplementary statement) that there was no reference to the contractual provisions in the defender's telephone calls, emails or correspondence until they received an email from Khris Veldman on 17 November 2015 with a summary of the legal advice he had received about the purported suspension of training in the face of ongoing approval; and the relevant contractual provisions (JP48).

[85] Evidence was lead from the defender's witnesses in relation to a Skype call on 18 November 2015 which involved David Doig, John McDonald and James Hamilton. John McDonald thought that Alan Sharp was present, however, Alan Sharp does not recall being there. Mr McDonald's evidence (witness statements, tab 10, para 38) is that Mr Hamilton appraised Mr Doig of the email correspondence between Mr Veldman and Mr Sharp including JP46. Mr Doig was also appraised of the said letter from Mr Veldman (JP48) which first made reference to legal advice and the terms of the Contract. There is no evidence that Mr Doig was appraised of the re-training agreement which had been entered into by the parties or the fact that re-training had commenced in terms of the agreed schedule. According to Mr McDonald's statement (*supra*, para 38) the focus of Mr Doig's consideration appears to have been on the original breach with no regard or scant regard for the fact that the training had been completed satisfactorily during the audit and the parties' actions in the intervening five weeks. There is no evidence that Mr Doig directed his mind to the contractual discretion afforded in Clauses 3.3 and 3.5 to form an opinion as to whether the non-conformance was or was not "sufficiently material to justify an immediate withdrawal of the approval." There is no evidence that there was any discussion about any distinction between the BOSIET/FOET/HUET courses and the standards which did not require the omitted LAPP jacket and re-breather training.

[86] There is no reference to the Contractual provisions in JP53, which is the letter dated 18 November 2015 and signed by John McDonald. The wording used was that:

> "The OPITO Chief Executive has viewed the report regarding the above audit conducted at your facility. I am writing to inform you that he has accepted the audit findings and his recommendation is to non-approve Effective Offshore for delivery of the following OPITO standards."

[87] There then followed a list of all of the pursuer's approvals. It is of note that the word "recommendation" is used in relation to what would more properly be described as a "decision" of the Chief Executive had regard been had to the contract or the effect of such a decision. In any event, parties appear to have proceeded on the basis that the said letter was to be construed as a "decision" of the defender rather than a recommendation of the Chief Executive.

[88] All of the pursuer's approvals were withdrawn including those courses for which it is agreed there is no requirement to train in Cat B-EBS. It is agreed by parties that such training was not a requirement of the defender's standards in respect of (i) Banksman and Slinger training Stage 1; (ii) Rigger Training Stage 1; (iii) Minimum Industry Safety Training; (iv) Rigger Competence Stage 3; and (v) Rigger Competence Stage 4.

[89] In development of her position that the defender did not act in good faith in relation to its decision making she submitted first: in proceeding in the way in which it did between 14 October and 18 November 2015 it could be inferred that the defender was acting in a way which could be seen (retrospectively) to fall more clearly within the terms of clause 3.3 of the contract, than 3.5, in that non-conformance had been "issued" and there had been agreed between the defender and the pursuer a date to rectify the matter, by way of the re-training agreement, as well as ongoing submission of evidence in relation to the other areas of non-conformance/ compliance and "closing out" of actions. She accepted on behalf of the pursuer that the factual situation does not fit squarely into either sub-Clause, under observation that in the defender's acting up to and including 18 November 2015 there was no mention by the defender of the provisions of the Contract, in particular clause 3.5. She also accepted on behalf of the pursuer that Alan Sharp and James Hamilton indicated that a decision would be taken on approvals at the end of the period of re-training (scheduled

for December 2015) but in taking the decision that it did on 18 November 2015, one day after receipt of the pursuer's letter of 17 November (JB48) which first referred to the contract terms, it can be inferred that the decision was not taken in good faith and following due process by the defender, as nothing else had changed between 17 and 18 November 2015.

[90] Secondly she submitted: additionally, the defender would not appear to have been acting in good faith when James Hamilton instructed Alan Sharp to hold off on intimating the decision between 18 and 20 November 2015 and not to respond to correspondence sent to him by the pursuer in the meantime, which were the said updates on contact with and bookings made for re-training of the affected delegates.

[91] Thirdly she described the whole decision making process of the defender as flawed. In advancing this point she argued that it is clear on the evidence that the senior management team and the individual charged with making the decision (the then CEO, the late David Doig) did not have the contract and its provisions in mind. This can be seen from the evidence that there was no reference to the proper contractual decision-making process and options in any internal senior management discussions or correspondence. The defender's witnesses gave evidence that the terminology was never used in discussion leading up to the decision on 18 November, by which time the defender was in receipt of the pursuer's email of 17 November 2015 (JP48) which had first raised the matter of the contract and its terms.

[92] There were three contractual options open to the defender following the monitoring audit, two of which applied in the event that the opinion was first formed that the standards were not being maintained (Clauses 3.3 and 3.5). It is submitted that the defender has attempted in pleadings and in evidence to retrospectively "map" the decision which was taken onto the contractual terms and has unsuccessfully attempted to "shoehorn" the

decision into clause 3.5 of the contract despite the actings of the defender in the period up to and including 18 November 2015, from which it can reasonably be inferred that the defender itself, did not view the situation as falling within clause 3.5. Had it done so, the decision to withdraw approvals would have been taken at an earlier stage and the defender would not have entered into the re-training agreement which required ongoing approval.

[93] Separately, the request by the defender to the pursuer to "suspend" or "stop" all training other than re-training in the face of ongoing approval has no contractual basis and underlines the fact that the decision-maker did not have the contractual provisions in mind in the period prior to the decision being taken. It is submitted that the purported suspension of all of the pursuer's approvals lends credence to the submission that no regard whatsoever was had to the contractual terms until after receipt of the pursuer's letter of 17 November 2015 (JP48) which made reference to the legal advice received relative to the terms of the contract, including the fact that there was no contractual power to "suspend" training; and the provisions of clause 3.3.

