QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

Apr. 17, 18, 22, 23, 24, 25, 29, 30,
May 1, 2, 7, 8, 9, 13,
14, 15, 16, 20, 21, 22, 23, June 4, 5,
6, 7, 10, 11, 12, 13,
Oct. 2, 3, 1996; Apr. 30, 1997

RED SEA TANKERS LTD. AND OTHERS
v.
PAPACHRISTIDIS AND OTHERS
HENDERSON, BAARMA AND BOUCKLEY
(THIRD PARTIES)

(THE "HELLESPONT ARDENT")

Before Mr. Justice MANCE

Contract — Ship's purchase — Gross negligence — Contributory negligence — Plaintiffs entered into commercial and technical advisory agreements with defendants in relation to acquisition of oil tanker — Whether defendants owed duty of care to plaintiffs — Whether defendants grossly negligent and or guilty of wilful misconduct in recommending tanker for purchase — Whether officers of defendants owed duties personally to plaintiffs — Whether plaintiffs' directors and bankers contributorily negligent.

The first plaintiff (Red Sea) was a fund incorporated in the Cayman Islands on Mar. 10, 1989 for the purpose of investment in oil tankers. The second to fifth plaintiffs were the first plaintiff's wholly owned subsidiaries incorporated to serve as one-ship companies owning the four tankers including *Hellespont Ardent* (*Ardent*) acquired in the summer of 1989.

The second (PL) and the third defendants (PSMSL) were English companies which offered service to persons engaged or interested in engaging in the shipping market. In June, 1989 PL entered a commercial advisory agreement (CAA) and PSMSL entered into a technical advisory agreement (TAA) with Red Sea subject to New York law. PSMSL was a wholly owned subsidiary of PL and PL's entire share capital was beneficially owned by the first defendant Mr. Papachristidis. The fourth defendant (Mr. Anderson) and the fifth defendant (Mr. Dunn) were managing directors and directors of PL and PSMSL respectively.

The fund originated in discussions between the National Commercial Bank of Saudi Arabia (NCB) and the Chase Manhattan Bank of New York (Chase) and the first and second third parties, Mr. Bouckley and Mr. Baarma were officers of NCB who became directors of Red Sea. The third party Mr. Henderson was an independent director of Red Sea.

Red Sea raised for the purchase of second-hand tankers some U.S.$71,588,000. These moneys appeared to have been wholly or largely spent and lost in the repair, upgrading and operation of the four vessels following their eventual sales at dates in the early 1990s when the market stood much lower than in 1989. Red Sea sought to attribute responsibility for its losses to the five defendants.

Red Sea alleged that each of the five defendants were grossly negligent and/or guilty of wilful misconduct in failing to arrange for adequate inspection of *Ardent's* class records and/or adequate survey of her condition, in recommending her for purchase without adequate basis and/or misrepresenting her condition, in giving cost estimates and time scale projections without proper basis, in failing to warn of the risks of acquiring *Ardent* and in negotiating her purchase without any discount properly reflecting her condition.

Red Sea submitted that each of the defendants, Mr. Papachristidis, Mr. Dunn and Mr. Anderson owed a personal duty of care to the plaintiffs in respect of his acts or omissions and that Red Sea relied on the special expertise which they held themselves out as possessing. PL, PSMSL, Mr. Papachristidis, Mr. Dunn and Mr. Anderson denied liability and sought to rely on cll. 2 and 7.9 of the CAA and TAA to negative or exempt them from any tortious liability. Those clauses provided inter alia:

> 2. The Corporation will ... indemnify and hold harmless the Commercial Advisor and its officers, directors ... from any ... claim ... which ... arise out of, relate to or are in connection with the performance of its duties ... except for any Indemnified Damages that are found ... to have resulted from the bad faith, gross negligence or wilful misconduct of ... the person seeking indemnification.
>
> 7.9 Neither the Commercial Advisor nor its officers directors ... shall be liable ... to the Corporation for any losses, claims ... suffered ... by the Corporation ... arising out of, relating to or in connection with any action taken within the scope of duties of the Commercial Advisor under this Agreement or omitted to be taken by the Commercial Advisor ... except ... Damages resulting from acts or omissions of the Commercial Advisor which (a) were the result of gross negligence, (b) constituted wilful misconduct ...

The defendants alleged that the third parties were contributorily negligent.

The issues for decision were: (1) whether any of the first to fifth defendants owed a duty of care to the plaintiffs in contract, tort or otherwise in relation to the acquisition of *Ardent* and if so the nature and scope of such duty or duties; (2) whether the first to fifth defendants acted in breach of duty to the plaintiffs in relation to the acquisition of *Ardent*; (3) whether the first to third parties acted in breach of duty to the plaintiff in relation to the acquisition of *Ardent* and were liable to make contribution pursuant to the Civil Liability (Contribution) Act, 1978.

———*Held*, by Q.B. (Com. Ct.) (MANCE, J.), that (1) on the evidence it did not appear that the thoroughness of any pre-purchase investigation and inspection of vessels was in focus or discussed before the acquisition of *Ardent*; but general representations were made by Mr. Anderson and Mr. Papachristidis about PL's and PSMSL's capabilities as prospective advisers which would necessarily include their capability to identify and recommend the purchase of second-hand vessels;

but it was clear that they were at the relevant time in 1989 unaware of any significant risks that vessels would be acquired on a basis which might involve major uncertainty about their actual condition or might lead to the discovery after their acquisition of a need for major unbudgeted repairs (*see* p. 559, cols. 1 and 2; p. 560, col. 1);

(2) it was for the Papachristidis organization to identify any such risk within their knowledge if it was unavoidable or to avoid it if it was reasonably avoidable, whereas the bankers who dealt with the Papachristidis organization, some of whom became directors of Red Sea, were entitled to believe that there were no such significant risks or none that could not and would not be avoided by proper exercise of their functions by PL and PSMSL (*see* p. 560, col. 1);

(3) the figure of U.S.$2 m. given for repair costs was an overall assessment and was also intended to allow for general overhauling; it was not the result or object of any process of detailed calculation or breakdown (*see* p. 571, cols. 1 and 2);

(4) on the evidence, although the market was hot and still rising the price paid for *Ardent* was in excess of any market price which could be deduced from other sales or objective information, if it was assumed that the vessel would incur repair costs of anything like U.S. $2 m. on top of the price paid (*see* p. 578, col. 1);

(5) the concept of gross negligence appeared to embrace serious negligence amounting to reckless disregard without any necessary implication of consciousness of the high degree of risk or the likely consequences of the conduct on the part of the person acting or omitting to act; the conclusion applied under New York and English law (*see* p. 586, col. 2);

(6) "Gross" negligence was clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence; but as a matter of ordinary language and general impression the concept of gross negligence seemed to be capable of embracing not only conduct undertaken with actual appreciation of the risks involved but also serious disregard of or indifference to an obvious risk; the difference in the way in which the concepts in cll. 7.9 and 7.10 were expressed appeared entirely consistent with the phrase receiving its ordinary meaning and embracing acts or omissions resulting from gross negligence and acts or omissions constituting wilful misconduct (*see* p. 586, col. 2);

(7) in circumstances falling within the scope of cll. 7.9 and 7.10 respectively PL and PSMSL were under no contractual liability in the absence of wilful misconduct or gross negligence; and to the extent that they were under any parallel liability in tort in the same circumstances, it was subject to similar qualification (*see* p. 588, cols. 1 and 2);

(8) it was for PL and PSMSL to identify, investigate, evaluate and make appropriate recommendations to Red Sea in respect of vessels for acquisition by Red Sea; all the criticisms of PL and PSMSL related to the alleged acts or omissions within the scope of the duties with respect to the management or conduct of the affairs of Red Sea and of the business or affairs of PL or PSMSL relating to Red Sea; the last sentences of cll. 7.9 and 7.10 did not suggest any limitation on the scope of the earlier language of the clause; they simply introduced a limited immunity in cases where professional advice was followed, conditional on the exercise of "extreme care" in the choice of professional advisers (*see* p. 588, col. 2);

(9) under the CAA and TAA Red Sea obtained by contract undertakings of PL and PSMSL within their respective spheres; Red Sea never at any time sought express collateral undertakings from the personal defendants in the handling of the matters entrusted to PL and PSMSL; the personal liability sought to be imposed on the individual defendants as officers of PL and/or PSMSL was in respect of matters falling within PL's and PSMSL's responsibility under CAA and/or TAA; and although all three principal officers of PL and PSMSL were criticized as negligent the roles they played did not cover the whole field of PL's and PSMSL's activity; although they had overall responsibility for PL and PSMSL, the actual functions of Mr. Papachristidis, Mr. Anderson and Mr. Dunn could not be regarded together or a fortiori individually as coterminous or co-extensive with those undertaken by PL and PSMSL (*see* p. 591, col. 2; p. 592, col. 1);

(10) each of cll. 7.9 and 7.10 started by identifying the beneficiaries of its protection; it then defined the scope of the losses in respect of which they were to be protected; the language of the clauses contemplated that "Damages" as defined might arise out of actions or omissions within the scope of the advisor's duties; in the exception the phrase "Damages resulting from acts or omissions of the . . . Advisor" simply repeated the same conception, with a slight degree of shorthand; it contained nothing to indicate that officers, and directors were not to be liable or responsible in case of gross negligence; on the contrary they could not claim the clauses' benefit if their gross negligence had led to acts or omissions of the advising company resulting in damages (*see* p. 592, col. 2);

(11) the fact that New York law would not recognize the validity of any exclusion of gross negligence supported that conclusion; and whether or not the exceptions which the clauses contained precisely mirrored the restrictions on the ability to exclude liability under New York law it was improbable that the draftsman meant simply to disregard those restrictions in respect of officers, directors, employees and agents (*see* p. 592, col. 2; p. 593, col. 1);

(12) it would not be appropriate to treat the personal defendants as undertaking any duty of care, even a duty limited to responsibility for gross negligence, wilful misconduct, fraud or bad faith or carrying with it an exception from liability except in such circumstances; this was not an exceptional or special case and Red Sea and its subsidiaries should be held to the contractual framework which was deliberately negotiated; even if the personal defendants were grossly negligent there was no basis for treating them personally as having undertaken responsibility in respect of the substantial commercial risks of a financial nature in the success or failure of the relevant transactions (*see* p. 593, col. 2);

(13) it was no part of Mr. Anderson's role as chairman of Red Sea to undertake any of the functions entrusted to PL and PSMSL or to acquire or communicate knowledge of events leading up to a decision by

PL and/or PSMSL to make an unqualified recommendation to Red Sea; the evaluation of individual vessels was a matter for PL and/or PSMSL and Red Sea relied exclusively on PL and PSMSL for such matters (*see* p. 594, col. 2; p. 596, col. 1);

(14) any relevant knowledge acquired by Mr. Anderson was acquired by him while acting for PL and or PSMSL not for Red Sea or its subsidiary; even if Mr. Anderson was under a duty to communicate to Red Sea directors knowledge of factors relevant to PL's and/or PSMSL's recommendations for *Ardent*, such knowledge was not to be imputed to Red Sea since he did not communicate it and there was no suggestion that Mr. Anderson was the directing mind and will of Red Sea for the purpose of attributing his knowledge on that ground; the directing mind and will was the board as a whole which alone had the responsibility for approving or disproving any recommendation; and even if Mr. Anderson informed other directors of the recommendation, which was not shown in the case of *Ardent*, still his knowledge could be no substitute for communication to the whole board if he did not pass it on (*see* p. 596, col. 2; p. 597, col. 1; p. 98, col. 1);

————*El Ajou v. Dollar Land Holdings plc.*, [1994] 2 All E.R. 685 and *Meridian Global Funds Management Ltd. v. Securities Commission*, [1995] 2 A.C. 500, considered.

