Case No: HT-13-05

Neutral Citation Number: [2014] EWHC 224 (TCC)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7th February 2014

Before :

The Honourable Mr Justice Stuart-Smith

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Between :

Waterdance Limited	**Claimant**
- and -	
Kingston Marine Services Limited	**Defendant**

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Mr Tom Whitehead (instructed by **Myton Law**) for the **Claimants**
Mr David Hart QC (instructed by **Kennedys**) for the **Defendants**

Hearing dates: 5th, 6th February 2014

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JUDGMENT

Mr Justice Stuart-Smith :

1. The Joy of Ladram ["the Vessel"] was a Beam Trawler that was appropriately licensed to fish for profit. On 12 January 2007 she suffered damage to her engine. It is assumed for the purposes of this hearing that the damage was caused by negligence or breach of contract on the part of the Defendant. It is agreed by the experts that, immediately before the damage occurred, the value of the Vessel's hull and machinery was in the range £647,000 to £680,000. The damage to the Vessel would have cost £435,000 (£415,000 plus a reasonable contingency of £20,000) to repair and the repairs would have taken 15 weeks to carry out. In the event, the Claimant decommissioned the Vessel later in 2007 without having carried out the repairs. It was decommissioned pursuant to a Governmental scheme which was introduced in April 2007, the purpose of which was to reduce capacity in the trawler fleet fishing for sole in the South West by securing the permanent withdrawal of vessels from the fishing fleet. Under the scheme, the Claimant offered to decommission the Vessel in return for a grant payment of £1,119,000. The offer was accepted and the grant was duly received.

2. The Claimant claims damages for diminution in value and for loss of use. The Defendant contends that no damages are payable for diminution in value because the Claimant has either "avoided or mitigated any loss it may have suffered by reason of the physical damage by decommissioning the Vessel for a sum equal to that which would have been obtained irrespective of the [physical] damage." It contends that no damages are payable for loss of use because the Vessel had been fishing unprofitably in the periods before it was damaged.

3. In December 2013, Ramsey J ordered the trial of preliminary issues:

   i) Whether the Claimant suffered any loss by diminution in value of the Vessel and/or whether the Claimant has avoided and/or mitigated any such losses;

   ii) Whether, on the assumption that the vessel was loss-making at the date of the engine damage, the Claimant is as a matter of law entitled to damages for loss of use based upon the capital value of the Vessel.

4. Shortly before the hearing, the Defendant abandoned the argument that payment of the decommissioning grant mitigated or avoided any loss otherwise suffered by the Claimant. Before and during the hearing the Claimant indicated that if it succeeded on the first issue it would not pursue the second.

5. This judgment sets out my conclusions on those preliminary issues. In summary:

   i) The Claimant suffered an immediate and direct loss on the occurrence of the damage to the Vessel on 10 January 2007. The measure of loss is the reasonable cost of the repairs required to put the Vessel back into the condition in which it was before the damage occurred. The Claimant's loss was not avoided or mitigated by the receipt of the grant payment of £1,119,000 or otherwise;

   ii) In the light of my finding on the first issue, I do not deal with the second.

The Background Facts in a Little More Detail

6. In the period to January 2007, the Claimant was operating the Vessel to fish for profit, including fishing for sole in the waters of the South West of England. The Vessel's fishing licence was an essential pre-requisite to commercial fishing but was a tradable asset that was separate and distinct from its hull and machinery.

7. In May 2006 Defra announced its intention to introduce a decommissioning scheme as part of the long-term plan for managing stocks of sole in an area of the South West known as Area VIIe. It is apparent on the evidence that the fact of the impending scheme was well known in the fishing industry before the statutory instrument was laid before Parliament. Mr Carter, the managing director of the Claimant, knew about it from May 2006 at the latest, since he was present at meetings at which the possibility of a decommissioning scheme for those who could not survive the burden of high fuel prices was mooted. On 9 August 2006 Defra issued its consultation document, proposing criteria for the scheme which the Vessel and other vessels owned by the Claimant would be able to meet. The Claimant was one of six respondents to the consultation. The others included the South Western Fish Producer Organisation, which was the cooperative body that represented the interests of the various producers including the Claimant. The Vessel was the largest in the Beamer fleet and it seems probable that the Claimant's response (which has not survived) referred to it, as the regulatory impact assessment produced by Defra in January 2007 included a clear (but implied) reference to it.