[94] Beyond the above she contended that the timing of the decision to remove the approvals was of some significance in considering the issue of whether the defender was acting in good faith. Her position in expansion of this was: the timing of the decision-making process raises questions about the process itself. There was a long delay overall in reaching a decision between 15 October 2015 when the Audit Report and auditor's recommendations were issued and the date of the decision on 18 November 2015. The delays in responding to correspondence and telephone calls from the pursuer (which on the evidence of the defender's witnesses related to annual leave of the defender's personnel) do not suggest any immediacy on the part of the defender in relation to withdrawal of the

approvals which tends to negative any suggestion that there were imminent safety concerns thus justifying the immediate withdrawal of approvals.

[95] Looking to the issue of the reasonableness of the decision she submitted that the decision maker had not taken into account all of the relevant factors and in particular had failed to take account of or given insufficient weight to the following: omitted training on CB-EBS LAPP jacket and re-breather related to only one element of one suite of courses (BOSIET/FOET/HUET); the pursuer immediately accepted responsibility for its actions; during the audit the practical element of a HUET including the omitted LAPP jacket and re-breather training was completed and observed by the auditor; a re-training agreement was entered into by Alan Sharp on behalf of the defender and as agreed contact was made with all delegates by the pursuer with dates being arranged for re-training which was dependent upon approvals; the re-training had commenced; an indication had been given by the defender that the question of approvals (either BOSIET/FOET/HUET or all approvals) would be considered by the defender on completion of the re-training (Alan Sharp's explanation for the phrase "until such time"), which on the schedule would have been the end of December.

[96] Ms Tanner also relied on what she described as the re-training agreement and she submitted that it is an agreement to address a non-conformance where there is considered to have been a failure to meet the standards, by a specified time, that is to say the type of action envisaged in terms of clause 3.3 of the Contract. She accepted that, in addition to the re-training agreement, the defender was additionally attempting to get the pursuer to agree to a "suspension" of the approvals for other training in the meantime but given that such action was not permitted under the contract she argued that that does not support the defender's argument that this was a "3.5 situation". After the re-training agreement was

reached Khris Veldman made contact with all of the affected delegates and provided updates on the same to the defender, including on the day of and day after the decision was taken (but in ignorance of that decision as it was not intimated by the defender for two days afterwards).

[97] Further in respect of the re-training agreement she said this: it is not clear from the evidence whether the ultimate decision-maker was made aware that the re-training agreement had been reached or that re-training had commenced. Assuming that he was then the decision which was made on 18 November 2015 to withdraw all approvals appears irrational. She also submitted that it can be categorised as arbitrary and capricious on the basis that it appears to have followed directly upon the receipt of the pursuer's email of 17 November 2015 in which reference was first made to the contractual terms.

[98] She next went on to submit that the decision was capricious for certain further reasons and in development of this submission said: the decision is capricious in that the approach of the defender changed according to no discernible rules. Within the same week the defender indicated that a decision on approval would be taken at the end of the re-training programme and made a decision to withdraw the approvals that were required for that to take place. It might also be inferred that it was the letter from the pursuer making reference to the contractual terms which prompted the defender to change its approach mid-way through the decision-making process. Separately, while the central issue was the omission for a period of time of training from one course (BOSIET/FOET/HUET) the defender took the decision to withdraw all approvals.

[99] Moreover she submitted that the decision was irrational in the public law sense. Given the factors which were known to the decision-maker at the time she submitted that no reasonable decision-maker tasked with making the same decision as at 18 November 2015

would have considered that the non-maintenance of the approval requirements (given that a re-training agreement had been entered into) was "sufficiently material to justify an immediate withdrawal of the approval", as required by clause 3.5, or indeed, all approvals.

[100] Lastly, she said this: the effect of the decision meant that the pursuer was thereby unable to run the agreed re-training programme which had already commenced, and four delegates had already been re-trained. The defender's witnesses were at great pains to state in evidence that a critical safety problem arose as a result of the pursuer's actions in the affected period. This is inconsistent with the defender's own actings in two critical regards. The defender's stated safety concerns for the affected delegates and their certification are difficult to reconcile with their decision which prevented the pursuer from undertaking the agreed re-training and to do nothing to ensure that the delegates were re-trained elsewhere. Further, the fact that the defender has allowed the defective certificates to remain registered (for a fee) on its Central Register and the wider Vantage system (to date and for four years from the date of certification) suggests that their decision to remove all approvals, thus allowing the delegates, their employers and potential employers to believe that the certificates are valid when, in fact, a safety component was missed from the training, was irrational.

[101] Ms Tanner in addition argued that there had been a breach of the retraining agreement. She submitted that this was of relevance in considering the breach of the Braganza duty.

The defender's submissions in reply

[102] Mr O'Brien began by submitting that the pursuer's failure in respect to provision of training was serious and the defender was entitled to consider it so.

[103] It was serious for these reasons:

[104] Firstly, it amounted to a failure properly to train delegates in the use of potentially lifesaving equipment.

[105] Secondly, the omission to train in the LAPP jacket and re-breather pointed to systematic failures on the pursuer's part. This was a persistent failure, over a period of months, to train in a piece of lifesaving equipment altogether. It should not have been possible for a training company such as the pursuer to simply drop part of a standard. The very fact that such an error could have occurred gave proper cause for concern about the pursuer's management and procedures more generally. As all of the defender's witnesses made clear, concern extended beyond the particular omission to the reliability of the pursuer more generally. That was an entirely legitimate response to such a serious omission.