(15) Mr. Dunn neither undertook nor instructed any detailed analysis of the nature or cost of overhauls not specified by the surveyor or of steel work; he took U.S.$2 m. on a broad basis as sufficient for PSMSL's and PL's purposes; if he had focused on the likely cost of other overhauls he would have acknowledged that they required a substantial additional provision over and above the specific provisions allowed in the surveyor's report; Mr. Dunn with his experience ought to have recognized the need for an additional provision of this general order; the allowance made by Mr. Dunn did not cater for any uncertainty by taking a sufficiently large figure to cover all eventualities which it could then be expected might foreseeably materialize; and the excess over estimated repair costs could not be explained or excused on the basis that *Ardent* proved to be in a condition which could not reasonably be foreseen in relation to a vessel which had passed special survey some three years and remained in class (*see* p. 608, cols. 1 and 2);

(16) PSMSL and PL would not have pursued an interest in the vessel if they had conceived that so much steelwork would be required; if they had in such circumstances pursued any interest it would have been incumbent to warn the directors of the Red Sea fund expressly of the requirement to replace so much steel in a vessel, to which they were contemplating exposing the fund; they gave no such warning because, although they contemplated serious corrosion in the ballast tanks, they had in mind a lesser order of steel renewal and also allowed a total of U.S.$2 m. which Mr. Dunn thought was generous in relation to such an order of steel renewal; PSMSL's conduct through Mr. Dunn leading up to PL's decision to recommend the acquisition of *Ardent* was negligent (*see* p. 608, col. 2 p. 609, col. 1);

(17) in failing to inspect Lloyd's Register of Shipping class records, PSMSL through Mr. Dunn failed to exercise the care expected of a reasonable adviser in the position of PSMSL in relation to the Red Sea fund; the records could and should have been obtained and there was no reason why they should not have been obtained before the pre-purchase inspection in the case of *Ardent*; the complete omission to obtain them at any time was neither wilful nor in a subjective sense reckless; if Mr. Dunn had seen the full class records they should have demonstrated a need for caution about the vessel's maintenance and allowances for overhauling (*see* p. 609, col. 1; p. 611, cols. 1 and 2; p. 612, col. 2; p. 613, col. 1);

(18) Mr. Dunn failed sufficiently to address the particular problem of corrosion presented by *Ardent* in respect of which additional steps could and should have been taken before she was considered or assessed further as a candidate for the fund (*see* p. 614, col. 2);

(19) although Mr. Dunn believed that an assessment of U.S.$2 m. was sufficient and that he was being generous, there was no reliable basis for that belief; in respect of corrosion and steel renewals Mr. Dunn ought also to have realized that he had insufficient information to justify giving a U.S.$2 m. or indeed any, overall estimate to Mr. Anderson for him to use and rely on in assessing *Ardent* and in deciding whether to recommend her to the Red Sea fund without exposing the fund to inappropriate risk (*see* p. 614, col. 2; p. 615, col. 1);

(20) if fuller visual inspection of the permanent ballast tanks had been allowed, their actual condition would have been sufficiently apparent to make the vessel of no further interest; there was no sufficient reason for not requesting such inspection, and had the standard applicable been the familiar standard of reasonable skill, care and diligence PSMSL would have been held to be in breach, that breach would have led to the recommendation and purchase of *Ardent* and, apart from the breach, she would not have been recommended to or acquired by the Red Sea fund (*see* p. 615, cols. 1 and 2);

(21) the inspection of full class records was an elementary and simple step that any competent adviser fulfilling PSMSL's role ought to have undertaken and PSMSL's failure to inspect them must be regarded as gross negligence (*see* p. 615, col. 2; p. 616, col. 1);

(22) PSMSL's failure to insist on a proper inspection of any permanent ballast tanks in empty condition was a matter going to the core of their particular functions and this failure was underlined by PSMSL's gross negligence in failing to sight full class records; the contents of the full class record must be treated as known to PSMSL when considering whether it was grossly negligent of PSMSL to put forward the figure of U.S.$2 m. to Mr. Anderson; even so what occurred was no more than negligence by PSMSL in the course of inadequate attempts to fulfil its contractual role and the shortcoming in PSMSL's performance of its duties were not so serious that they should be categorized as gross negligence or should deprive PSMSL of the general contractual protection afforded by cl. 7.10; although the present case revealed significant misjudgments and shortcomings in approach and observance of proper standards in relation to *Ardent* it did not involve

negligence of so grave a nature as to fall outside the sphere of immunity (*see* p. 617, col. 2; p. 618, col. 1);

(23) it was Mr. Anderson's duty on behalf of PL to consider the situation and evaluate it in the interests of the fund; he had no sufficient assurance as to the significance which could properly be attached to Mr. Dunn's U.S.$2 m.; and he had reason to doubt whether that figure was reliable and to inquire into its basis; he was quite sufficiently familiar with usual ship purchase procedures and reports and sale contract negotiations for it to be incumbent on him to raise the possibility of insisting on further inspections; PL through Mr. Anderson failed to exercise proper skill and care in the steps which they took to consider and evaluate *Ardent* (*see* p. 621, col. 2; p. 622, col. 1);

(24) as to obtaining full class records this was a matter primarily for PSMSL; and Mr. Anderson or PL were not liable to criticism because full class records were not sighted (*see* p. 622, col. 1);

(25) Mr. Anderson allowed his perfectly proper desire to complete the acquisition of vessels for the fund to overcome normal or proper caution in respect of *Ardent*; and although the failure by Mr. Anderson to pursue with Mr. Dunn the significance of the U.S.$2 m. estimate and the possibility of inspecting at least some of *Ardent's* permanent ballast tanks constituted clear and serious aspects of negligence, it was not gross negligence to justify the conclusion that PL was deprived of its prima facie contractual immunity (*see* p. 622, cols. 1 and 2);

(26) on the assumption that Mr. Papachristidis had knowledge and was involved in the decision-making process his conduct was open to the criticism that he did not suggest or insist on any inspection of permanent ballast tanks in empty condition; but this did not amount to gross negligence; the most that could be said was that he failed to apply his mind sufficiently to this particular vessel and assumed that Mr. Anderson and Mr. Anderson and Mr. Dunn had between them done so; and failure to question the basis of Mr. Anderson's recommendation and Mr. Dunn's estimate did not amount to gross negligence depriving PL of contractual immunity (*see* p. 623, col. 2; p. 624, col. 1);

(27) although there was causatively relevant negligence on the part of PL and PSMSL, it did not amount to gross negligence or forfeit under cll. 7.9 and 7.10 the contractual immunity otherwise available to protect the defendants; and the action failed in relation to the acquisition of *Ardent*; the preliminary issues would be answered accordingly (*see* p. 624, col. 1);

(28) if the issue on contributory negligence had arisen none of the first third parties acted in breach of duty to the first or fifth plaintiff or was liable to make any contribution pursuant to the Civil Liability (Contribution) Act, 1978 (*see* p. 624, col. 2; p. 625, cols. 1 and 2).

The following cases were referred to in the judgment:

City Equitable Fire Insurance Co. Ltd., Re (C.A.) (1924) 19 Ll.L.Rep. 93; [1925] Ch. 407;

Colnaghi U.S.A. Ltd. v. Jewelers Protection Services, 79 N.Y. 2d 1027, 584 N.Y. S. 2d 430 (1992);

Davie v. *The City of Edinburgh*, 1953 S.C. 34;

Dorchester Finance Ltd. v. Stebbing, [1989] B.C.L.C. 498;

Edgworth Construction Ltd. v. N. D. Lea and Associates Ltd., [1993] 3 S.C.R. 206;

El Ajou v. Dollar Land Holdings plc., (C.A.) [1994] 2 All E.R. 685;

Fairline Shipping Corporation v. Adamson, [1975] Q.B. 180;

Federal Insurance Co. v. Honeywell Inc., 641 F. Supp. 1560 (S.D.N.Y. 1986);

Fireman's Fund Insurance Co. v. ADT Systems Inc., 847 F. Supp. 291 (E.D.N.Y. 1994);

Fraser v. Furmin, (C.A.) [1967] 2 Lloyd's Rep. 1;

Gardner v. Owasco River Railway, 142 A.D. 2d 61 534 N.Y.S. 2d 819 (3d Dep't. 1988);

Henderson v. Merrett Syndicates Ltd., (H.L.) [1994] 2 Lloyd's Rep. 468; [1995] 2 A.C. 145;

Henderson v. Merrett Syndicates Ltd., [1997] L.R.L.R. 265;

Hong Kong Export Credit Insurance Corporation v. Dun & Bradstreet, 414 F. Supp. 153 (S.D.N.Y. 1975);

Hooper Associates Ltd. v. AGS Computers Inc., 74 N.Y. 2d 487;

Ivory (Trevor) Ltd. v. Anderson, [1992] N.Z.L.R. 517;

Karp (Matter of) v. Hults, 12 A.D. 2d 718, 209 N.Y.S. 2d 128, affd. 9 N.Y. 2d 857, 316 N.Y.S. 2d 99, 175 N.E. 2d 465;

Kalisch-Jarcho Inc. v. City of New York, 58 N.Y. 2d 377 (1983);

London Drugs Ltd. v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299; 97 D.L.R. (4th) 261;

McCullogh v. Lane Fox & Partners, (C.A.) Dec. 19, 1995, unreported;

McDuffie v. Watkins Glen International Inc., 833 F. Supp. 197 (W.D.N.Y. 1993);

Meridian Global Funds Management Ltd. v. Securities Commission, (H.L.) [1995] 2 A.C. 500;

Metropolitan Life Insurance Co. v. Noble Lowndes International Inc., 84 N.Y. Rep. 2d 430; 643 N.E. 2d 504, 618 N.Y.S. 2d 882 (1994);

Midland Bank Ltd. v. Hett Stubbs and Kent, [1979] 1 Ch. 384;

Punjab National Bank Ltd. v. De Boinville, [1992] 1 Lloyd's Rep. 7;

R. v. Adamoko, (H.L.) [1995] 1 A.C. 171;

R. v. Bonython, [1984] S.A.S.R. 45;

Reed (Albert E.) & Co. Ltd. v. London & Rochester Co. Ltd., [1954] 2 Lloyd's Rep. 463;

Rich (Marc) & Co. A.G. v. Bishop Rock Marine Co. Ltd., (H.L.) [1995] 2 Lloyd's Rep. 299; [1995] 3 W.L.R. 227;

Rudnick (Stuart) Inc. v. Jewelers Protection Services, 194 A.D. 2d 317, 598 N.Y.S. 2d 235 (1st Dep't. 1993);

Sealand of the Pacific v. Robert McHaffie Ltd., [1974] 51 D.L.R. (3d) 702;

Seminara v. Highland Lake Bible Conference Inc., 112 A.D. 2d 630, 492 N.Y.S. 2d 146 (N.Y. App. Div. 1985);

Shawinigan Ltd. v. Vokins & Co. Ltd., [1961] 2 Lloyd's Rep. 153; [1961] 3 All E.R. 396;

Sommer v. Federal Signal Corporation, 79 N.Y. 2d 540, 583 A.D. 2d 317, 589 N.Y.S. 2d 235 (1st Dep't. 1992);

Williams v. Natural Life Health Foods Ltd., Dec. 1, 1995, unreported; (C.A.) Dec. 5, 1996, unreported.

This was an action by the plaintiffs Red Sea Tankers Ltd. and its subsidiaries Charis Shipping Ltd., Brooke Shipping Corporation, Wentworth Shipping Corporation and Tumbridge Shipping Corporation the owners of the vessels *Ellen* (renamed *Hellespont Armour*), *South Angela* (renamed *Hellespont Archer*), *Erato* (renamed *Hellespont Arrow*) and *Ocean Maid* (renamed *Hellespont Ardent*) claiming damages against the defendants Mr. Basil Papachristidis, Papachristidis Ltd. (PL) Papachristidis Ship Management Services Ltd. (PSMSL) Mr. Louis Anderson, Mr. John Dunn and Hellespont Investment Ltd., in respect of losses suffered by the plaintiffs allegedly caused by the defendants' gross negligence or wilful misconduct in failing to arrange for adequate inspection of inter alia *Ardent's* class records and or adequate survey of her condition, in recommending her for purchase without adequate basis and in failing to warn of the risks by acquiring *Ardent*.

Mr. Bernard Eder, Q.C., Mr. Richard Jacobs and Mr. Brian Dye (instructed by Messrs. Allen & Overy) for the plaintiffs and third parties; Mr. Victor Lyon and Mr. Huw Davies (instructed by Messrs. Watson Farley and Williams) for the defendants. The proceedings against Hellespont Investment Ltd. had earlier been stayed.

The further facts are stated in the judgment of Mr. Justice Mance.

Judgment was reserved.

Wednesday Apr. 30, 1997

JUDGMENT

Mr. Justice MANCE

SCHEME

The scheme of this judgment is as follows:

I. INTRODUCTION

I.1 *Outline*

This action results from an ill-fated investment in oil tankers in 1989. The first plaintiff ("Red Sea") is a fund incorporated in the Cayman Islands on Mar. 10, 1989 for the purpose of the investment. The second to fifth plaintiffs are the first plaintiff's wholly owned subsidiaries incorporated to serve as "one-ship companies" owning the four tankers acquired in the summer of 1989. These tankers, in order of purchase, were *Ellen* (renamed *Hellespont Armour*), *South Angela* (renamed *Hellespont Archer*), *Erato* (renamed *Hellespont Arrow*) and *Ocean Maid* (renamed *Hellespont Ardent*). For convenience, I shall usually refer to these vessels as *Armour*, *Archer*, *Arrow* and *Ardent*.