8. Among the questions on which Defra consulted were "Question 3: Do you have any evidence that the EU maxima for vessels up to 25 years old is not a realistic value for vessels within that age group?" and "Question 4: Do you have any evidence about the relative value of vessels up to and over 25 years old?" The responses to Question 3 included that "Age is not a measure of catching capacity, but vessel values are related to catching capacity." The responses to Question 4 included "Vessel age does not directly relate to vessel value. Fishing opportunity and capability sets vessel value." and "£3000-£3500 per tonne removed would be the required amount to make it worthwhile for vessel owners to apply for decommissioning."

9. The relevant statutory instrument was the Decommissioning of Vessels Scheme 2007, which was made pursuant to s. 15(1) of the Fisheries Act of 1981. It was laid before Parliament on 8 February 2007 and the scheme came into force on 6 April 2007. The core eligibility criteria included some that had been proposed in the consultation paper: vessels had to be at least 10 metres in length, at least 10 years old, and had to have fished for at least 75 days in each of the two periods of 12 months immediately preceding the date of application. Other criteria proposed in the consultation paper were either modified or dropped from the scheme as enacted. The final regulatory impact assessment identified 58 trawlers as satisfying the criteria for the scheme and envisaged that 8-10 vessels would be decommissioned.

10. As introduced, the scheme made available a fund of £5 million. Vessel owners were invited to bid for grant in the region of £3,000 to £3,500 per gross registered tonne ["grt"]. Defra had obtained EU clearance for this level

of grant, which was in excess of the limits imposed by the relevant EU Regulations. Applications had to be submitted by 25 May 2007. To ensure that the best value for money was achieved by the scheme, Defra assessed the benefits and costs of individual vessels and ranked them using an evaluation and ranking system that took into account the tonnage of the vessel to be removed, the effort exerted in the fishery during a reference period, and the amount of sole caught during a reference period. The process of ranking the submitted bids led to the creation by Defra of two lists: the first was a list of those to whom offers of grant would be made initially and the second was of those next in line if any of the initial offerees refused the offer, as happened. After the process of identifying to whom the grants should be paid and in what sum, grant payments were made in about August 2007.

11. As well as being the largest in the Beamer fleet, the Vessel was the largest of the trawlers satisfying the requirements of the scheme, which was in its favour; however, price mattered. In the event, the Claimant submitted a bid at £3,000 per grt, or £1,119,000 overall, which was accepted. The rate of £3,000 per grt was the lowest rate offered by any of the bids that were ranked in the first six, to which offers were made. The other five bids all pitched at £3,250 or £3,500 per grt. Twenty-six bids were made in all. Eight grants were made.

12. The Vessel made a negative contribution to gross profit in the period from April 2005 to December 2006 (an overall loss of £61,085 before depreciation and £169,170 after depreciation). This comprised two periods in the management accounts: to March 2006 (a loss of gross profit of £71,014 before depreciation and £132,858 after depreciation) and from April to December

2006 (a profit of £10,071 before depreciation but a loss of £36,312 after depreciation). Fishing is not the only enterprise undertaken by the group of which the Claimant forms a part and it is clear that the directors adopt an entrepreneurial approach to their business, constantly assessing what may be the most profitable strategy in the short and long term. It is therefore typical of the Claimant that the day after the Defra consultation paper came out, Stephanie Clark (an accountant employed by the Claimant) prepared a spreadsheet to identify what the proposed scheme would mean for the Claimant's vessels, adopting varying levels of bid. On the evidence, she may well have done this on her own initiative though it is possible that she was asked to do it by one of the directors.