[106] The pursuer in the course of the evidence led on its behalf sought to downplay the significance of its error by attributing it to a mistake on the part of Mr Veldman and suggesting that the particular context of proposed changes in the standard provided a mitigatory explanation. However, the evidence adduced by the pursuer falls far short of providing a plausible basis for a legitimate and excusable error. In particular he argued as follows:

[107] It is not in dispute that, at the relevant time, the CAA had requested that LAPP jacket and re-breathers be replaced with Category A equipment within the UK Continental Shelf, and that there were discussions regarding proposed changes to the training standards to reflect this. Mr Veldman points to various documents relating to those discussions. However, it would have been obvious to anyone reading those documents that these discussions related to the UK Continental Shelf, whereas the BOSIET standard applied worldwide. It would also have been obvious to anyone reading those documents that

difficulties had been encountered in introducing Category A training, due to concerns over the safety of practical exercises, and as to the potential application of the Diving at Work Regulations. Any change of practice could be expected to be promulgated through formal channels.

[108] Mr Veldman says that he believed JP21 to be a new requirement and that he "was under the impression this meant I had to re-do all training to the re-written standard": witness statements, tab 5, para 21. But he did not in fact make any changes in February 2015 when this document was produced, nor could he sensibly have believed that the document represented a new standard, as it is plainly described as a draft standard to be used in a pilot Category A practical exercise. Nor did he in fact introduce practical Category A exercises of the sort described.

[109] By early 2015 there were discussions about a formal interim standard being promulgated: see eg JP22 and JP24 an email of 6 March 2015 reporting on a working group meeting, and noting "OPITO to prepare a draft interim standard to reflect the above". The defender's March 2015 standards update (JP26) refers at MS 373 to the BOSIET/FOET/HUET review being conducted in parallel with the development of a new standard incorporation Category A. A minute of 10 March 2015 (JP27) records at para 7.2 (MS 379) that two new standards had been prepared and were to be piloted; at MS 381-382, the same minute records that a decision from the HSE on the health and safety issues was needed "before any future position can be determined", and that the defender was not prepared to proceed with a standard that required practical Category A training until the HSE had granted exemptions from the Diving at Work Regulations that would enable the standard to be taught legally. An email chain of 24 April 2015 (JB28) also records that the defender had "no plan to implement interim measure". He also directed the courts attention to MS 388 in the

same email chain which said: "I also note that there is no movement on the implementation of CA EBS dry training within BOSIET/FOET as an interim measure…")

[110] Mr Veldman was also well aware of the normal procedures which were used by the defender to announce changes to standards. The defender would announce the changes and would seek confirmation from training providers that the changes had been introduced. Examples of such exchanges are lodged as JP11, 7/15, 7/17-7/19, 7/23-7/25, 7/27 and 7/30-7/31 of process, covering a period from August 2010 through to May 2015 (very shortly before the LAPP jacket and re-breather was dropped by the pursuer). Mr Veldman also accepted in cross-examination that information about the current standards could easily be obtained from the pursuer.

[111] Despite all this, Mr Veldman's evidence was essentially that a European Training Provider Advisory Group meeting in June 2015 had given him the impression that teaching the LAPP jacket and re-breather was no longer required. He says that "My impression from the June 2015 TPAG held in Cork was that UK/ROI training providers were to use their discretion when doing refresher training with delegates so as to not make them train with what was an obsolete piece of equipment": para 25. But he does not explain what gave him that impression. Mr Foody's evidence, similarly, was that something must have happened to give him that impression, but he did not know what it was.

[112] In cross-examination, Mr Veldman appeared to shift from this position and suggested that he was aware that no formal change had taken place. His evidence instead appeared to be that he had been given the impression that the defender would turn a blind eye if individual trainees were allowed to skip the LAPP re-breather exercise. When it was pointed out that he had gone much further than that, and dropped the re-breather entirely, he acknowledged that, and said this was his "error" – ie not simply that he had

misunderstood the TPAG discussion, but that he had gone beyond even the impression which he claimed to have. On that view, he never even had a genuine belief that he was acting in accordance with any sort of approval given by the defender, informal or otherwise. He then seemed to revert to the position that he thought the standard had changed – but could not explain how that related to his account of what was discussed at the meeting.

[113] Even on his own account, Mr Veldman dropped an element of the training course on the basis of a discussion at a TPAG meeting, even though he had no notes of that meeting. He did not seek clarification from the defender. In cross-examination, he said that staff had in fact queried the decision, but evidently this too did not prompt him to reconsider.

[114] None of the above he submitted detracted from the seriousness of the omission, or from the reasonableness of the defender's opinion as to its seriousness. If anything, the weakness of Mr Veldman's explanation and the lack of objective basis for his actions only reinforced the concern about the pursuer's ability to deliver training courses.

[115] Moreover, the pursuer's staff continued to complete training records, as if they were providing the training, the omission only came to light when the auditor asked why the equipment was not being maintained. Again this was a matter which the defender was well-entitled to regard as a cause for serious concern. The entries in the training records were clearly untrue.

[116] In conclusion he submitted: in these circumstances the defender was more than entitled to conclude that the pursuer's error was of such materiality as to justify withdrawing its approvals. It stopped providing training in life saving equipment because its director Mr Veldman thought he had heard that the position had changed. No change to the standard has been promulgated through the usual routes. He accepted that he knew that, and that he could easily have checked the position. He accepted that his staff had

queried the decision – a point not mentioned anywhere in his statements – and that he had proceeded regardless. He had no basis for thinking that there had been a change in the standard. His evidence that the defender had indicated that it would turn a blind eye in individual cases should be rejected; if the defender had been minded to allow that at all, it would have promulgated it through the normal channels.

[117] These were serious systematic failures on the part of the pursuer. They should have had proper procedures in place which would have prevented this from happening on such a flimsy basis. They show a cavalier approach to the application of standards. Despite his attempt to portray this as an understandable error in unusual circumstances, Mr Veldman was unable in cross-examination to explain how the materials cited by him could realistically have led him to think that there was a basis for acting as he did. It is striking that Mr Veldman's witness statement focuses so heavily on the proposition that the real issue was simply to fix the training of the 118 affected delegates, and downplays the serious systematic concerns arising. His complaint that LAPP jacket and re-breathers were only used in certain courses misses the point for the same reason; the systematic concerns applied across the board.