The second and third defendants are English companies which offered services to persons engaging or interested in engaging in the shipping market. They were and are based at Tradewinds House, 190 Vauxhall Bridge Road, London SW1. In June, 1989, PL entered into a "commercial advisory agreement" ("CAA") and PSMSL entered into a "technical advisory agreement" ("TAA"), in each case with Red Sea and subject to New York law. The third defendant ("PSMSL") was a wholly owned subsidiary of the second defendant ("PL"). PL's entire share capital was beneficially owned by the first defendant, Mr. Papachristidis. He was also chairman of both PL and PSMSL and had by 1989 some 24 years' experience in the shipping industry. His interests extended to a group of shipowning and management companies, known as the Hellespont group. The group included Seatramp Tankers Inc., a company providing centralized operating services to companies in the "Seatramp pool", which was in substance a collaborative venture between the Hellespont group and Compagnie Nationale de Navigation ("CNN"), part of another group, the Worms group. It will be convenient at some points to refer loosely to "the Papachristidis organization [or group]", to embrace without distinguishing all or any of these companies in which Mr. Papachristidis was interested. The Papachristidis organization had a reputation as high class ship managers, maintaining high standards. That was a matter of some pride and value to Mr. Papachristidis, and one about which prospective clients would be expected to be aware.

The fourth defendant ("Mr. Anderson") was at the material times managing director of PL and a director of PSMSL, with by 1989 some 19 years' experience in the shipping industry. He became chairman of the board of directors of Red Sea. The fifth defendant ("Mr. Dunn") was at all material times managing director of PSMSL and a director of PL. He qualified as a chartered engineer and was a member of the Institute of Marine Engineers and by 1989 also had many years experience on the technical side of the shipping industry.

The fund originated in discussions between two banks, National Commercial Bank of Saudi Arabia ("NCB") and Chase Manhattan Bank of New York ("Chase"), and Mr. Papachristidis and other officers in the Papachristidis organization. The first and second third parties, Mr. Bouckley and Mr. Baarma, were and are officers of NCB who became directors of Red Sea. The last third party, Mr. Henderson, had extensive shipping (although not tanker) experience and became an independent director of Red Sea

after being approached by Mr. Papachristidis in early March, 1989.

Red Sea raised for the purchase of second-hand tankers some U.S.$71,588,000, or U.S.$68,628,000 after paying the expenses of floatation and of raising preference stock. These moneys appear to have been wholly or largely spent and lost in the repair, upgrading and operation of the four vessels followed by their eventual sales at dates in the early 1990s when the market stood much lower than in 1989. In this action Red Sea seeks to attribute responsibility for its losses to the five defendants. It claims damages against each for breach of contract and/or duty in relation to each of the four vessels acquired. Under preliminary issues ordered by consent, I am at present concerned only with the fourth and last vessel acquired in August/September, 1989, *Ardent*. The five defendants deny liability, but say that, if they are under any liability, the third parties caused or contributed to any loss which the plaintiffs may have sustained. The five plaintiffs and the three third parties have been represented before me by common solicitors and Counsel. I was told that the litigation is being funded by NCB. The five defendants have likewise been represented by common solicitors and Counsel.

The preliminary issues which remain live are as follows:

1. whether any of the first to fifth defendants owed a duty of care to the plaintiffs in contract, tort or otherwise in relation to the acquisition of *Ardent* and, if so, the nature and scope of such duty or duties;

2. whether the first to fifth defendants acted in breach of duty to the plaintiffs in relation to the acquisition of *Ardent*;

3. whether the first to third parties acted in breach of duty to the plaintiffs in relation to the acquisition of *Ardent* and are liable to make contribution pursuant to the Civil Liability (Contribution) Act, 1978.

The plaintiffs' case in outline is that each of the five defendants was grossly negligent and/or guilty of wilful misconduct in failing to arrange for adequate inspection of *Ardent's* class records and/or adequate survey of her condition, in recommending her for purchase without adequate basis and/or misrepresenting her condition, in giving cost estimates and time scale projections without proper basis, in failing to warn of the risks of acquiring *Ardent* and in negotiating her purchase without any discount properly reflecting her condition. Questions arise as to the precise role of each defendant. As to the three individual defendants, there is also an important issue whether or to what extent they, as officers within the Papachristidis group, owed any duties personally to the plaintiffs.

In relation to all the defendants, an important feature of the arrangements consists in clauses in the CAA and (with minor differences) in the TAA, providing for indemnification and limiting liability of the relevant adviser. I set out these clauses in Part IV.1 of this judgment. Their presence explains the assertions in the plaintiffs' pleadings of "gross negligence" on the part of the defendants. Since the CAA and TAA were expressly subject to New York law, experts were called on principles of construction, and on the question whether the phrase "gross negligence" possesses any settled meaning, under New York law.

Behind Red Sea's establishment was confidence in the tanker market which had been rising since the end of 1985 after a long rescession in the late 1970s and early 1980s. A feature of market conditions in 1989 was that older tankers cost less but could earn the same or almost the same rates on the market as newer tankers. This and the prospects of further rises in the market and in hull values led a number of banks and shipowners to view second-hand tankers as attractive investment vehicles, and to set up funds to raise money for that purpose. In 1988 Chase co-operated with the Hellespont group to set up a fund called Hellespont Tankers Ltd. ("HTL"), of which Mr. Papachristidis became chairman. HTL acquired four second-hand medium-sized tankers. One of these was a vessel managed by PSMSL and within the Seatramp pool, so that the Papachristidis organization was familiar with her. A company in the Hellespont group, Hellespont Shipping Corporation ("HSC"), took a 20 per cent. interest in HTL. The Red Sea fund was intended to repeat what was considered the success of the HTL fund. Mr. Anderson became chairman of Red Sea, simply because the Papachristidis organization took the view that Mr. Papachristidis should not be chairman of both HTL and Red Sea. HSC took in respect of Red Sea a 10 per cent. shareholding interest on a subordinated basis, at a cost of U.S.$4.188 m. As its name might suggest, the Red Sea fund was intended to appeal to Middle Eastern investors, although the appeal was not fully realized and many subscribers were found elsewhere.

Particulars of the four acquisitions made by the plaintiffs follow. The first vessel, *Armour*, was acquired under a memorandum of agreement ("MOA") dated May 16, 1989, signed by the second plaintiff on June 2, 1989, on the strength of a deposit lent by HSC, which would have taken over responsibility for the acquisition if the floatation of Red Sea had failed. She was Japanese-built in 1972, and was acquired for U.S.$11.68 m. She was sold on Jan. 8, 1992 for U.S.$7,321,627. *Archer* was 116,783 dwt and Brazilian built. She was completed by 1976, but remained alongside until a purchaser was found in 1978, and she was

classed as 1978-built. She was bought under MOA dated July 26, 1989 at a cost of U.S.$20 m., and delivered on Aug. 29, 1989. She was sold on June 14, 1993 for U.S.$3,835,868. *Arrow* was 87,439 dwt, Japanese-built in 1974. She was bought under MOA dated Aug. 16, 1989 at a cost of U.S.$15.5 m. and delivered on Sept. 8, 1989. She was sold on Feb. 22, 1993 for U.S.$2,228,609. *Ardent* was 96,961 dwt, Spanish-built in 1972, acquired under MOA dated Aug. 30, 1989 at a cost of U.S.$12,018,200 and delivered on Sept. 20, 1989. It is common ground that, before *Ardent* was acquired, Mr. Dunn and Mr. Anderson had in mind and mentioned on one basis or another to Mr. Bouckley a figure of U.S.$2 m. in respect of repairs and upgrading before she could be put into service. In the event, her repairs and overhauling, as completed in late February, 1990, cost some £5,708,000. They included the replacement of some 607 tonnes in her segregated ballast tanks at a cost of U.S.$2,423,229. The vessel was sold on Apr. 22, 1993 for U.S.$2,621,414.

I.2. *Witnesses*

The plaintiffs called as witnesses of fact Mr. Bouckley, Mr. Baarma and Mr. Henderson, followed by Mr. Reddy, an officer at the material times of Chase but working since late 1991 with NCB, and Mr. Thomson of NCB. On the defendants' side, Mr. Papachristidis, Mr. Anderson and Mr. Dunn all gave evidence, as did Miss O'Donnell-Keenan, finance director of PL with responsibility for providing financial advice to the Hellespont group, Mr. Reilly, an independent surveyor engaged to inspect *Ardent* before her acquisition in August, 1989 and Mr. Rayner, the broker with Messrs. Clarksons through whom the negotiations for her acquisition took place. As technical and engineering experts the plaintiffs called Mr. Houghton from Vine Gordon & Co. Ltd. and the defendants Mr. Spence from Brookes Bell & Co. I consider in Part V.1 their precise experience and expertise. The defendants further called as an expert Mr. Marsh, a sale and purchase broker with Braemar Shipbrokers Ltd. On questions of New York law, the plaintiffs called Mr. John J. Kenney of the law firm Simpson, Thacher & Bartlett, a former resident of the Federal Bar Council, and the plaintiffs called Judge Marvin E. Frankel, a retired United States District Judge of the Southern District of New York from 1965 to 1978 and now with the law firm Kramer, Levin, Naftalis, Nessen, Kamin & Frankel.

The main focus of the plaintiffs' factual evidence was on a number of alleged meetings and conversations prior to and after the acquisition of *Ardent*. The defendants' factual evidence focused on the circumstances leading to *Ardent's* acquisition.

There is a marked lack of internal memoranda and written communications on both sides to record or assist/reconstruct the precise course of events leading to setting up of the Red Sea fund and acquisition of the four vessels. In part, on the plaintiffs' side, there appears to have been some loss of files, of which Mr. Bouckley in particular spoke. In large measure, on both sides, it appears that such memoranda and communications never existed. The oral evidence has thus assumed an importance which in other circumstances it might not have had. The lapse of time and the pressures of this litigation have affected evidence given on both sides. A good deal of the factual evidence given by the plaintiffs' witnesses about events leading to the setting up of the Red Sea fund and the purchase of individual vessels was inaccurate and unconvincing, not in my view as a result of any process of deliberate distortion or misrepresentation, but because of perils and pressures associated with attempts to reconstruct events about which no detailed record exists in the context of problems which after the event may seem only too obvious. Likewise, on the defendants' side, factual evidence was given which in my view suffered from similar defects, without any deliberate attempt to mislead. This applied to all the defendants' principal witnesses, Mr. Papachristidis, Mr. Anderson, Mr. Dunn and Mr. Reilly, although Mr. Papachristidis' evidence, in particular, was characterized by readiness to acknowledge that he had no actual recall of many of the meetings or conversations scrutinized before me.

II. HISTORY

The considerable evidence adduced, particularly by the plaintiffs, about meetings leading to the setting up of the HTL and Red Sea funds had some potential relevance to their case against the defendants of gross negligence in respect of pre-purchase inspection of *Ardent* as well as in relation to the defendants' claim against Messrs. Bouckley, Baarma and Henderson as third parties. In the event it proved to add up to relatively little. But it will take some time to review in this part of the judgment.

II.1 *Representations relating to the HTL fund*

By a supplementary statement served at a late stage, the plaintiffs introduced evidence from Mr. Reddy as to representations, said to have been made in the context of the HTL fund by Mr. Anderson and Mr. Papachristidis, about the nature and thoroughness of the steps which would be taken by PL and/or PSMSL before acquiring vessels. Mr. Reddy said that thorough physical inspection was understood to be "fundamental to the rationale behind the HTL fund and, later, the Red Sea fund". In relation

to the HTL fund, this evidence was contradicted by Mr. Anderson and Mr. Papachristidis and did not appear to match even the relevant documentation to which they were able to refer at so late a stage. I found it unimpressive and unconvincing. I do not accept that there were, in the context of the HTL fund, representations focusing directly on the nature or type of pre-purchase inspections.

II.2 *The setting up of the Red Sea fund*

The first approach appears to have been by Chase to NCB in late January, 1989, with a view to NCB raising investment support in the Middle East for a new shipping fund. Chase introduced NCB to PL. On Feb. 6/7, 1989 Mr. Bouckley met and formed a favourable opinion of Mr. Papachristidis, Mr. Anderson and Miss O'Donnell-Keenan at a meeting in London also attended by Mr. Baarma, Mr. Thomson and Mr. Reddy. Litigation is in progress by Red Sea against Chase in New York relating to the setting up and failure of the fund, and it is unnecessary to go into the relations or roles of Chase and NCB at this early stage. The favourable impression and good reputation of the Papachristidis group and personnel were confirmed by subsequent enquiries in the course of NCB's exercise in "due diligence" in relation to the proposed transaction. The general purpose of the meeting was to discuss the tanker market outlet, the age, size, number and likely cost of vessels which might be purchased by a new fund, the ability of PL and PSMSL to undertake the same advisory roles as in relation to the HTL fund and the questions of financing and equity. But there was no specific discussion of pre-purchase inspections or procedures.