13. Mr Carter rejected any suggestion that he had decided by 12 January 2007 to apply for a grant under the scheme to decommission the Vessel. He explained the prompt production of the spreadsheet on 10 August 2006 as being a normal step for the Claimant in looking at all options for the business. I accept that evidence and, though it is not necessary for my overall decision in the case, I reject the suggestion that the right hand column of the spreadsheet was added in or about August 2006. Both the formatting and the content suggest that it was more likely to have been added in March 2007 when the Claimant was considering the potential outcome if it were to bid at various different levels.

14. The Claimant's case was that from about November or December 2006, the Claimant was in negotiations to sell the Vessel and two smaller vessels to another trawler-owning company, then known as Vedahaven Limited. The

Claimant's initial asking price for the three vessels had been £1,500,000 for the Vessel and £900,000 each for the smaller two. Shortly before the damage occurred, Vedahaven Ltd had made a counter-offer of £1,400,000 for the Vessel and £875,000 for each of the smaller two. Mr Langdon, a director of Vedahaven Ltd (whose witness statement was admitted as hearsay evidence without him being called) said that Vedahaven Ltd intended to buy the Vessel and that it would have been prepared to pay at least £1,400,000 for the Vessel if there had been no engine damage. When the damage occurred, that plan fell through and negotiations for the Vessel stopped. Vedahaven Ltd bought the two smaller vessels and paid the Claimant £875,000 for each.

15. Mr Carter's oral evidence about negotiations to sell the Vessel to Mr Langdon was vague about when the negotiations occurred and their content. However, it was not suggested to him that no negotiations had taken place and his evidence that they had is supported by the hearsay evidence of Mr Langdon. The fact that Mr Langdon did not attend reduces the weight that I attach to his statement significantly. However, I find that there were at least preliminary negotiations before the Vessel was damaged in the course of which Mr Carter said he wanted £1,500,000 and Mr Langdon had said he would pay £1,400,000. Negotiations ceased when the damage occurred.

16. After the damage occurred, estimates were obtained. On 26 February 2007 the estimates were summarised in a letter from Marine Surveyors in the total sum of £414,306. The estimates provided for a rebuilt engine similar to the Vessel's old one. On 2 March 2007 the Vessel's insurers wrote to Mr Carter referring to the estimates and inviting Mr Carter to indicate how he wished to

proceed. Mr Carter (in his words) doesn't do letters; so he telephoned insurers on 6 March 2007 and told them that he may well not repair the vessel but may look to have an offer of settlement from them without doing so. In accordance with the policy conditions, Insurers offered 75% of the estimated cost of repairs less the policy deductible of £25,000. After a short period of further negotiation, Insurers upped their offer to £300,000, which the Claimant accepted verbally on 14 March 2007 and in writing thereafter. Mr Carter said that the strategic decision to dispose of four of their larger trawlers was driven by the very hard conditions being experienced, which led to the decommissioning of the Vessel as well as the selling of the two smaller vessels. He explained that he would not contemplate replacing the damaged engine with a rebuilt equivalent because that would be replacing old technology with old: instead, if he was going to retain the Vessel he would want to install a new engine with improved fuel efficiency, but that would cost considerably more. Mr Medler, the expert valuer called on behalf of the Defendant, agreed that this was the ideal way forward if the engine was to be replaced. That being so, Mr Carter's evidence was that if he got the £300,000 from Insurers and something in the region of £1.1 million he would have got an acceptable return and he would not re-engine the Vessel unless he failed to get a decommissioning grant. I accept the thrust of this evidence.

Issue 1: Did the Claimant Suffer Any Loss by Diminution in Value of the Vessel and, if so, Did the Claimant Avoid or Mitigate Such Loss.