[118] Turning to the issue of the genuineness of the defender's belief he said this:

[119] The pursuer suggests that the actual course of action followed by the defender indicates that it chose to follow the clause 3.3 route of requiring remedial action, and that it did not regard the problem as calling for immediate withdrawal of approvals. However, that is not a fair reflection of what happened.

[120] It should be recalled that the clause 3.3 route involves a training provider continuing to trade normally while it takes steps to remedy the disconformities which have been identified. In contrast, the clause 3.5 route involves the training provider losing its

approvals altogether until such time as a fresh application for approval is granted. There is no power to suspend approvals; the closest mechanism provided by the contract would be a suspension under clause 3.5, with a swift re-approval following.

[121] The evidence shows that the defender's staff did indeed form the view that this was a serious matter which called for immediate withdrawal of approval. Mr Duncan, Mr Sharp, Mr Hamilton and Mr McDonald all gave evidence to that effect. Although the defender's internal discussion would have been framed in terms of non-approval or approval with corrective actions, rather than in terms of Clauses 3.5 and 3.3, those terms are a fair paraphrase of the contractual position. The pursuer points to an email from Mr Sharp to Mr Hamilton of 19 October 2015 (JP185) in which he refers to three "recommendations" – broadly, suspension, non-approval and approval with corrective actions. Since those options are plainly mutually exclusive, Mr Sharp cannot have meant that he was recommending all three of them at once; rather, he was identifying options. He confirmed in cross-examination, however, that after further discussion he recognised that suspension was not a contractual option, and that his recommendation was non-approval. On 27 October 2015, Mr Hamilton emailed Mr Doig (JP186) also recommending non-approval, and specifically making the point that the error went to "the fundamentals of delivering a standard against a course package and conducting accurate assessment", so that all approvals should be affected.

[122] Mr Sharp's email (JP185) also acknowledges the practical problem which was presented in this case: the seriousness of the error merited non-approval, but a withdrawal of approval would both prevent the pursuer from carrying out remedial training, and potentially have serious effects on the pursuer's business. The evidence indicates that it was

these considerations that led Mr Doig of the defender to explore other options, albeit that this would involve departing from the contractual framework.

[123] From the outset, however, Mr Doig was clear that he wanted the defender to stop training, except for the limited purpose of remedying the 118 delegates whose certificates were defective. In an email of 27 October 2015 replying to Mr Hamilton (JP187), Mr Doig asked for confirmation of the facts, and said: "One thing for certain right now is no more training". Mr Sharp delivered that message to Mr Veldman the next day: Sharp para 34. Mr Veldman disputes that account of the call but accepts that message was conveyed no later than 5 November: see his note of the 5 November call at JP39.

[124] Subsequently, discussions proceeded on the basis that the defender wanted the pursuer to cease training in the meantime, except for remedial measures. The subject is central in the correspondence that follows. In his letter of 6 November 2015 (JP41, MS 464-465), Mr Veldman set out two possible scenarios – one that involved ceasing all training except for remedial work, and the other involving the pursuer continuing to honour existing bookings. He maintained that the former option was not financially viable for the pursuer.

[125] In his reply by email of 13 November 2015 (JP45, MS 483), Mr Sharp indicated that the proposed practical arrangements for re-training could be agreed and said that "we now need you to action this immediately". However, in the same short email, he also acknowledged the two scenarios which Mr Veldman had put forward, and said that "After internal discussions it was decided we need you to stop all OPITO approved training until such time" [sic]. Although that email is obviously badly phrased, it was clear that the defender was insisting that all other training stop. Clearly, these discussions have to be read as a whole; any agreement on the remedial training was obviously dependent on the

pursuer retaining its approvals in the meantime for that purpose, and the parties had not reached agreement on that.

[126] It is clear from Mr Veldman's response (MS 482) that he also understood the discussions in that way. In an email to Mr Hamilton of 16 November 2015 (JP46, MS 487) he said that the pursuer could not move forward on the re-training "without more clarity from OPITO" in relation to the suspension of other training, because the defender's request was "tantamount to Commercial Suicide and we cannot agree to this at this time without further discussion". He saw the two issues as linked. Mr Hamilton responded on 17 November 2015 reiterating the defender's position that no other training should be conducted (JP47, MS 492). Mr Veldman replied that evening reiterating that a cessation of training was impossible for the pursuer, and arguing that any attempt to stop it from training would be a breach of contract (JP48, MS 499).

[127] Viewing this exchange as a whole, the position is clear. The defender always regarded the non-conformities as so serious that training should stop. Save for the limited purpose of enabling the pursuer to fix its errors. The defender never departed from that view. Its discussions about remedial work were always linked to the demand that the pursuer should stop all other training until the defender was satisfied that training should resume. The pursuer would not accept that demand, and the defender was left to use the non-approval route.

[128] It is artificial for the pursuer to suggest that this somehow amounted to an adoption of the clause 3.3 route of approval with corrective actions. The clause 3.3 route would have involved the pursuer being free to continue training as normal while the defects were addressed. That was never the defender's proposal, as the pursuer clearly understood. The defender was proposing that approvals should in effect remain in force only for the limited

purpose of allowing remedial training. The contract did not provide a mechanism which would have allowed the defender to impose this arrangement. But it was in substance far closer to a qualified withdrawal of approvals in the expectation that they would be restored in due course (per clauses 3.5 and 3.6) than to an approval with corrective measures (per clause 3.3). The defender explored this route in an attempt to address the practical problems which would flow from an outright withdrawal of approval, not because it had departed from its view of the seriousness of the breach.

[129] By clause 3.5 of the contract, the defender's view on materiality should have led to the withdrawal of approvals. But any delay by the defender in acting on that conclusion has to be seen in the context of Mr Doig's understandable wish to double check the facts and to explore any other possibilities which might avoid the serious consequences of withdrawal. In any event, if the defender is to be criticised for not acting more swiftly and decisively, that would not assist the pursuer in this action; it would simply mean that the events complained of would have happened earlier. Any delay by the defender in acting on its conclusions should not prevent it from taking the necessary steps.