Following the meeting, Miss O'Donnell-Keenan produced financial scenarios and cash flow projections based on different assumptions, including assumptions that tankers built in 1972 and 1975 would be bought, that each would have —

> ... an initial dry-dock cost of approximately $500,000 to ensure that it is of a similar standard to other vessels managed by [PSMSL] ...

that an annual drydocking reserve of U.S.$280,000 per annum would thereafter be accumulated and that the working life of the tankers purchased could be prolonged to 27 years; assumptions were made about future time charter rates and future residual hull values. These documents were seen and reviewed by Mr. Bouckley, Mr. Baarma and Mr. Thomson. Mr. Bouckley sought and received further "disaster" scenarios based on more pessimistic assumptions about rates and residual values. The main risks in the transaction, as he perceived it, were related to any decline in these, but Mr. Papachristidis and Mr. Anderson expressed confidence about the future in both areas. I note that the "disaster" case scenario regarding residual values assumed sale after $5\frac{1}{2}$ years, for U.S.$10 m. per vessel, of vessels purchased at U.S.$13 m. a vessel, but envisaged that, even if each vessel only realized U.S.$8 m., the ordinary preferred shareholders would still be repaid in full. By Feb. 16, 1989 a draft brochure was under preparation, and Mr. Bouckley had discussed with Mr. Anderson the size and type of tanker to be bought. It was initially thought that the size of vessels might have to be confined, to avoid a conflict of interest with the Papachristidis organization's involvement in HTL. But the size was in the event simply stated as between 80,000 and 150,000 dwt. The type of vessel to be bought was envisaged as whatever could be purchased most advantageously when the time came. In late February, 1989 Mr. Bouckley reflected the cash flow forecasts in summaries. The notes stated inter alia:

> Papachristidis is hopeful that it can purchase tankers of a suitable age and conditions that cost less than $13 million. As charter rates are *not* affected by the age of the vessel, then it follows that the cheaper the price paid, the greater the overall profits will be.
>
> For example, Papachristidis were offered a 17 year old 118,000 ton tanker 2 weeks ago for $11.5MM. Plus the vessel was already in Dry Dock which would have saved us another $0.5MM in start up costs.

The last sentence of this note identifies a point which each of Mr. Bouckley, Mr. Baarma and Mr. Reddy said that Mr. Anderson made to them at some stage. Mr. Anderson said that he would not have made it in these terms, but that his listener "could infer that". Mr. Anderson insisted that, in so far as he did make any such statement, it was "in relation to the PPM" and to its assumptions and bases. In the "real world" he said any saving in drydock costs would "presumably" be reflected in the price paid for the vessel. In fact, it is, I think, likely that Mr. Anderson emphasized the "saving" of the budgeted U.S.$0.5 m. drydocking costs, without making sufficiently clear its probably illusory nature in the context of the overall financial picture.

The plaintiffs pleaded for the first time in their points of reply in October, 1995, and Mr. Bouckley gave evidence, that at another meeting with Mr. Papachristidis "probably" in February or March, 1989 "the need for full survey reports" was discussed in general but not technical terms with Mr. Papachristidis, and that Mr. Papachristidis said that the Papachristidis organization had "the proven ability to go out and find suitable tankers to be purchased, get vessels surveyed and then manage

them". According to Mr. Bouckley, Mr. Papachristidis went on that surveys would be done by their own suitably qualified staff or outside surveyors, and took Mr. Bouckley into a separate room to show him some survey reports. Mr. Bouckley's evidence was that he emphasized the even higher level of due diligence required on this transaction, involving as it did third party money, and that Mr. Papachristidis agreed, adding "We have never bought a bad ship". Mr. Papachristidis had no recollection of any such meeting or statements. The last phrase Mr. Thomson recalled in his witness statement as having been made at a later meeting dated May 24 (to which I come below, but at which Mr. Papachristidis was not in fact present); orally, he suggested that it may have been made at the earlier meeting of Feb. 6, 1989.

Mr. Baarma said that, prior to the meeting of Feb. 6, 1989, he had been told by an American naval architect friend, Mr. J. Cuneo, who runs his own shipping business, of the importance of buying good, sound vessels and making a thorough pre-purchase survey for that purpose. He said that he did not mention this at the Feb. 6 meeting, and only mentioned it to Mr. Bouckley by telephone in March or April, 1989. Mr. Bouckley's witness statement made no mention of any such conversation. In evidence, Mr. Bouckley indicated that prior to reading Mr. Baarma's witness statement he had had only a vague recollection of the conversation, about which Mr. Baarma's statement reminded him. He then said that he now remembered being called at least twice into Mr. Baarma's office in New York to meet Mr. Cuneo, and being advised to go back to Mr. Papachristidis on the subject of pre-purchase surveys. He said that he might have gone back to Mr. Papachristidis in this connection, but could not now recall.

The evidence about events leading to the suggested discussion about the need for full or thorough pre-purchase surveys or reports thus lacked coherence and consistency. As matters emerged in cross-examination, the emphasis during any discussion between Mr. Baarma and Mr. Cuneo was on the need for *independent* surveys of vessels before acquisition. If and when Mr. Bouckley raised the point with Mr. Papachristidis at all, I do not think that the focus would have been on the "fullness" of pre-purchase surveys. If any survey reports were shown at all at this early stage, which is far from clear, they would have been periodic survey reports in respect of vessels already under PSMSL management, rather than pre-purchase inspection survey reports.

Towards the end of March, 1989 Miss O'Donnell-Keenan prepared "disaster case" scenarios for Mr. Bouckley, comparing the cash flow as per brochure with a situation (regarded, according to the notes, by "Papachristidis" as "unrealistic") in which each vessel would spend an average of 30 days each year off hire.

On May 24, 1989 there was a further meeting involving officers of the banks, including Mr. Bouckley, at PL's offices. The plaintiffs' pleadings assert that it was attended by Mr. Papachristidis, Mr. Anderson and Mr. Dunn, each of whom made representations —

> ... that they and PL and PSMSL exercised a high degree of care and thoroughness in investigating and surveying vessels prior to purchase and produced samples of survey reports to demonstrate these assertions.

In fact Mr. Papachristidis was travelling on business in the Far East at the time. Mr. Dunn was also not present. The meeting started in the morning and after lunch participants were offered a tour of the offices, to see inter alia the operations centre of the Seatramp pool and with the general aim, no doubt, of enhancing the participants' favourable view of the Papachristidis organization. Again, if survey reports were shown, as they may well have been on this occasion, they are likely to have been periodic condition reports prepared by PSMSL in respect of ships under its technical management, rather than pre-purchase inspection reports.

Mr. Anderson said that he had no recollection of any discussions in the first half of 1989 focusing specifically on the process of acquisition of vessels to be acquired or their condition or the surveys contemplated. I am satisfied in fact that he had only limited recollection of any meetings and conversations in the first half of 1989. He accepted under cross-examination the likelihood that some statements were made, particularly in the very early stages, about the "proven ability" of the Papachristidis organization to identify and acquire vessels and to render advisory services in that respect. The phrase comes from the outline for a "road-show" in respect of the HTL fund, in which both he and Mr. Papachristidis had been involved. Although he could not specifically recall, he thought that at the meeting of May 24, 1989 he probably explained in the context of the Red Sea fund the ability of Mr. Papachristidis and the Papachristidis organization to identify and acquire ships, in similar fashion to the way in which it had been explained at the road show in the context of the HTL fund. Mr. Papachristidis reconstruction of the course of discussions was to similar effect.

The first board meeting of the directors of Red Sea fund took place on June 15, 1989. The minutes were pre-prepared by lawyers, but amended by Miss O'Donnell-Keenan as appropriate during or after the meeting. They record that Mr. Anderson was appointed and acted as chairman. Also present

were Mr. Vouzounerakis (of HSC) who was appointed managing director and secretary, Mr. Bouckley, Mr. Baarma, Mr. Henderson and Mr. van Brummen. The purchase of *Armour* was ratified, and arrangements for her financing and management and her budget were approved. The CAA with PL and the TAA with PSMSL were approved for execution, with other agreements. Each director approved the contents of the private placement memorandum ("PPM"), and the arrangements were agreed for the proposed placing of shares. Paragraphs 29 and 30 of the minutes noted:

> *Vessel Acquisition Plan*
>
> 29. Mr. Anderson informed the Board of the vessels currently being inspected. The Board resolved that the Technical Advisor should be requested to arrange for the purchase of ships as quickly as possible. Mr. Vouzounerakis was given authority to enter into memoranda of agreement which would subsequently be ratified by the Board.
>
> *Other Business*
>
> 30. (i) It was agreed that a complete list of names, addresses and phone numbers of the Directors would be circulated with the Minutes of this meeting.
>
> (ii) The next meeting was scheduled for Friday, 22 September in Greece.

Miss O'Donnell-Keenan said that it would have been more correct to refer in par. 29 to "the Commercial Advisor with the assistance of the Technical Advisor". A list was circulated in accordance with par. 30. Mr. Anderson said that its purpose was to enable informal contact with and approval by Red Sea directors before any purchase was negotiated. He accepted that in practice he probably would not have spoken to all the directors. In particular, he would not have spoken to Mr. Baarma, who was difficult to contact in Saudi Arabia, but would have left Mr. Bouckley to do that. Mr. Bouckley suggested that his approval was in fact only sought once a price had been agreed. It would not be safe to infer from any agreement reached on June 15 that the agreed procedure was necessarily followed in practice. I am however satisfied that Mr. Bouckley himself was generally aware of negotiations before a price was agreed and that there was no understanding that any agreement made with a seller would be subject formally to some further procedure involving approval by the Red Sea board. In particular, I am satisfied in relation to *Archer* that Mr. Bouckley was aware of the negotiations to buy at U.S.$20 m., which led to agreement on July 26, 1989. He was at the same time (but not as a pre-condition to the conclusion of the negotiations) requesting information about the financial implications of the acquisition. The information arrived after agreement on purchase had been reached and led Mr. Baarma to protest about the dilution of the fund's hoped for profitability. This in turn played a part in the decision to recommend and go for the (older and cheaper) *Ardent* in August.

In their witness statements Mr. Bouckley and Mr. Reddy gave evidence that, at a financing meeting with Mr. Papachristidis on July 11, 1989, Mr. Papachristidis mentioned looking at vessels which included a storage vessel. Mr. Reddy could remember no more. Mr. Bouckley said that there followed —

> ... a short discussion about whether we should even be considering a vessel which had been used for storage for the Fund and his response was "yes", as long as it was in good condition and did not require large sums spent on it in order to correct any faults brought about by non-use.

He also said that in the same meeting Mr. Papachristidis mentioned a shortage of vessels on the market and referred to a letter from Mr. Yoran Kinsberg of Chase dated July 6, 1989 (saying that it was "quite essential to identify one or more ships soon to maintain marketing momentum"), to which his response was to tell Mr. Papachristidis that he was under no pressure to buy a vessel. Mr. Papachristidis had no relevant recall of the meeting. As to the suggested discussion about "good condition", the plaintiffs' pleadings relate this to a meeting in August, 1989, suggesting (implausibly) that Mr. Papachristidis had said that the Papachristidis organization was going to re-look at *Ardent*. A storage vessel may have been mentioned, but it may as well have been *Vestelegia* as *Ardent*. There may well have been reference to the relatively low number of vessels on the market and to Mr. Kinsberg's letter of Aug. 6, 1989. I also accept that Mr. Bouckley did not himself specifically endorse or go as far as Mr. Kinsberg's remark, although he was no doubt interested in seeing the fund progress. Mr. Bouckley's evidence failed however to persuade me that there was any relevant discussion about the condition of any storage vessel on Aug. 11, 1989. I do not believe that this was at the time perceived as a problem calling for any such discussion.

The plaintiffs' banking witness gave evidence of various discussions, with Mr. Anderson in particular, in relation to the acquisition of *Archer* (bought on July 26, 1989) and *Arrow* (bought Aug. 16, 1989). Its general effect was that Mr. Anderson told them that, because these vessels did not require drydocking, there would once again be a "saving" of U.S.$0.5 m. They also said that they were told that the vessels were in "good" or "first class" or "perfect" condition and required "no repairs". In

respect of *Archer*, Mr. Bouckley said that he was told this by telephone on July 25, 1989; Mr. Baarma referred in his witness statement to a meeting on Aug. 3, 1989 with Miss O'Donnell-Keenan, Mr. Priest and Mr. Anderson, where the conversation focused on Mr. Baarma's undoubted concern about the U.S.$20 m. purchase price of *Archer* and led to a decision to look for an older and cheaper vessel. Mr. Reddy referred to a follow up meeting which, if it took place at all, can only have been on or after Aug. 9, 1989. As to *Arrow*, Mr. Bouckley said that he was told this by telephone when on holiday in New Jersey; Mr. Baarma also said that he was told by telephone and Mr. Reddy suggested that he was told at a meeting in August, 1989.