17. It is now established beyond argument to the contrary at this level that the Claimant suffered a direct loss when the damage occurred on 12 January 2007: see *Jones v Stroud District Council* [1986] 1 WLR 1141, *Dimond v Lovell*

[2002] 1 AC 384, 406B-H per Lord Hobhouse, *Lagden v O'Connor* [2003] QB 36 at [84-85], *Coles v Hetherton* [2013] 1 All ER (Comm) 453 at [15-26] per Cooke J, affirmed at [2013] EWCA Civ 1704.

18. Those authorities also establish that the reasonable cost of repairing a damaged chattel is prima facie evidence of the diminution in value caused by the damage, whether or not it is in fact repaired. In *Coles v Hetherton* Aikens LJ summarised the present position as follows at [27]:

> "Taking Lord Hobhouse's statement [in *Dimond v Lovell*] together with statements in other cases: (1) where a chattel is damaged by the negligence of another that loss (the "direct" loss) is suffered as soon as the chattel is damaged. (2) The proper measure of that loss is the diminution in value that the chattel has suffered as a result of the negligence of the defendant. This follows the general principle in awarding damages, i.e. that of restitution. In Lord Hobhouse's phrase, "this can be expressed as a capital account loss". (3) If the chattel can be economically repaired, the claimant is entitled to have it repaired at the cost of the wrongdoer, although the claimant is not obliged to repair the chattel to recover the direct loss suffered. (4) Events occurring after the infliction of the damage are irrelevant to calculating the diminution in value measure of damages. Thus, subsequent destruction of the chattel, or a decision to delay repairs, or an ability to have the repairs done at less than cost or for nothing will not prevent the claimant from recovering the diminution in value of the chattel that has been caused by the negligence of the tortfeasor. (5) Generally, the practical way that the courts have calculated this diminution in value is to ask how much would be the reasonable cost of repair so as to put the chattel back in the state it was in before it was damaged. In general this is a convenient practice which we think the courts should continue to follow. Only if the sum claimed appears to be clearly excessive will the court be justified in investigating whether that sum exceeds the cost that the claimant would have incurred in having the repairs carried out by a reputable repairer."

19. The question directly in issue in *Coles v Hetherton* was whether a person who had the benefit of insurance cover and who, by virtue of that cover, had repairs carried out at a lower cost than he would have had to pay if he had not had that

benefit, should recover the full cost that he would have had to pay if uninsured or the reduced cost that he in fact incurred. That question does not arise here. Sub-paragraph 4 of [27] is, however, directly in point and is founded on authority going back to *The London Corporation* [1935] P 70 and beyond.

20. The facts of *The London Corporation* were very similar to those of the present case. The Defendant's vessel caused damage to the Claimant's, which would have cost £250 to repair. Before repairs were carried out, the Claimant's vessel was sold to be broken up. The Defendant submitted that the Claimant had suffered no loss and was entitled to no damages. In finding for the Claimant, Greer LJ (with whom the other judges of the Court of Appeal agreed) said, at 77-78:

> "Prima facie, the damage occasioned to a vessel is the cost of repairs - the cost of putting the vessel in the same condition as she was in before the collision, and to restore her in the hands of the owners to the same value as she would have had if the damage had never been done; and prima facie, the value of a damaged vessel is less by the cost of repairs than the value it would have if undamaged, though it is true that evidence may establish that the value of the vessel undamaged is exactly the same as her value after she had been damaged. The learned judge decided that if that proposition were going to be established, it was for the owners of the *London Corporation* to establish it.
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> …
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> Quite apart from that, however, I agree with the learned judge that in cases of this sort, the prima facie damage is the cost of repair, and circumstances which are peculiar to the plaintiffs - namely, that they have, before the damage has been determined, sold the vessel to be broken up, is an accidental circumstance which ought not to be taken into account in the way of diminution of damages, any more than it is in a case of the sale of goods, where the difference in market price and contract price is always allowed, regardless of the fact that having regard to what the purchaser has done, no such damages are in fact suffered by him. It is desirable that there should be a measure of damage which can be easily and definitely found. In

> this case, circumstances which are accidental to the plaintiffs of which the defendants have no knowledge, or circumstances applicable to the defendants of which the plaintiffs have no knowledge, need not be taken into account."