[130] The short answer to the chapter of the pursuer's case where it seems to rely on an alleged training agreement is that it was made clear at all times that withdrawal was still under consideration. Any agreement about the arrangements for re-training was always tied in with the question of whether training could continue in the meantime. The pursuer cannot pick and choose parts of the discussion in this way.

[131] In any event, even if the Re-Training Agreement can somehow be severed from the discussions on whether the pursuer could carry out other training in the meantime, that would not assist the pursuer. It would be no more than an agreement to allow the pursuer

to carry out loss-making remedial work. That in itself would not have caused the losses sued for.

Discussion

[132] I believe the appropriate place to start consideration of whether the defender's decision is open to challenge is this question: was the defender's decision irrational? Put another way did it arrive at a decision that no reasonable decision-maker would have made? I am persuaded that the answer to these questions is no. The defender was entitled to consider that the pursuer's non-compliance was serious and in terms of the contract, sufficiently material to justify immediate withdrawal of approvals.

[133] Mr O'Brien advanced three reasons in support of his argument that the pursuer's failure was material and the defender was entitled to hold it material.

[134] In short these factors were:

1. The failure amounted to a failure properly to train delegates in the use of potentially lifesaving equipment.
2. The omission to train in the LAPP jacket and re-breather pointed to systematic failures on the pursuer's part.
3. When the explanation provided by the pursuer for the failures was looked at, it tended to reinforce the materiality of the failure.

[135] I consider that each of the above was a relevant factor in considering materiality and when taken together would have entitled the reasonable decision maker to have held that there was a material non-compliance justifying the immediate withdrawal of approvals.

[136] The first factor the reasonable decision maker would have been entitled to hold went to the core of what the pursuer was offering, namely: training in health and safety. Its

failure related to training in potentially lifesaving equipment, not some minor aspect of health and safety. All of the defender's witnesses stressed this particular point and I had no difficulty in accepting this. The failure subsisted over a significant period of time. The pursuer's attempt to try and downplay the seriousness was not persuasive. For the foregoing reasons this was clearly a serious failure.

[137] It appeared to me that the reasonable decision maker would have been entitled to hold that the failure identified at the audit pointed to wider issues in respect of the operation of the pursuer's business, namely: to system and procedure issues. I agree with Mr O'Brien's submission that this failure was one which the defender was entitled to consider brought into question the reliability of the pursuer in a general sense and took matters well beyond the particular issue of training in the LAPP jacket and re-breather. Rather, it cast a doubt on the general reliability of the pursuer to provide any training courses.

[138] The third factor relied on by Mr O'Brien related to the pursuer's explanation for its failures. The pursuer in the course of its evidence sought to put forward what might be described as a plea in mitigation and in a sense to seek to put forward that the mistake which had been made was in some way excusable and that given this explanation the defender was not entitled to view what had happened as being sufficiently serious to justify invoking clause 3.5.

[139] I am persuaded that for the very detailed reasons advanced by Mr O'Brien this plea does not lessen the seriousness and materiality of the omission. I also believe Mr O'Brien was correct in advancing that this explanation rather raised further concerns which the reasonable decision maker in the position of the defender would have been entitled to factor into any decision in respect to materiality.

[140] In particular I observe that (a) nothing in any correspondence or what he said he was told explained the misunderstanding arrived at by Mr Veldman, nor was Mr Foody able to give any explanation for how he had arrived at the same view as Mr Veldman; I do not accept the evidence of Mr Veldman or Mr Foody that anything said by the defender indicated that it would turn a blind eye in individual cases; (b) this lack of a proper basis for the view which Mr Veldman and Mr Foody reached casts a very considerable doubt on the pursuer's ability to deliver courses; (c) the completion of what were false records by the pursuer's staff was clearly a matter which the reasonable decision maker was entitled to treat with grave concern as it pointed to a very serious breakdown in management procedures, that this could take place undermined the trust that could be placed in the pursuer's records as a whole; (d) the pursuer's failure to check the position as to whether there had been any change in the requirements of the standard, where it knew how to check the position, was also a matter which would be of considerable concern to the reasonable decision maker; and (e) the fact this error could subsist over a significant length of time, without procedures within the pursuer bringing the error to light, was also a matter which a reasonable decision maker would regard as being of significant concern. All of these matters I am satisfied point to the existence of general and serious problems within the pursuer's business and point to a serious problem in the general provision of training. The reasonable decision maker I believe would have been entitled to reach that view. Ms Tanner sought to characterise the pursuer's failure as being minor in that it was no more than a failure in respect to one element of one suite of courses. This submission wholly fails to recognise: the safety critical nature of the failure; the period of failure and its calling into question the pursuer's management systems and its general ability to provide courses; the lack of any acceptable explanation of Mr Veldman's instruction relative to this part of the course, which

given his position within the management of the defender called in to question the overall management of the defender; and finally the production of false records which again raised wider issues about the management of the pursuer's business.

[141] In conclusion all of these factors impacted to a significant extent in respect to the pursuer's general suitability to provide training courses and the reasonable decision maker would have been entitled to hold that given the foregoing the immediate withdrawal of all of the pursuer's approvals was justified. The defender's decision I consider could not be described as irrational, rather given the whole circumstances it is entirely reasonable.

[142] It is also perhaps interesting in the context of consideration of the issue of the reasonableness of the decision which was reached by the defender to look at Mr Veldman's views about the seriousness of the pursuer's failures as at the time when parties were discussing this. I observe that in (JP41) being a letter from him to Mr Alan Sharp dated 6 November 2015 he said *inter alia* this:

> "I appreciate the life line that OPITO CEO David Doig has allowed us by not instantly removing our centre approval for BOSIET/FOET/HUET
> …
> I am acutely aware of the gravity of the situation."