Under cross-examination, Mr. Baarma's and Mr. Reddy's evidence proved as problematic in these as in other areas. Mr. Baarma had essentially no relevant recollection of any discussions regarding repairs, and was suffering badly from influenza at the Aug. 3, 1989 meeting. Mr. Reddy now sought to put the conversation with Mr. Anderson in respect of *Arrow* as occurring long after the event in September, 1989. The reality is that any significant conversation on such matters is likely to have been with Mr. Bouckley. Neither Mr. Bouckley nor Mr. Papachristidis could positively recall any. Once again however I think it likely that Mr. Anderson did emphasize the "saving" of U.S.$0.5 m. resulting from the fact that no drydocking would be required, and that Mr. Bouckley did not appreciate that the fact that the vessels had been drydocked would probably have influenced the price paid. Mr. Anderson may well also have made some general comment to Mr. Bouckley in the same context about the vessels being "in good condition".

Mr. Baarma's evidence was that he first heard of *Ardent* from Mr. Anderson around the same time, possibly during the Aug. 3, 1989 meeting, that Mr. Anderson said that corrosion was often a concern with storage vessels and, in a later conversation, that the owners were resisting inspection, but, in response to concern expressed by Mr. Baarma, that he would "make sure that she was properly inspected"; that in a yet further conversation he learned from Mr. Anderson either directly or (as he said orally) through Mr. Bouckley that the purchase of *Ardent* was being recommended subject to a satisfactory divers' report, to which he agreed; and that still later he heard that a satisfactory divers' report had been obtained. He described his recollection on these points as vivid, although, when his defence in the third party proceedings was prepared in October, 1994, it ascribed the exchanges about corrosion in storage vessels and "proper" inspection to a single telephone conversation with Mr. Anderson "on a date which Mr. Baarma cannot recall". Mr. Anderson acknowledged that there was conversation on Aug. 3 about the purchase of an older vessel, and that the possibility of acquiring a storage vessel may have been mentioned. He did not think that the topic of corrosion would have arisen or that there would have been discussion about the nature of any inspection. The course of events described by Mr. Baarma regarding a diver's report does not fit with the actual history of *Ardent's* purchase.

On Aug. 16, 1989 Mr. Anderson appears to have had lunch with Mr. Thomson at NCB's offices, and probably made a passing reference to the fact that the Papachristidis organization was looking at a possible fourth vessel.

On Aug. 23, 1989 a meeting was set up to decide whether the fund should acquire a total of four or five vessels. Present were Mr. Papachristidis, Mr. Bouckley, Mr. Thomson and Mr. Reddy. Mr. Anderson was by now on holiday. The decision was to limit the total to four. Mr. Papachristidis had again no real recollection of the meeting, but thought that *Ardent* would have been discussed and that authorization would have been given to purchase her. He also thought that it was "inconceivable" that the pre-purchase inspection reports for her and the other vessels would not have been available at the meeting. Mr. Bouckley and Mr. Reddy, but not Mr. Thomson, recalled reference to a storage vessel as a possible fourth vessel. I find that the purchase of a storage vessel as the fourth vessel was raised. I am not satisfied that Mr. Papachristidis actually said anything to lead to a conclusion that his knowledge of this possible fourth vessel was unusually "perfunctory". Mr. Reddy's evidence proved once again unreliable as to the course of any discussion. Mr. Bouckley said that he recalled reference to the storage vessel being in "good condition" and to the possibility of a sufficient "discount" being obtained. Since Mr. Papachristidis knew that *Ardent* could require U.S.$2 m. of repairs and overhauling, it seems unlikely that he could or would have made any unqualified comment about her being in "good condition". He may well however have referred to a "discount" to cover repairs and overhauls. As will appear, Mr. Papachristidis is, in my view, likely to be right in saying that the discussion led to the Papachristidis organization being authorized to pursue *Ardent*.

Mr. Bouckley and Mr. Reddy gave evidence that Mr. Reddy learnt for the first time during this meeting from a pre-purchase inspection report in respect of *Arrow*, which they found on the table, that her upgrading would involve costs of U.S.$150,000. However, they failed to raise this during the meeting and the only pre-purchase report identified shows costs of U.S.$0.5 m. Since *Arrow* is the subject of issues not now directly before me

and it is unnecessary to say more, I shall not do so. Mr. Papachristidis also suggested that it was inconceivable that the pre-purchase inspection report in respect of *Ardent* was not before the meeting on Aug. 23, 1989. Mr. Buckley was confident that it was not. Even if it was available, Mr. Bouckley and the other bankers present would not have had either the time or the knowledge and skill to understand and digest it. In the circumstances it does not matter whether it was available. It has not been established one way or the other whether it was.

Mr. Reddy suggested that he received a telephone call late in August, 1989 from Mr. Anderson regarding the condition of the fourth vessel, stating that the Papachristidis organization would be evaluating it thoroughly before any purchase. I do not accept that there was any such discussion. Mr. Anderson did probably ring Mr. Reddy on Aug. 29, 1989, but simply to tell him that *Ardent* had been acquired.

What is the upshot of this and other evidence regarding specific assurances and representations said to have been made on behalf of PL and/or PSMSL about the thoroughness of the process of vessels before acquisition? The evidence given by Mr. Bouckley, Mr. Baarma and (to the limited extent to which he was involved) Mr. Reddy fails to persuade me that the thoroughness of any pre-purchase investigation and inspection of vessels was in focus or discussed, before the acquisition of *Ardent*. Mr. Anderson is likely to have made general comments to Mr. Bouckley about a "saving" of drydocking costs on the first three vessels and their "good condition". But I do not accept that this was linked or led to any particular discussion about pre-purchase inspection procedures. The contrary evidence of Mr. Bouckley and Mr. Baarma, in particular, was in my view neither convincingly given nor sustained and was in many respects inherently improbable. Mr. Bouckley, Mr. Baarma and Mr. Reddy were bankers without any understanding of ship purchase procedures, the technical aspects of ship purchase or management matters or the meaning of a "thorough" or "proper" survey. Consistently with this, when, in December, 1989, Mr. Bouckley was told by Mr. Anderson that *Ardent* was costing considerably more than had been estimated because a "full survey" had not been done, he did not refer back to any prior assurance that such a survey would be done; he simply asked Mr. Baarma "did you know that a full survey had not been done?" and mentioned his concern about *Ardent's* condition in October, 1989.

I accept, on the other hand, that general representations were made by Mr. Anderson and Mr. Papachristidis about PL's and PSMSL's capabilities as prospective advisers, which would necessarily include their capability to identify and recommend the purchase of second-hand vessels. By implication, this would mean suitable second-hand vessels. The notes to the cash flow projections prepared in February, 1989 illustrate a general understanding that the vessels would be in appropriate condition. The references in such notes to Papachristidis vessels averaging only five days off-hire per annum over the last four years and to a "worst case" scenario of 30 days off-hire being "unrealistic" show that the assumed reliability of vessels to be acquired on PL's advice was perceived as a matter of importance. These notes were however directed primarily to the Papachristidis organization's ability to manage vessels once acquired, rather than to their initial acquisition. None of the parties concerned appears to have regarded acquisition of suitable vessels as involving any significant problem or risk. For this reason the PPM did not identify any such problem.

Mr. Anderson is on record as suggesting in April, 1992 that:

> 2. The directors [of Red Sea] were well aware that in the prevailing market decisions on whether to purchase would have to be made without benefit of a thorough inspection of all vessels. This commercial reality, coupled with the ages of the vessels, meant not only that repair costs would have to be incurred but that there was the risk that certain conditions necessitating repairs might not be discovered until after purchase.
>
> . . .
>
> 4. The advisors always held all documents and information concerning the vessels available to the Directors. Individual Directors, cognizant of the market reality requiring less than thorough inspections and prompt decisions and creating the accompanying risk of additional unidentified repairs being required, may have chosen not to avail themselves of this data.

A similar suggestion featured in all the defendants' points of defence and third party points of claim. These asserted knowledge by Red Sea through each of its directors that all forecast projections and established reserves may all prove "wholly inaccurate".

Mr. Anderson's memorandum and these allegations by the defendants were in my view a forensic exercise. I also reject Mr. Anderson's suggestion in cross-examination that he believed that the other directors of Red Sea knew that the type of pre-purchase inspections carried out would involve risks such as those identified in his memorandum. Mr. Bouckley, Mr. Baarma and Mr. Reddy all admitted that they knew that there was no *assurance* that the budgets for repairs would be sufficient to cover actual costs. But it is clear that they were

at the relevant time in 1989 unaware of any significant risks that vessels would be acquired on a basis which might involve major uncertainty about their actual condition or might lead to the discovery after their acquisition of a need for major unbudgeted repairs.

The difference between the parties lies in the fact that it was for the Papachristidis organization to identify any such risk within their knowledge if it was unavoidable or to avoid it if it was reasonably avoidable, whereas the bankers who dealt with the Papachristidis organization, some of whom also became directors of Red Sea, were entitled to believe that there were no such significant risks or none that could not and would not be avoided by proper exercise of their functions by PL and PSMSL.

III. THE ACQUISITION OF THE ARDENT

III.1 *Roles of the three main Papachristidis officers*

The defendants analysed the respective roles of Mr. Anderson, Mr. Papachristidis and Mr. Dunn as follows. Mr. Anderson's involvement was essentially commercial. He handled the commerical aspects of any sales and purchases, as well as the financing and chartering, of vessels. He was responsible for identifying vessels falling within the parameters which were of interest to the Red Sea fund. He would then discuss those vessels informally with Mr. Papachristidis and Mr. Dunn, and, if a vessel looked of interest, would ask the brokers for permission to inspect the vessel's records. But he had, it was said, no technical experience or expertise. If permission was received, any subsequent inspections of the records and of the vessel herself were matters for Mr. Dunn and PSMSL's staff. Mr. Anderson although a director of PSMSL played no day to day role in PSMSL's affairs. Mr. Dunn was responsible for all inferences and conclusions to be drawn from any inspections made. However, his role in turn was confined to technical aspects. He would report to Mr. Anderson. Mr. Anderson would then appraise the position commercially, and, subject to discussion with Mr. Papachristidis and Mr. Papachristidis' overriding decision, Mr. Anderson would on this basis be responsible as a director of PL for any recommendation to purchase any particular vessel.

In day to day reality, I do not accept that there was necessarily so clear-cut a formalization and differentiation of roles. Mr. Anderson, Mr. Dunn and, when he was there, Mr. Papachristidis collaborated closely. To some extent they kept Miss O'Donnell-Keenan also informed, but I do not consider that she interested herself greatly in aspects not directly financial in nature. Mr. Anderson and indeed Mr. Papachristidis, although neither has a technical qualification, have both had long involvement in the shipping industry. Their evidence tended in my view to downplay the extent of their general understanding of technical problems and risks which may affect the operation of tankers. Likewise, Mr. Dunn was well aware that vessels in relation to which inspections were arranged were candidates for purchase by the Red Sea fund, and that his assessment of repair, overhauling or upgrading costs would be central to any decision to purchase. The extent to which he arranged inspection of a particular vessel must have involved some assessment of her potential interest to the fund. I find it difficult to believe that Mr. Dunn always focused exclusively on a vessel's technical condition and that he would never become involved in any general consideration or discussion whether a particular vessel was a suitable or worthwhile purchase. It is also clear that, at the time of negotiations to acquire *Ardent*, when Mr. Anderson was on holiday in the United States, Mr. Dunn became the channel of communications and instructions between the Papachristidis organization and Clarksons. Of more importance than the precise distinctions in role which the defendants sought to suggest were probably the status and character within the Papachristidis organization of each of the main three personalities. Mr. Anderson was a powerful, energetic and decisive character, Mr. Dunn, by comparison, less so in my judgment, despite his undoubted competence and experience on technical matters. Mr. Papachristidis was and is an obviously intelligent, acute and capable businessman. He was however to a considerable extent detached from day to day activities involving the implementation of the fund. There appears to be force in the plaintiffs' submission that his mind at this stage was also focusing on the inception of another strategic move involving his group, an acquisition of tankers under what was called and became the Tisch deal. For these reasons, rather than because of the precise delineation of roles which the defendants urged, I believe that Mr. Anderson is likely at the time to have been the dominant influence in any decision to purchase a vessel such as *Ardent*.

III.2 *Identification of Ardent*

Ardent was on the market for a substantial period in 1989. In or about early March, 1989, Mr. Anderson asked brokers for information about possible candidate vessels for purchase by the fund. Various brokers brought *Ardent*, among other vessels, to Mr. Anderson's notice between early March and the end of May, 1989, with price ideas increasing over this period from U.S.$9 m. to U.S.$10.5 m. She was said to be expected to finish her present

storage contract in May and her owners were said to be looking "very seriously at sales interest". Mr. Anderson also received a statement by the vessel's classification society (Germanischer Lloyd — "GL") of her survey position dating from July, 1988. Some notes written by him appear on this and some other of the documents received from brokers. Mr. Holding of PSMSL reviewed the position on May 31, 1989 for Mr. Anderson as follows:

> The vessel is Spanish built which means that scantlings are small and spare parts for any Spanish made equipment or machinery will be hard to come by as most of the manufacturers have ceased trading.
>
> The vessel is 17 years old which apart from any other consideration makes the previous paragraph even more significant.
>
> The survey is almost a year old and apart from the vessel's particulars there is not much else to go on. Suggest we have the records inspected.