21. The Court of Appeal affirmed the judgment of Bateson J and, so far as I am aware, Greer LJ's statements of principle have never been doubted. The first passage was effectively endorsed by the Court of Appeal in *Coles v Hetherton* at [28] where Aikens LJ said:

> "… the correct jurisprudential analysis of a claim for diminution in value, even if it is measured by the reasonable cost of repairs, is that it is a claim for general damages, not one for "special damages". The diminution in value claim should therefore be pleaded as a claim for general damages. Documents such as an invoice for the cost of the repairs undertaken are no more than evidence of the diminution in value suffered by the chattel as a result of the negligence of the wrongdoer which can be used to make good the claim. Strictly speaking, the cost of the repairs is not itself the loss suffered."

22. On this state of the authorities, the Claimant accepts that diminution in value is the touchstone, with the agreed cost of repairs being the prima facie measure of loss; and the Defendant accepts that the burden rests upon it to prove that there was no diminution in value despite that prima facie evidence. The Defendant does not suggest that the cost of repairs (£435,000) is "clearly excessive" and there is no material upon which such a finding could be made. In my judgment, therefore, and given the approach adopted by high authority to events subsequent to the occurrence of damages as exemplified by *The London Corporation* and *Coles v Hetherton* at [27(4)], the Defendant must show that circumstances existed on 12 January 2007 as a result of which the physical damage to the Vessel caused no diminution in its value to the Claimant on that date.

23. There is no absolute requirement that the diminution should be a diminution in "open market" value, though that is often what is claimed. Since what is being assessed is the loss suffered by the Claimant, the critical question is the extent of any loss of value to it which could, at least theoretically, be influenced by matters other than the open market value. For example, if on 12 January 2007 there had been in place a governmental scheme under which the Claimant had an established right to recover £2 million if it disposed of the vessel, that could be the value of the vessel to the Claimant even if £2 million was well above what the Claimant could obtain on the open market; and the existence of such a scheme would not necessarily or even probably have the effect of causing the open market value to be the same as the sum available under the scheme. Whether or not the availability of such a scheme would have *any* impact on the open market value would be a matter for evidence in a given case.

24. The statements of principle to which I have referred do not require the Court to determine what was the open market value before the physical damage was suffered. In some cases it may be necessary to do so in order to determine whether the claimed repair costs are "clearly excessive"; but what matters in principle is the diminution in value caused by the damage and not what the undamaged value may have been.

25. The only circumstance existing on 12 January 2007 to which the Defendant can point is that it was well known that the decommissioning scheme was coming. It submits that the effect of that knowledge was that no diminution in value occurred at the time of the physical damage. On the evidence that is an unsustainable submission.

26. I have accepted the theoretical possibility that the existence of a governmental scheme could have the effect of fixing the value of a chattel so that physical damage did not cause it to diminish: see [23] above. However, the facts of this case are far from that theoretical example, for two main reasons. First, on 12 January 2007 there could be no certainty that the Vessel would be accepted under the scheme. There was an element of competitive bidding under the scheme: although £3,500 was the highest rate per grt that could be bid by an owner, there was no lower limit. While the Vessel was well placed because of its size, the Claimant had no control over which other owners would apply under the scheme or the level at which other owners would pitch their application. In the event, two applications adopted less than £2,000 per grt and a further nine adopted between £2000 and £2999. One example shows how this flexibility of bidding price could introduce uncertainty. If the Claimant had pitched at £3500 per grt (instead of £3000) it would have achieved 563 ranking points (instead of 657). If the fourth ranking vessel (Vessels 9) had pitched its bid at £3000 (instead of £3500) it would have leapfrogged above the Vessel (scoring 576 points). Second, if the claimant had pitched its application for the Vessel at £2500 and had been successful, it would only have received a grant of £932,000. So, even assuming that the decommissioning scheme would be brought in and would adopt the criteria that had been proposed in consultation (which was not certain), there was real uncertainty for vessel owners such that not even the Claimant with its well-placed vessel could be certain of success under the scheme or the level of grant that it should pitch for or would obtain. A further uncertainty on 12 January 2007 would have been about whether a damaged vessel would be

eligible: as it was, the scheme as introduced required the vessel to be "seaworthy" and Mr Carter made a special visit to a fishery officer who initially said that the damaged Vessel could not be included, though he later relented.