[143] I believe that on a fair interpretation of the above it is quite clear that Mr Veldman at that time thought that the defender was entitled to immediately withdraw the pursuer's approval.

[144] This is perhaps a convenient point to deal with the issue of the credibility and reliability of the various witnesses. So far as Mr Veldman and Mr Foody are concerned I did not find them to be entirely satisfactory witnesses with respect to the substantive issues in this case.

[145] My concerns arose from their evidence as to the basis upon which they had come to the view that the LAPP jacket and re-breather training was no longer required and as to the precise circumstances in which it was not required. Their evidence on this was wholly unclear. It never became clear in evidence, what precisely it was that was said at the meeting in Cork which caused them and in particular Mr Veldman to reach the view that this aspect of training was no longer required. As I have said I did not accept that anything said by the defender indicated that it would turn a blind eye in certain circumstances. Nor was it clear from their evidence and in particular from the evidence of Mr Veldman what they regarded as the nature and extent of this permission not to conform to the standard which they allege had been granted by the defender. The evidence of Mr Veldman was not, as argued by Mr O'Brien, consistent in relation to this issue.

[146] I also found it difficult to understand, why if it was thought by them that it was no longer necessary to carry out this particular aspect of the training, false records were prepared. The making up of false records did not in my view fit in with them having had an understanding that it was no longer necessary to carry out this aspect of the training.

[147] Moreover, both of them appeared to know how changes were officially made by the defender to the standard and no explanation was given in evidence as to why they thought in those circumstances, when no official change had been made it nevertheless entitled them, to reach the conclusion they did about this aspect of training no longer being necessary.

[148] In this context I found it interesting to note that it was accepted by Mr Veldman that no other provider seemed to have reached the same conclusion as the pursuer about this training no longer being required. This emphasised the implausibility of what was being said by the pursuer's two witnesses regarding this error.

[149] Overall I found their explanation as to how this error had come about lacking in plausibility and I believed it cast a considerable shadow over the credibility and reliability of these two witnesses.

[150] A further factor which I consider supports the conclusion I had reached regarding their credibility and reliability was this: it did seem to me that during the course of their evidence they sought to downplay the seriousness of the omission. However, this did not fit in with the position Mr Veldman had taken at the material time.

[151] Overall I believe Mr O'Brien was correct in submitting that their evidence should not be accepted on any contentious, substantive issue unless supported by contemporaneous documentation.

[152] Turning to the evidence of the witnesses for the defender I found them to be credible and reliable. It seemed to me that when looked at in the round their evidence was consistent with the various contemporaneous records to which reference was made during the course of the proof. I overall found them to be reasonably impressive witnesses with respect to the matters in issue.

[153] Ms Tanner made detailed submissions regarding the credibility and reliability of the defender's witnesses arising from first the circumstances in which they signed their affidavits and second the same phrase appearing in more than one affidavit. Having considered these submissions I do not accept that they cast an adverse light on the credibility and reliability of the defender's witnesses. Overall it appeared to me that the documents which they adopted as their evidence in chief properly reflected their evidential position. The manner in which they had been signed seemed to reflect badly on the solicitors, who were then acting for the defender rather than on the witnesses themselves. I had the considerable advantage of seeing and hearing the witnesses and any doubts I may

have had arising from the way in which their affidavits were signed were dealt with by my considering the impression they made on me and testing their evidence against the contemporaneous records.

[154] I turn to look at the next question: was the defender in reaching its decision acting in good faith? Was the defender's belief that there should be an immediate withdrawal of approvals spoken to in evidence a genuine one?

[155] Ms Tanner's position in essence was this: the actings of the defender in the material period indicated that it was following the 3.3 route and therefore it did not regard the pursuer's failures as genuinely requiring immediate withdrawal of its approvals.

[156] The question for the court therefore becomes this: is the above a fair reflection of what happened? I would answer that question in the negative for the following reasons.

[157] It is clear that in the way that it behaved in the material period the defender acted in a manner which fell outwith the framework of the contract. It did so by seeking to have the pursuer suspend training except for the limited purpose of enabling the pursuer to remedy the non-conformities by re-training those who had been granted certificates where the training in the LAPP jacket and re-breather had not been carried out. It was not a matter of contention that there was no power in the contract to impose such an arrangement upon the pursuer. However, this course followed by the defender does not I believe support the pursuer's argument that the defender did not in good faith regard the non-conformities as so serious that 3.5 was the appropriate route.

[158] Firstly on a proper analysis of the contemporaneous records that is clearly not the position.

[159] The email trail commences with an email from Mr Sharp to Mr Hamilton of 19 October 2015 (JP185). It was recognised by Mr O'Brien that this is not an email which is

easy to understand as on the face of it, there are three mutually exclusive recommendations made.

[160] The only way I think that this email can be understood is that it makes no recommendation. However, it does recognise (1) "the safety critical" nature of the pursuer's failure, (2) the effect on the pursuer's business of withdrawal of the approvals and (3) the issue of a large group of people having not been properly trained.

[161] The matter is then considered by Mr Hamilton (Mr Sharp's line manager) and his immediate recommendation to Mr Doig made by email on 27 October 2015 (JP186) is immediate withdrawal of approvals and specifically makes the point that the error went to the fundamentals of delivering a standard against the core package and conducting accurate assessment.

[162] Thus within two weeks Mr Hamilton had taken the view that this was a serious breach and that he was recommending non-approval as the appropriate course.

[163] Mr Doig, who was the person who would make the ultimate decision, in his reply to Mr Hamilton (JP187) says among other things this:

> "One thing for certain right now is no more training"

[164] He also raises the issue of what will happen to the pursuer's business as a result of its actings.

[165] It is I believe clear from (JP187) Mr Doig considers the pursuer's failure as of such seriousness to justify immediate withdrawal.

[166] It appears from the outset that Mr Hamilton and Mr Doig viewed this as a serious matter justifying immediate withdrawal of approval. This was also the position of Mr McDonald, although he did not have a specific position within the decision making process.