The "total disagreement" which Mr. Papachristidis expressed in evidence in relation to Mr. Holding's views was no doubt directed to the first two paragraphs.

The last paragraph was followed up by Mr. Anderson asking Clarksons to arrange inspection of the records. Mr. Dunn was taking a brief holiday at the time. Clarksons on June 1, 1989 informed Mr. Anderson that owners had authorized GL to release records to Abstech. Mr. Holding asked Abstech to instruct their Hamburg office to undertake the inspection. Mr. Anderson noted on Clarksons' fax that the owners were "Marontree Shipping, Lebanese based in Greece".

III.3 *The Abstech report*

On June 8, 1989 Abstech sent to PSMSL an eight-page report on the vessel's class records held by GL. It disclosed that the vessel had had four previous names (prior to her current name of *Ocean Maid*), that she had been reclassed with GL pursuant to application dated July 2, 1987, that her last drydocking had been in August, 1986 when she had passed her third special survey under Lloyd's Register classification and that the only information found "available during the short classification period with GL" consisted of reports on her admission to class and annual class survey at Aqaba in July, 1987, on machinery damage and repairs in Piraeus in December, 1987 and on a further annual class survey in December, 1988.

The Abstech report is unmarked. Its limitations were obvious on even a cursory reading, but no steps were taken to inspect the records held by Lloyd's Register for the vessel's previous life. Mr. Dunn could not recall whether he reviewed the Abstech report when it was received, or, as he put it in his original witness statement, "why we were unable to inspect the earlier class records". He believed, however, that he would have reviewed the report —

> . . . at or shortly after the time when Jim McIndo [of PSMSL] began to arrange a physical inspection of the vessel, which it would appear he began to do the following week.

This is a reference to communications between Mr. McIndo and Clarksons about the possibility of inspecting *Ardent*, commencing on about June 14, 1989. The same communications show a misapprehension within PSMSL's offices as to whether any report had been received from Abstech at all and general confusion arising from a multiplicity of possible purchases being conducted by different staff members without common files. On June 22, 1989 Captain Powell of PSMSL wrote a memorandum to Mr. Dunn pointing out that a report had already been received from Abstech and "had now been found on Jim McIndo's file". Up to that date, therefore, it may well be that Mr. Dunn was not even aware of the receipt of the report.

Mr. Dunn's apparent suggestion of some reason for being unable to conduct a full records inspection lacks foundation. No such reason at all has been shown or suggested. No attempt was made to inspect the earlier Lloyd's Register records at any stage. Mr. Dunn was unable to explain why not. In his statement he said that he would "normally insist" on inspection of the records for a vessel's full life. In evidence he demurred at the suggestion that this was very important or essential, and would acknowledge it only as "preferable". He also sought to excuse PSMSL on the basis that what mattered most was the current survey position and the last two to three years. The GL records in respect of *Ardent* covered just under two years, excluding the last special survey when the hull should have been looked at closely. Mr. Dunn also said that, when it later came to physical inspection of the vessel by Mr. Reilly, he (Mr. Dunn) took the view that he had sufficient information to enable Mr. Reilly to look at the vessel. This comment was, I think, no more than ex post facto reconstruction. I am not satisfied that Mr. Dunn did in August, 1989 focus on the fact that only very limited records had been seen. If (as he should have done) he did read the Abstech report again either on Aug. 11, 1989 when he instructed Mr. Reilly (to whom he believed it was then given) or on Aug. 16, 1989 before or when meeting Mr. Reilly, he must have been prepared to allow the absence of a full records report to pass. Whatever the circumstances in which it came about that full records were never sighted, there was no valid excuse.

So far as Mr. Reilly is concerned, while he was given the Abstech report to read, his statement says:

> ... I cannot now recall whether I asked to see these records, or whether I drew the obvious conclusion that for one reason or another they were not available.

In his oral evidence, Mr. Reilly indicated that it would have been "nice" to have them, if they had been available, but they were not critical to the work he had to do. Nothing in the evidence or impression given to me by Mr. Reilly makes it likely that Mr. Reilly took any initiative in relation to their absence by raising it with Mr. Dunn, or that he gave any real thought to the question whether it would be desirable for PSMSL to see them. He simply undertook a physical inspection as instructed by Mr. Dunn. The incompleteness of the records inspection thus passed without comment or action by Mr. Dunn and Mr. Reilly.

III.4 *Inspection of Ardent*

On June 29, 1989 (the day before taking another short holiday) Mr. Dunn asked Mr. Karoussos, a surveyor with HSC, to liaise with Mr. McIndo with a view to inspecting *Ardent* and *Arrow* in either order as suited his work schedule. In reply to enquiries, *Ardent's* owners indicated on June 30 that the vessel was fully loaded, that she might discharge part of her cargo in Aqaba and have some empty tanks around July 15/20, and that owners were only prepared to clean one cargo tank; on July 4 that cargo tank Nos. 5 port and starboard were empty and gas free; on July 11 that the vessel was now scheduled to sail on July 14 with a part cargo for the Mediterranean; and on July 19 that, after discharging and four to five days washing and gas freeing of tanks, she would be inspectable in drydock at Piraeus around July 27/28. Owners' brokers followed this up on July 24 by asking Clarksons "if/when yr buyers intend to carry out inspection of above vessel in Piraeus", and on July 26 by informing Clarksons that the vessel was now expected to arrive gas free at Piraeus around Aug. 2/3 when Mr. Karoussos was "welcomed to inspect". The arrival was still further delayed until Aug. 12, when Mr. Karoussos was not available. In the meantime, owners' brokers on Aug. 9 indicated to Clarksons that owners' price ideas had increased to U.S.$12 m., adding —

> ... however as brokers would suggest yr buyers to inspect and make outright offer after inspection when believe owners will become more reasonable.

Since Mr. Karoussos was not available, Mr. Dunn obtained Mr. Papachristidis' agreement to engaging an outside surveyor, and chose Mr. Reilly. Mr. Reilly was an experienced engineer, known to Mr. Dunn from his previous employment as a superintendent with a company called Maritime Overseas. Mr. Dunn had offered him a full-time post with PSMSL, but he had set up business on his own. He had just undertaken the pre-purchase survey of *Arrow* and the supervision of repairs to a Hellespont vessel. He was thus in PSMSL's offices on Aug. 10 and met with Mr. Dunn on Friday Aug. 11 to discuss undertaking the pre-purchase inspection of *Ardent*. He was shown the Abstech report. He also made contact with a Captain Kazazis of Hellespont Shipping Corporation who was to accompany him on board. Captain Kazazis was not an engineer, but he was an experienced seaman well qualified to look at the vessel's on-deck condition, particularly with respect to her loading and discharging equipment, whose views on other aspects of a vessel's structures and condition could be expected to be of value. Captain Kazazis ascertained from owners that their superintendent would be available on the next Monday and Wednesday, but not Tuesday because it was a holiday.

Mr. Reilly and Captain Kazazis attended the vessel at anchorage from 09 00 to 15 00 or 15 20 hours on Monday Aug. 14. A pre-purchase inspection of this nature is usually superficial in nature. Even so, in the context of a vessel of this nature and size, the time occupied in this particular inspection was short. Before boarding Mr. Reilly and Captain Kazazis circled the vessel by launch. After boarding and meeting the deck officer and master, they changed and returned to the master's cabin to inspect the papers on board and to discuss the vessel generally. This seems to have occupied the first one and three quarters of an hour or so of the visit. At some point, Mr. Reilly thought near the outset of this meeting, they asked to see as many cargo and ballast tanks as possible, and were told that the permanent ballast tanks were full. The vessel has on each side seven tanks and a bunker tank and in the centre four larger cargo tanks. She also had a forepeak and afterpeak. Nos. 3 and 7 tanks on each side and the forepeak and afterpeak tanks were all permanent (that is dedicated or segregated) ballast tanks. Nos. 2 and 5 were clean ballast tanks, that is cargo tanks capable of use as ballast tanks. Nos. 6 were slop tanks. Mr. Reilly and Captain Kazazis were shown No. 2 port and No. 5 starboard clean ballast tanks and No. 2 centre cargo tank. This appears to have taken a further one and a half hours or so. After looking at some deck machinery, Mr. Reilly left Captain Kazazis with the master and went aft to look at the engineroom. En route he took advantage of open hatches to permanent ballast tanks Nos. 3 port and 7 port and starboard to look briefly into those spaces, which were in fact almost but not completely full. Mr. Reilly's estimate was that about three quarters of an hour was spent on

deck, presumably including these brief inspections. Another one and a half hours was spent by him in inspecting machinery and half an hour in the accommodation area, particularly the galley, bridge and radio room. At about 15 00 hours the master told Mr. Reilly and Captain Kazazis that he had ordered the launch and, when they asked, that they would not be able to return next day.

In his witness statement Mr. Reilly suggested that No. 3 port permanent ballast tank was one of the tanks sighted during the initial inspection under the aegis of the master. In his oral evidence he made it clear that this was not so. It was, like Nos. 7 port and starboard, a tank into which he was able to "sneak" a view. At one point during his oral evidence, he suggested that he had sneaked an even briefer view into No. 3 starboard tank, but had almost immediately to withdraw the suggestion of any such recollection.

In his statement, Mr. Reilly suggested that on his inspection he found the accommodation "in very poor state, particularly the crew cabins and wash room". That was indeed the case, but it was a matter which on his inspection he actually failed to identify. His comments in his written report were that the alleyways, public rooms and accommodation were "dirty and dark by design. Originally a high standard Western style" and that the galley and pantries were "satisfactory". In oral evidence he agreed that the accommodation, which he himself revisited some four or five weeks later, was in appalling condition, such as he had never seen "in the history of being at sea", and explained that accommodation would not have featured high in priority during his inspection. Having also acknowledged at this point that he had nevertheless formed a "favourable" view of the accommodation on Aug. 14, he appeared at a later point in his oral evidence to suggest that Captain Kazazis and he had in fact identified the accommodation as being in dirty "and poor" condition. The reality appears to be that, despite what the report might suggest, there can have been no real inspection of most if not all of the accommodation.

While I do not doubt Mr. Reilly's honesty as a witness or general competence as a surveyor, the matters which I have mentioned are examples of aspects of his evidence which lead me to consider that it would be unsafe to place much reliance on his evidence in respects not supported by contemporaneous documentation. Although not the object of any claim, some of the issues in this action may make Mr. Reilly's position one of potential embarrassment. I formed the view that his appreciation of the issues in this action had some undue influence on the formulation of his statement and on evidence which he gave in the witness box.

III.5 *The surveyor's telephone conversation with Mr. Dunn on Aug. 15, 1989*

After leaving the vessel, Mr. Reilly and Captain Kazazis returned to HSC's offices in Piraeus. They telephoned Mr. Dunn, taking turns to speak. The conversation lasted some 10–15 minutes. Mr. Dunn's very brief notes made during it read as follows:

Ocean Maid

O. K. pipeline
Main Deck
Sep. Ball. tank fitted
but top part very corroded
CBT tank—in mode lots fuel oil in this tank
Inert Gas Sy[stem]. Not used 2 yrs solid —
Engine vast No people No UMS min 2 bodies —
Bridge control
Looks nice but all superficial
No work for two years . . . .

Under that Mr. Dunn wrote "Put in Sale File". Mr. Reilly said in evidence that, although he had no specific recollection of what was said or of any disagreement with Captain Kazazis, he could not agree with some statements in this note, particularly the words "but all superficial" and "no work for two years". He thought they must have been said by Captain Kazazis. This may be so, but I think it unlikely that there was any actual difference between Mr. Reilly and Captain Kazazis. Mr. Dunn said that he could recall the general course of the conversation. His statement commented on individual points contained in his note, and recalled also that Mr. Reilly had mentioned that the engineroom would need a lot of work. It did not comment on the penultimate line of his note, but in evidence Mr. Dunn suggested that it was linked to the superficial nature of the inspection. I doubt whether that can have been so. It was it seems probable a general caveat. However, Mr. Dunn is correct in saying that it is dangerous to try to derive too much from his very brief notes. Further, Mr. Reilly is right to point out that the last sentence cannot be taken absolutely literally, since *some* work had been done on the vessel during the last two years, as he observed and photographed during his visit.

Mr. Dunn also added the general recollection that the "overall impression" given by the inspectors was favourable. This does not appear to me to fit easily with the general impression given by the notes which Mr. Dunn made, even though they were highlighting relevant points for future attention, or with Mr. Reilly's remark about the extensive work needed in the engineroom. Further, it was common ground between Mr. Dunn and Mr. Reilly that Mr. Dunn was told in the conversation that the

inspectors would have liked to continue their inspection. The inspectors had identified potentially significant problems regarding the condition of the ballast tanks, the condition of certain machinery and the extent to which there had been proper maintenance. Mr. Dunn did not ask for and Mr. Reilly would not have been in a position to give at that stage any estimate as to costs which these matters might involve. Mr. Dunn did not however take any steps to enable the inspectors to carry out any further inspection. Mr. Dunn said that, if the inspectors had told him that they needed to go back on board, then of course he would have requested this, but that he thought that they had seen sufficient and believed that they told him that. In the light of the problems which the inspectors had identified, and the uncertainty of their extent, his thinking is not easy to follow. Mr. Dunn also said that he did not believe that he gave the uncertainty regarding steelwork much thought at that particular time.