27. The uncertainty about the level of any prospective recovery leads directly to another flaw in the Defendant's case. The scheme clearly had to offer sums that would attract vessel owners to apply; and Questions 3 and 4 linked the sums to be offered to the realistic value of vessels. However, the decision of an owner whether (and at what level) to decommission his vessel would not simply be dependant upon the value at which a willing seller and willing buyer would agree a transaction. On the evidence, the profitability of a given vessel to its owner could and would depend upon extraneous features such as the owner's possession of quota: the owners who were hardest hit by rising fuel prices were those who had restrictive quotas which, on the evidence of Mr Carter, was not a serious constraint for the Claimant. For that reason, and because of the flexibility that was likely to be introduced by the need for "competitive" bidding, it cannot be assumed that the sums which the owners would receive if their bids were successful would be representative of open market value.

28. Mr Reid, the expert valuer for the Claimant, maintained that the cost of repairs was an appropriate measure of the diminution in value despite the prospect that the scheme would be brought in. Mr Medler had valued the Vessel in January 2006 on an open market basis for bank lending purposes in the sum of £1,110,000, assigning a value of £595,000 to the vessel and £515,000 to the

licence. In his report for these proceedings he noted that the decommissioning grant of £1,119,000 was similar to his January 2006 valuation and gave as his opinion that he considered "this to be a good indication of the open market value of the vessel complete with the fishing licence attached applicable in January 2007." Assigning a value of £472,000 to the licence on this occasion, he expressed the view that the maximum residual value of the vessel would be £647,000. The implication of this evidence, and the foundation of the Defendant's argument, was that the payment of the £1,119,000 decommissioning grant was equivalent to the full value of the Vessel in its undamaged state.

29. In his initial report Mr Medler had confirmed that in the 12 months to August 2007 "Beam Trawlers qualifying under the proposed and subsequently confirmed decommissioning scheme were still being sold/purchased on an open market basis." He had valued six vessels during that period, which amounted to 10% of the qualifying fleet. He "was aware of no apparent trend of increase or decrease in normal market activity." In this last observation he contradicted the evidence of Mr Mamza, a witness of fact who said that there had been little if any movement in respect of sales of Beam Trawlers in the South West of England, particularly those trawlers which could potentially meet the criteria for payment of a grant under the scheme. Mr Medler went on to say that "qualifying Beam Trawlers were being offered for sale during the period in question and up to the point that the decommissioning grants were awarded. The asking price for any qualifying vessel complete with fishing licence in the defined period was generally a minimum of £3,500 per gross registered ton. To the best knowledge of [Mr Medler], no sale/purchase

transaction for vessels (with licence attached) was completed during the specified period for a lower price." I have no hesitation in accepting the evidence of Mr Medler, a respected valuer with considerable experience and expertise, rather than that of Mr Mamza.

30. The implications of this evidence were expressly confirmed by Mr Medler in the course of cross-examination. He confirmed that market behaviour did not change on account of the scheme and that £3500 was being used as a benchmark or starting point. He accepted that if he had been asked to value the Vessel in January 2007 he would not have had the outcome of the decommissioning scheme or any source of data coming from the scheme. Although he was unaware that the scheme did not require an applicant to state the market value of their vessel, he had known that various people would be putting bids in and that not all would be successful; so he presumed that the bidding would be some form of competition. Also at that time he had not been aware that only £5 million would be available under the scheme. His lack of detailed knowledge about the scheme reflected his view that it did not affect "too much" any valuations he was doing, although some owners were saying that they could get up to £3,500 per grt under the scheme and that should affect what he (Mr Medler) thought their vessel was worth. In fact, although he described the scheme as a factor to be taken into account, he did not take it into account in his valuation of any of the 10% in the 12 months to August 2007; and it was plain from his answers that he did not adjust his valuation in any case on the basis of that factor, despite these nudges from the owners. What is more, though he listed in his report eight features that would affect the valuation of the Vessel, the scheme was not one of them.