[167] However, the defender although it wanted the pursuer to cease new training, also wanted it to carry out remedial training in relation to those who had been inadequately trained in the LAPP jacket and re-breather. In (JB41) a letter of 6 November 2015 from Mr Veldman to the defender he makes two proposals:

> "**Training Proposal 1**
> • Ceasing all training of OPITO approved courses with effect from Friday evening the 6th November and only delivering re-training/certification for the 118 learners. This re-training would take place between now and the end of 2015 to enable those that are unavailable due to work commitments or location in the world to return to Effective Offshore.
>
> **Training Proposal 2**
> • Continue to deliver booked/confirmed training and assessments of OPITO courses from now until the end of 2015 but **only** to those that have received Joining Instructions and paid deposits to date while at the same time prioritising the retraining of the 118 learners."

[168] The reply to this proposal by Mr Sharp is contained in (JP45). He said this: he acknowledged the two scenarios which Mr Veldman had put forward and said that "after internal discussions it was decided we need you to stop all OPITO approved training until such time". I note that once again Mr Sharp's email is not entirely well phrased. However, I agree with the submission of Mr O'Brien that other than re-training the defender was insisting that all training should cease.

[169] Mr Veldman's reply to this I believe recognises that the pursuer's approvals are only being continued to allow re-training. He says this at JP45 dated 15 November:

> "We are also mindful that no decision has been made regarding our 'approvals'. Can you advise if all the approvals that we currently hold are being considered for withdrawal after the retraining of those affected by the in-water LAPP omission or is it only the BOSIET/FOET/HUET?
> At this time both options are being considered but nothing concrete has come from senior management."

This email is almost immediately followed up by JP47 from Mr Hamilton an email of 17 November 2015 reiterating the defender's position that no other training (other than

re-training) should be conducted. Mr Veldman replied to that reiterating that a cessation of training was impossible for the pursuer and arguing that any attempt to stop it from training would be a breach of contract (JP48).

[170] I consider that on a fair reading of the correspondence looked at as a whole: first, the defender genuinely held the view that this was a serious matter justifying immediate withdrawal. Secondly, the defender was concerned about the position of those delegates who had received inadequate training and sought during this period to obtain re-training for these persons from the pursuer. By so doing, however, the defender at no point agreed that the pursuer should be allowed to continue training, which related to persons other than those requiring re-training.

[171] It appeared from the evidence that the situation faced by the defenders was a unique and difficult one. According to the oral and documentary evidence the defender was concerned about the 118 people who had not been properly trained and in circumstances where it could not offer re-training wished the pursuer (for free) to do this. In order to achieve this the course adopted by the defender was to seek to impose a suspension in order to allow re-training to take place but no other training to be carried out. This course strongly supports the view that the defender genuinely believed matters were of such seriousness as to require an immediate withdrawal. If the defender was not genuinely of that view there was no need to suggest suspension as training and any necessary re-training could have continued in terms of clause 3.3. It was only where they genuinely believed that immediate withdrawal was justified, but wanted re-training to take place that suspension would be necessary. One of the strongest pieces of evidence supporting the defender's position that it genuinely held the view that 3.5 was the appropriate course was it seeking to adopt suspension as a course.

[172] Beyond the above I, for the reasons already stated, accepted the evidence of the defender's witnesses who spoke to this issue that they genuinely held this view.

[173] Ms Tanner relied on a number of other factors as pointing to the defender's position not being a genuine one.

[174] She relied on the final email confirming the decision regarding immediate withdrawal being sent immediately after the sending by Mr Veldman of JP48 in which he challenged the lawfulness of the use of suspension. I do not find anything sinister in that final decision immediately following the receipt of JP48. It does not support the view that the defender was not genuine in its position as to the seriousness of the breach. This final decision flowed from the sending of JP48 given that it became clear from the terms of it that there was no question of the pursuer simply carrying out re-training but accepting a suspension in respect to any other training. Thus there was no further point in the defender seeking to follow that particular route. Given that the defender was only prepared to allow re-training to take place then in the absence of that being a possibility it is no surprise that it simply sent the email confirming immediate withdrawal of approvals. This tends to show that throughout the defender's genuine position was that 3.5 was appropriate but it also wished to try and ensure that persons who had not been trained properly received re-training from the pursuer. Its only reason in not immediately sending JP48 after the audit had been in the hope of achieving re-training.

[175] Secondly, some reliance was placed by Ms Tanner on the delay between 14 October when the audit took place and 18 November when the decision on the 3.5 route was intimated.

[176] It appears to me not to be a particularly long delay in the context of what was a very important decision for both the pursuer and defender and where the decision was being

made in unique circumstances. Further the delay has to be viewed in the context of the discussions to try and have the pursuer carry out re-training. Once it became apparent that the pursuer would only carry out re-training if allowed to continue with other training then immediate intimation of the withdrawal was made. There is nothing in this delay which suggests to me that the defender's decision was not one which was genuine.

[177] It also requires to be recalled, as pointed out by Mr O'Brien, that the decision had to be passed up through various stages within the defender and there were also minor delays due to holidays or absence from business by the persons who were wishing to discuss the matter.

[178] Ms Tanner also relied on Mr Hamilton instructing Mr Sharp to hold off on the intimation of the decision from 18 to 20 November and not to respond to correspondence from the pursuer in the meantime. I do not understand how a delay of two days supports an inference of lack of good faith. Given the position that the defender had reached I also do not find it strange that in that short two-day period it would not reply to any further correspondence from the pursuer. There was, given the decision which it had reached, nothing further to discuss.

[179] Ms Tanner founded on what she described as the senior management team's decision being flawed from the outset. This submission relied first on the failure of the senior management team to refer to Clauses 3.3 or 3.5 in their discussions. It is correct to say that the contemporaneous documentation makes no reference to clause 3.3 or 3.5 of the contract. However, I believe Mr O'Brien to be correct in his submission, that on the evidence, discussions internally in the defender fairly reflected the terms of the material provisions. It is reasonably clear from that documentation and from the evidence of the various witnesses on behalf of the defender, whose evidence I accepted, that they

understood what the terms of 3.3 and 3.5 amounted to and were properly considering the terms of these Clauses when considering the option to follow.