The plaintiffs invited me to conclude that Mr. Dunn's inaction and disinterest in these respects were because he concluded, at that point, that the vessel was not a serious candidate. They also referred to a conversation or conversations which Mr. Henderson said that he had had with Captain Kazazis either later in 1989 or early in 1990, in which, according to Mr. Henderson, Captain Kazazis told him that both he and, at some point, Mr. Reilly had cautioned against acquisition of *Ardent* without further investigation. Captain Kazazis may well have said words along these lines to Mr. Henderson in early 1990, and may well have been referring to the telephone conversation of Aug. 14 and/or Captain Kazazis' own later telex of Aug. 16, 1989. But caution is necessary in relation to an account given by Captain Kazazis in early 1990, after problems had materialized. Mr. Henderson's first note of any such account dated Mar. 21, 1990 is wrong in another respect (in suggesting that Mr. Reilly only spent two hours inspecting the vessel). Captain Kazazis' own telex (set out below) is a better guide as to the way in which the matter was put orally by the inspectors on Aug. 14.

Mr. Dunn's failure to react or to seek any further inspection is, nevertheless, puzzling. The conclusion I reach is not that Mr. Dunn positively rejected the vessel as a serious candidate at that stage, as the plaintiffs suggested, but that he probably did not apply his mind to any great extent on Aug. 14, 1989 to the implications of what he was told on the telephone. At the time, PSMSL was under considerable pressure, particularly in the area of maintenance work. There had been some pressure, from Chase, to find vessels for the Red Sea fund before the end of July. The number of candidate vessels on the market was limited, although *Ardent* was not the only one, and the market was still rising. Whether for these or for whatever reasons, Mr. Dunn did not take any step at this stage towards further inspection. He simply awaited Mr. Reilly's attendance at PSMSL's offices and written report.

III.6 *Mr. Reilly's visit to PSMSL's offices on Aug. 16, 1989 and report*

Mr. Reilly flew to London alone on Aug. 15. He apparently took with him some notes which Captain Kazazis had made. He had on his personal computer PSMSL's standard format of report, and he started work on the airplane. He came into PSMSL's offices at 9 00 a.m. on Aug. 16, 1989 and stayed all day, completing and discussing his report. The "Surveyor's Summary" at the outset of the final report read as follows:

> Segregated ballast tanks, No 7 port and starboard wings upper parts, severe corrosion to deck beams, brackets, bulkhead stiffeners and ladders suspect remaining parts of tank to be in similar condition. Bulkhead stiffeners wasted away by 75%. CBT 2 Port found in unclean condition in certain bottom areas due no bottom gunclean machines, suspect fuel oil cargo contamination; will require hand cleaning. Note 5 port CBT is equipped with bottom gunclean machines.
>
> ...
>
> IG system to completely test and overhaul including deck seal.
>
> Bridge control in poor and unknown condition.
>
> Boiler automation will require complete overhaul.
>
> Ballast tank anodes completely wasted.
>
> Deck piping in good order.
>
> Wast[e] heat boiler unable to sustain turbo generator full load.

Cost to upgrade to Hellespont Standard

— Tail shaft survey	$ 40,000
— Renew all ballast tank anodes	$ 120,000
— Possible steelwork in segregated ballast tanks	?
— Muck out clean ballast tanks	$ 50,000
— All gauging and automation equipment in both deck and engine room to test and overhaul	$ 150,000
— Heating coils in all cargo tanks to test and repair	$ 90,000
— Pump room deck plating and under supports to replace	$ 15,000
— Marisat to install	$ 40,000
— Full grit blast underwater parts and coat	$ 500,000
Total (not inclusive of ballast tanks and dry dock charges)	$1,005,000

CONCLUSION

General appearance on deck very attractive, clean, tidy and well painted. Hull sides good. Present crew/management have provided a minimum of attention to the upkeep for the vessel, there is an obvious disinterest in ancillary equipment as a result of the vessel being a storage tanker. Apart from the very suspect condition of the segregated ballast tanks the hull and main deck including fittings are good.

The "Cost to upgrade to Hellespont Standard" was arrived at and included in the report by Mr. Reilly at Mr. Dunn's request after an initial discussion of the draft report between Mr. Dunn, Mr. Reilly and Captain Powell. Mr. Reilly's evidence was that it was not his brief to cover contingencies or unexpected problems, and he also omitted any items that would be done by the crew. He believed that Mr. Dunn or one of his colleagues asked him not to include any such allowance.

Under the detailed "condition report" incorporated in the report, Mr. Reilly included the following:

Forecastle, Main and Poop Decks

Good all round, Suspect all decks blasted and coated two years ago, but no maintenance since then.

...

Cargo Tanks

2 Centre inspected. No coatings or anodes ... All pipelines, valves, fittings and dresser couplings in very good condition. Tank surfaces very clean. Negligible sediment or scale, only light even corrosion.... Ladders very good, possibly renewed.

...

Cargo Heating Coils

Tanks inspected. Coils seen intact....

Deck stands in satisfactory condition. Coils have not been used for 2 years.

Ballast Tanks

5 Starboard CBT:

No coatings. Fixed anodes 100% wasted. Tank clean, showing small amounts of scale and sediment at bottom. Pitting confined to horizontal frames and brackets to a maximum of 4mm. Overall condition of tank very good showing minimum wastage, sharp edges in as new condition. Consistent pattern of mild corrosion everywhere. Tank clean machines in good order. Ladders in as new condition. A 200mm crack found along end of weld of 2nd stringer connection to aft bulkhead, crack not into bulkhead. Deck head and beams good. Heating coils intact but aft part of tank seen with a number of coils buckled.

2 Port CBT:

Similar condition to 5 port but found many areas with fuel oil sediments due no bottom tank clean machines. One valve operated by reach rod found valve wheel with broken spoke, iwo yoke.

3 Port SBT:

Tank full but seen handrails and brackets badly wasted. Suspect remaining part of tank to be in similar condition.

7 Port and starboard SBT:

Tanks full but top 3 metres sighted from ladders. Found extensive wastage, delamination of all beams and stiffeners, ladders also badly wasted.

In particularizing the six permanent ballast tanks, Mr. Reilly noted that they were not coated and that they had been fitted with anodes, which were 100 per cent. wasted. He explained in evidence that the basis for this was his observation that there were anodes in No. 5 clean ballast tank which were completely wasted. He had assumed that the permanent ballast tanks had also contained anodes but suspected that any such anodes would also have been completely wasted.

In relation to machinery, Mr. Reilly's report commented that the bridge control was out of use and the automation in generally suspect condition, that the oil fired boilers had to be manned at all times during firing, that the exhaust gas boiler could not sustain a full load on the turbo-alternator, that the inert gas system had not been used for two years and that the general condition of the engineroom auxiliary equipment was good but that its planned maintenance was suspect.

During the course of the day, photographs taken by Mr. Reilly on his inspection (appended to the report in its final form) became available. At 12 39 a.m. on Aug. 16, Captain Kazazis sent to PSMSL for Mr. Dunn's attention a fax giving his views on the vessel. According to Mr. Reilly, there had been some discussion about its contents between the two of them in Greece before Mr. Reilly left for London.

Re m.t.Ocean maid

Vsl inspected on 14/8/89 from 0900 to 1500 hrs

We wewre (sic) not permitted to stay more.

We expressed to owners rep. our intention to inspect as many tanks as possible but they did not permit us on our request to visit vsl. on 15th or 16th, they said no because owners rep. Mr Rodas would be busy.

The vsl was bought from Tsakos co.2,5 Years ago and timechartered by iraqis and stayed in Aqara alongside for two years.

The crew was mixed Greeks-Arabs-Spanish-Filipinos.

Master-cheng-2nd eng. Greeks they seemed not very knowledgeable and I doubt if they have maintained the vsl well.

General condition very good, hull strb side in very good condition. Port side with some rusty spots mainly from fenders. Main deck had been sandblasted two years ago but since then no paint had been applied. Main deck requires immediate attendance.

Machinery on deck look good. Almost all pipes on deck such as cargo-cow-steam lines etc have been renewed

Cargo tanks inspected 2p-2c-5s all in very good condition. Pittings 3mm max 5mm. Anodes completely gone. Permanent ballast tanks f/p 3w–7w were full of ballast and a very superficial inspection took place.3W and 7w condition of under deck and ladders very bad. Stringer almost 60??? Wasted. I believe that steal(sic) work should take place there.

P/room reasonable. Requires cleaning-painting. Decks of p/room in very bad condition-dangerous I would call it. Bilges with water and ballast pump leaking from mechanical seal.

IGS. They never used IGS for more than two years. It is doubtful if it works ok. Port Blower ceased. A thorough overhauling and possible change of some parts should be taken into consideration. Deck seal "dry type".

COW machines type Misuzo their condition unknown. However cargo tanks were clean except 2P which in some place was oily. An overhaul of the machines should be taken into consideration

Engine room looked ok. Vsl has two big boilers and they used 3 firemen on watch because automation out of order.

Two d/g, one turbine. One d/g out of order and on voyage from Aqaba to Piraeus they used turbogen and boiler instead of gas boiler.

Consumption of one boiler for t/g and fuel heating about 15–17 tons daily as per cheng.

Vsl was alongside for two years and I am not sure if cheng was doing the normal maintenance of engine room.

I believe a lot of money should be spent in engine room especially for boilers. As vsl was not trading normally and once it seemed to me that vsl was not maintained properly, we may face unexpected problems. Master-cheng seem to ignore few basic things on vsl's operation which betraying indifference. For example cheng had to look on vsl's particulars to find out the type of water generator. Captain did not know which tanks were CBT. Vsl was built on 1972 and it was in good condition for fer (sic) age. We could find more if we had more time for inspection.

III.7 *The discussions on Aug. 16 with Mr. Dunn and Captain Powell*

Mr. Reilly's report was discussed at some length with Captain Powell, who had some 40 years' technical and financial experience in the shipping industry including 23 years at sea, as well as with Mr. Dunn. According to Mr. Reilly's statement, the discussion embraced the steelwork. Although Mr. Reilly said when giving evidence that he could not recollect this, it seems probable in the light of the steelwork's importance. The question mark which Mr. Reilly had put against the cost of steel repairs remained unchanged after these discussions. Mr. Reilly explained, and Mr. Dunn confirmed in evidence, that Mr. Reilly felt unable to give a figure for the steelwork because he had not been able to gain access to the permanent ballast tanks. Mr. Reilly suspected, as his report indicated, that the remainder of the permanent ballast tanks would be in similar condition to the very limited parts under the deck-head which he had observed. To this he made the qualification in evidence that it was normal to find such tanks in worse condition at the top and to find "as you progress to the bottom, things remarkably improve", a proposition which cannot be accepted unequivocally and which I consider further in Part V.2 below.

Mr. Reilly described Mr. Dunn as "very keen" to put a price on the steelwork but Mr. Reilly told him it was impossible. Mr. Reilly at one point suggested that, in those circumstances, it was for Mr. Dunn, with all his experience and knowledge, to make the decision for him. In reality however there was no way in which either Mr. Reilly or Mr. Dunn could assess the order of costs which would actually be involved in steel repairs. Any attempt at an actual figure might prove too high or too low.

III.8 *Mr. Anderson joins the meeting*

According to Mr. Reilly, his role came to an end after he had made clear his inability to price the cost of steelwork. At some point, probably in mid-afternoon, Mr. Anderson joined the meeting, and Mr. Reilly was present as a spectator while Mr. Anderson pressed Mr. Dunn on more than one occasion to give, as Mr. Reilly put it at one point, "a bottom figure for all the repairs". That Mr. Anderson did press Mr. Dunn for some figure was common ground between Mr. Reilly, Mr. Anderson and Mr. Dunn. Mr. Reilly's phrase would fit with Mr. Anderson's insistence being directed not so

much to the steelwork alone, as to the whole of whatever refurbishment costs would be required. Other evidence made this contentious. The defendants' case is that the bottom line figure sought related to steelwork only, and that a figure of U.S.$1 m. was given, for steelwork alone, which when added to Mr. Reilly's specific items led to a round figure total of U.S.$2 m. for repairs.

Mr. Dunn's original statement described what happened as follows:

> Mr. Anderson explained that in order to consider whether this vessel may be suitable for Red Sea, he had to have some idea of the cost of the steelwork, and I recollect him asking whether the work could be done for US$500,000 or US$1 million. I explained that since we had not gained access to the tanks, it was impossible to assess how much steelwork would be required, but suggested that he allow $1 million as a guide, which based on my past experience, I believed would comfortably cover the work to be done.