31. The overall effect of Mr Medler's evidence on this point was that neither the prospect nor the existence of the scheme when it had been introduced affected either the volume of market activity or the price of transactions during the 12 months to August 2007. I accept that evidence as being accurate.

32. Three further aspects of Mr Medler's evidence were of prime importance for this issue. First, he confirmed the evidence of Mr Mamza and Mr Carter that no one was buying vessels with a view to putting them into the decommissioning scheme and that he would not expect that to happen. The second point emerged from his written evidence that £3,500 per grt was a benchmark during the 12 months to August 2007 and that he was not aware of any open market transaction taking place during that period at a price reflecting a lower rate than that. If that benchmark rate is applied to the Vessel, it produces a figure of £1,305,500 - £186,500 more than the Claimant's decommissioning grant. The third was that, having agreed that if the damage had occurred in January 2006 after he had given his (undamaged) valuation it would have been appropriate to reduce his valuation by £435,000 to reflect the damage, he expressly agreed that the same approach should be adopted in January 2007, whatever the correct valuation of the (undamaged) Vessel.

33. On this evidence it is impossible to conclude that the prospect of the introduction of the scheme had the effect that the damage to the Vessel caused no diminution in value. Quite apart from the fact that the final terms of the scheme were not yet known and the lack of certainty about whether the Vessel could or would be decommissioned pursuant to the scheme when it was

introduced, the structure and application of the scheme as proposed and as implemented do not justify the conclusion that a damaged vessel would necessarily have the same value to its owner before and after the damage occurred. Specifically, there is no reason to suppose that the Claimant would have been prepared to decommission the (undamaged) Vessel for a grant of £3,000 per grt at a time when, on Mr Medler's evidence, the open market was functioning normally and no transactions were concluded at less than £3,500 per grt; and there is no reason to conclude that a rate of £3,000 per grt represented the open market value of the Vessel when undamaged. Mr Medler accepted in evidence that if £3,500 per grt was adopted as the basis of valuation, the value of the (undamaged) Vessel would have been in the region of £1.3 million which, on the totality of his evidence, would have been a reasonable benchmark valuation despite his lower valuation the previous year. And a valuation of £1.4 million as proposed by the Claimant would only exceed that benchmark figure by about 7.5%, which is well within the margin of difference that is typical between valuers. Therefore, although it is not necessary to my decision to find the exact pre-damage value of the Vessel, I conclude that the weight of the evidence is overwhelmingly in favour of a conclusion that it was in excess of £1,119,000. For the reasons set out above Mr Medler's evidence as a whole, and in particular his express acceptance that, whatever the undamaged value, it was necessary in January 2007 to deduct £435,000 to reach the damaged value, is ultimately fatal to the Defendant's case.

34. Once it is concluded that the Defendant has failed to show that no diminution of value occurred, the prima facie measure of damages is the reasonable cost

of repairs. No alternative figure has been advanced by the Defendant and no reasons based on either fact or principle for adopting a different figure present themselves.

35. For these reasons I conclude that the Claimant suffered a direct loss at the time of the damage, the correct measure for which is the reasonable cost of repairs, namely £435,000.

Issue 2: On the Assumption that the Vessel was Loss-making at the Date of the Engine Damage, is the Claimant as a Matter of Law Entitled to Damages for Loss of Use Based upon the Capital Value of the Vessel?

36. This issue no longer arises.