[180] Of course it has to be noted that the defender was proceeding under an error as to its right to suspend. However, that particular point does not go to the core of the issue which they were being asked to consider which was whether 3.3 or 3.5 was the appropriate course to follow. As I have already said, the defender seeking to use the route of suspension shows that it understood the difference between 3.3 and 3.5.

[181] I am satisfied that when making the decision as to which course it was to follow the defender properly understood the nature of the options open to it and the basis upon which it could exercise these options.

[182] As regards the re-training argument in the end of the day it appears to me that the agreement, so far as the defender was concerned was always tied in its mind to it being limited to re-training. It does not assist the pursuer in advancing an argument that the defender's actions were not genuine for the reasons I have already given. Looked at objectively this was an agreement confined to re-training.

[183] Lastly she submitted that the defender's failure to remove from the register, which it keeps, the approvals which were granted without proper training showed that it never thought the issue was a safety critical one. The defender's position was that it was not entitled to remove persons from the register. It was for the training provider to do this. There was no evidence to a contrary effect and I saw no reason not to accept this evidence.

[184] Ms Tanner went on to submit that the decision was not only not in good faith but was also arbitrary and capricious. I have already found that the decision was a reasonable one given the factors relied on by Mr O'Brien. The decision is not arbitrary, it was rather based on proper considerations and as I have said was one the reasonable decision maker

was entitled to reach. It is not capricious; the defender did not change its position halfway through the decision making process. As I have said, the defender's view all along was that the failures were of such materiality as to justify immediate withdrawal. The defender tried to obtain re-training, which required while that re-training was taking place approvals to remain in position, however, it did not agree to anything beyond that. When it became apparent that that was a course which could not be followed, in that it was not acceptable to the pursuer, a 3.5 decision was immediately intimated.

[185] Ms Tanner submitted that on the evidence Mr Doig in making his decision had not had regard to all relevant matters. I consider that he had regard to all relevant matters. It is clear that he had before him the information from the audit regarding the nature and extent of the pursuer's failures. In addition when the decision was intimated he was aware that the course of the pursuer's carrying out re-training was no longer open given the pursuer's attitude. From the correspondence Mr Doig was aware of the background to the failures. I do not believe there were further material considerations.

[186] In respect to the retraining agreement, as argued by Mr O'Brien, this was tied in with the question of whether training could continue in the meantime. That training could continue was never agreed by the defender. There was no breach of such an agreement. In any event no loss would have flowed from such breach.

Conclusion

[187] For all of the above reasons I find that there was no breach of contract by the defender. I am persuaded the defender did not breach the Braganza Duty. Nor was there a breach of the retraining agreement.

Decision

[188] I accordingly assoilzie the defender from the conclusions of the summons. I was not addressed with respect to the issue of expenses and I reserve my decision on that matter.

Damages

[189] Given that the pursuer has been unsuccessful I do not require to decide on the issue of quantum of damages. However, I was addressed at some considerable length on the issue of damages and it is appropriate that I set out my position regarding that matter. Had I been of the view that there was a breach of contract I would have awarded damages as follows:

[190] The damages sought fell under a number of heads. The first of these was redundancy payments. The pursuer was under an obligation to reimburse the Irish government for redundancy payments made by it. The only issue regarding this head related to two members of staff who were made redundant when the defender's decision was intimated and who were not immediately re-employed following the restoral of the approvals by the court. It was argued on behalf of the defender that their redundancy in those circumstances could not be directly connected to the alleged breach. I am persuaded that there is some merit in this argument and I would accordingly have deducted the payments for these two persons from the sum claimed under this head. There appears to be some dispute as to the identity of one of these two persons, although not as regards the issue of whether two persons were not immediately re-employed. Had I been awarding damages, I would have required to hear further submissions with respect to the issue of the identity of this person.

[191] The second head of damage was loss of profits. As regards confirmed sales it did appear to me that this element was fully supported by the oral and documentary evidence produced on behalf of the pursuer and I would have awarded the sum sought. I was not impressed by Mr O'Brien's submissions set out in his written submissions regarding this particular part of this head of damage.

[192] The second matter which fell under this head was loss of profits through loss of potential sales.

[193] A number of specific criticisms in respect to this claim were advanced by Mr O'Brien in the course of his written submissions. With respect to the specific points he made at paragraph 49 of his written submissions I am persuaded that the points made regarding whether the persons referred to would have undertaken further courses before the cut-off date as being well made insofar as set out at: (i), (ii), (v), (vi), (ix), (xi) and (xii).

[194] Mr O'Brien went further and submitted that there should be a general deduction from the figure claimed under this head in that this figure was of such an amount that it showed the pursuer doing better than in any previous year, when it was a matter which was not in dispute that the oil industry was in the middle of a decline. I accepted Mr Veldman's evidence in response to this suggestion and accordingly rejected this submission.

[195] As regards Mr O'Brien's reliance on Mr Veldman's reference to a 60% return rate regarding those who made enquiries and who actually then confirmed a booking, this has to be seen in context. Mr Veldman it seemed to me when preparing the various documents had gone through carefully who he believed would in fact have followed up enquiries made during the relevant period and I did not see why I should make a further deduction from the figure which he had arrived at.

[196] I would have altered the figure for medicals in light of the deduction to the figure for lost potential sales.

[197] As regards the Donegal ETB Contracts for the reasons advanced by Mr O'Brien at paragraph 53 of his written submission I do not believe this part of the pursuer's claim had been proved.

[198] As regards the final figure for damages I would have required to have been addressed at a By Order hearing as to the precise effect on the figures of the various findings I have set out: I would have awarded interest at 4% per annum.