Mr. Dunn's supplementary statement dated Apr. 17, 1996 and evidence in chief on May 22, 1996 added to this account, after the phrase "impossible to assess", the word "precisely". His oral evidence was that, despite the lack of access and inspection, a judgment could be made based on a number of factors, including his experience and what had been seen elsewhere on the vessel, although the judgment would remain imprecise unless and until the tanks were emptied and were the subject of ultrasonic testing. While emphasizing the difficulties of visual inspection using a flashlight, he accepted on the first day of his cross-examination that it would have been preferable to see the inside of the permanent ballast tanks empty, and that this would "tell you more" and given an immediate impression as to how serious the corrosion was. On the second day of cross-examination he again described Mr. Anderson's insistence on a figure, this time as follows:

> He said that he needed a figure. I said, "We cannot give you it, unless we have ultrasonics, to be able to assess precisely what the cost would be for steel renewal". We needed to know the amount to be replaced, and it was difficult, without having ultrasonics, for us to come up with precise figures.

The account of the conversation with Mr. Anderson given on the second day of Mr. Dunn's evidence differs from that set out in his original statement and in suggesting for the first time that ultrasonics were actually mentioned. Mr. Lyon submits that the plaintiffs are bound by this answer, having failed to challenge it directly. In my judgment the whole question of Mr. Dunn's thought processes was sufficiently put in issue throughout his cross-examination. No unfairness can in my view have arisen to him or to other defendants from the failure to challenge this particular account of the conversation with Mr. Anderson directly. I had ample opportunity of seeing and forming a view on the general reliability of Mr. Dunn's evidence. Whether an inability to undertake ultrasonics, which are not normally taken or available on a pre-purchase inspection, or to obtain *precise* figures for steel renewal was the real concern at the time was clearly in issue during Mr. Dunn's evidence.

Mr. Reilly in a supplementary statement dated May 9, 1996 introduced into his evidence a similar theme regarding the difficulty of coming up with a precise figure without ultrasonics. He suggested that the only way of compensating for the uncertainty would have been to put in a figure that was almost certainly too high, and that, if he had been forced to give a figure for the steel at the time, he would have allowed a total of 80 tonnes, so that he had thought Mr. Dunn's U.S.$1 m. "a very generous allowance indeed". Mr. Reilly proved unable to sustain this evidence satisfactorily under cross-examination, accepting that the reason for his question mark was that he could not come up with even an approximate figure, and that any figure might have been too high or too low.

I find that Mr. Reilly's and Mr. Dunn's real concern at the time was not with the precision of any figure which might be produced or with the absence of ultrasonics, but with the impossibility of making even an approximate assessment without having had access to the permanent ballast tanks in an empty state for the purpose of a visual assessment. I find also that this was the concern which they communicated to Mr. Anderson. This leaves for consideration whether an "allowance" could be or was nevertheless made for the resultant uncertainty, large enough to cover all eventualities, as Mr. Anderson and Mr. Dunn suggested in their evidence. I return to that in Part III.10 below.

III.9 *Mr. Dunn's explanation of the figure given for repair costs*

In his statement Mr. Dunn said:

> The allowance of US$1 million for steelwork would have allowed for approximately 300 tonnes of steel at the then current prices, and was in my view a generous allowance for steelwork for a vessel in class of this age and size.

He said orally that this was not justification with hindsight; he had actually had a figure of 300 tonnes of steelwork in mind on Aug. 16, 1989, and had used a price of U.S.$3/3.5 per kilo of steel renewed prevailing at that time for work in Perama mentioned to him not long previously by Mr. Papachristidis. Mr. Dunn after some fluctuating evidence did not suggest that he had mentioned this

to Mr. Anderson as the basis of any figure given. Mr. Reilly on the other hand did at one stage suggest that Mr. Dunn had reached a figure of U.S.$1 m. after expressly mentioning to Mr. Anderson in his hearing a steelwork price of U.S.$3 a kilo prevailing at Perama. Mr. Reilly first called this the place "where the work would be done" later correcting it to a place "in the neighbourhood". Mr. Anderson recalled no reference to 300 tonnes of steel. Mr. Papachristidis suggested that 300 tonnes "rang a bell" but could not in the end tell the basis of the ultimate figure of U.S.$2 m. of which he was later told by Mr. Anderson and/or Mr. Dunn; he said only that it was "very conservative" and there was "no risk of exceeding it". Mr. Anderson and Mr. Reilly both supported Mr. Dunn's evidence that he gave a general figure of U.S.$1 m. for steelwork. The defendants submit that I should accept Mr. Dunn's evidence and that any other conclusion would be tantamount to saying that he and other witnesses were lying.

It is appropriate to examine some of the factors which were prayed in aid to explain the figure of U.S.$1 m. Taking first the suggestion that it was based on an estimate or assumption of 300 tonnes of steelwork, there is no suggestion that there was anything like a calculation where or how such a quantity of steel might be required in the permanent ballast tanks. Nothing in the experience of Mr. Dunn or anyone in the Papachristidis organization had extended to steelwork renewals of anything like 300 tonnes. Mr. Dunn's personal experience was limited to steel renewals of a maximum of 50 or 60 tonnes. Mr. Papachristidis said "we were totally taken aback" when another vessel (*Hellespont Spirit*) was not long afterwards found to require 100 tonnes. It was, Mr. Papachristidis said, a "huge" shock to learn of the need for work on that scale on *Hellespont Spirit*. The Papachristidis organization had only the most limited experiences of any tanker approaching *Ardent* in age and size. It had no truly comparable experience of tankers of *Ardent's* size and age at all. *Hellenic Faith*, of 1968 build, had been acquired by the Papachristidis organization when only four years old, and had been extensively altered in 1981. *Armour* built 1972 and acquired in June, 1989 had been seen in drydock. Despite the criticisms of her pre-purchase inspection in these proceedings, it noted extensive works being done in the permanent ballast tanks, and that the upper levels of the forepeak were in an acceptable condition, while expressing the reservation (mentioned in Part III.7 above) that the lower levels of the forepeak which were submerged on the inspection could give cause for concern.

In seeking to explain what in his past experience enabled him to fix on the figure of 300 tonnes, Mr. Dunn said this:

> Based on the experience we have had with similar size Aframax tankers and the fact that we have a low steel renewal and that the vessel itself looked in reasonable shape, the general knowledge of the industry as a whole, 80 to 100 tons seems to be what the average people would be putting in at, say, around third special survey [i.e. in or about a vessel's fifteenth year]. As far as I am concerned, I felt that I was able to make that judgment.

In his supplementary statement Mr. Dunn added that he believed that, for vessels of *Ardent's* size and type, steel replacements of 80–100 tonnes would have been carried out by yards with reasonable frequency. He also emphasized in evidence the comfort to be had from knowing that the vessel was in class and had passed her third special survey in 1986, and from the condition of other cargo tanks seen by Mr. Reilly. None of these matters appears to constitute a basis for arriving at any figure for steelwork, let alone an estimate or allowance of 300 tonnes. A need for steelwork of 300 tonnes or costing U.S.$1 m. must have thrown major doubt over the vessel's classification, despite Mr. Dunn's denial in evidence.

Any suggestion that a vessel requiring this sort of steelwork should be acquired for the Red Sea fund, would, as Mr. Papachristidis acknowledged, have been "very dramatic". Mr. Papachristidis said at one point that "I do not think that we were actually thinking at the time that the vessel would require as much as 300 tonnes of steel to be repaired . . . " and at another that —

> . . . I would have taken our lack of experience with such enormous steel repairs as reinforcing our confidence that this vessel could not possibly have had this much steel to renew.

I believe this to be correct, not just in the sense that they were hoping that the steel required would be less than 300 tonnes, but also in the sense, contrary certainly to Mr. Dunn's and in places perhaps also to Mr. Papachristidis' evidence, that they did not conceive that it could require so much steel. Had they envisaged that it could, I do not believe that they would have pursued any further interest in the vessel.

In his oral evidence, Mr. Dunn eventually accepted that, upon even a brief visual inspection of the vessel's permanent ballast tanks, it would have been obvious that there was "very severe" corrosion in them. He went on in that context to deny that he was told as much specifically by Mr. Reilly on Aug. 16. It is not easy to reconcile Mr. Dunn's suggestion that Mr. Reilly did not tell him of "severe" corrosion on Aug. 16, 1989 with his evidence the he had in mind the possibility of steel

renewals in the permanent ballast tanks extending perhaps to as much as 300 tonnes.

As to the suggested prices, Perama is about three miles from Piraeus and is a well-known area where vessels can undertake repairs, outside any yard, using local contractors and crew. But Mr. Dunn and PSMSL had never used Perama, although HSC apparently had. The prices which Mr. Dunn took derived, he said, from a conversation in July or August, 1989 during which Mr. Papachristidis mentioned that he had heard from friends in the shipping industry that good and cheap repairs could be carried out in Perama at rates between U.S.$3 and U.S.$3.5 per kilo, compared with prices of over U.S.$5 per kilo in local shipyards. Mr. Papachristidis was unable to confirm this conversation. No decision to use Perama for repairs on *Ardent* was taken until after her acquisition, probably until October, 1989. The conversation recounted by Mr. Dunn, assuming that he has correctly recalled its content and date, could not have constituted a firm basis for any assumption that any steelwork necessary on *Ardent* could be undertaken at the prices mentioned, or indeed at Perama at all. I accept that Mr. Dunn was aware that there was some prospect of using cheaper repair facilities such as those available at Perama, but I do not think that, in August, 1989, he was in a position to base — or would have based — any assessment of steel repair costs on any putative Perama figure of which he had by then heard but had no direct experience or knowledge. He would have been speculating if he had done so.

On Mr. Dunn's account, the figure of U.S.$1 m. was taken as the price of steelwork the subject of Mr. Reilly's question mark. The other items priced by Mr. Reilly totalled U.S.$1,005,000. The combined total in round figures was U.S.$2 m. On this basis, on the face of it, Mr. Dunn was not allowing any sum for any overhauling other than in respect of the specific matters identified and costed by Mr. Reilly.

In his statement in chief, Mr. Dunn made several references to comments by the inspectors suggesting that work would be necessary upgrading the vessel to Hellespont standards. For example, in the telephone conversation he recalled them reporting that no work had been done on the vessel for two years, and Mr. Reilly as mentioning that "the engine room needed a lot of work". He said also that he suspected from Captain Kazazis' telex that —

> ... little maintenance had been carried out on deck whilst she was on storage duty, because the port authorities would not have allowed it when cargo was on board.

He referred to the vessel "obviously suffering from a lack of maintenance". In cross-examination, when being asked why he had not attempted any form of calculation of the cost of other overhauls, he suggested not only that he would not have known what it would be, but also that Mr. Reilly had told him on Aug. 16 that "everything looked okay in the engine room" and given him "the impression that it was fine".

Reminded of his statement about what Mr. Reilly had said on Aug. 14, he then suggested that his view had been that —

> ... the lot of work that was needed would be covered within the engine room was covered within [Mr Reilly's] $1,005,000.

A little later he amplified his response that there was slack in Mr. Reilly's figures by making particular reference to the figure of U.S.$500,000 for "full grit blast underwater parts and coat", which it was common ground was intended to embrace all drydocking work.

I have come to the conclusion that these responses by Mr. Dunn derive from hindsight and attempted but inaccurate reconstruction. They do not, in my view, reflect Mr. Dunn's actual thinking at the time. Mr. Reilly's specific figures were the product of discussion with Captain Powell and Mr. Dunn on Aug. 16. They were, I find, figures which were conceived as appropriate to cover the items to which they related. They were not viewed as covering or containing "slack" to cover other matters. Mr. Dunn himself recalled in his original statement in November, 1995 that the costs estimates reached by Mr. Reilly were the result of discussions with PSMSL's own superintendents "who had recent experience of similar items" and went on to say:

> I was also happy that the estimates were reasonable based upon my own experience.

Later, in relation to the drydocking cost allowed by Mr. Reilly, he said specifically:

> I expected that an allowance would need to be made for gritblasting and renewal of the antifouling in line with the allowance of US$500,000 that Mr Reilly had made.

It is correct that at this stage the plaintiffs' complaint was of failure to allow for certain specific items and did not yet extend to general overhauling of other items. But there is still an inconsistency between, on the one hand, Mr. Dunn's account in his witness statement (which corresponds with Mr. Reilly's account to this day) as to the derivation and basis of the specific figures provided in Mr. Reilly's report and, on the other hand, Mr. Dunn's suggestion in evidence that he viewed Mr. Reilly's specific figures at the time as containing sufficient slack to cover other, unidentified overhauling.

The defendants criticized the manner in which this point has been raised by the plaintiffs. Whether Mr. Dunn approached overhauling in the way suggested in his oral evidence was put generally in issue in cross-examination. It is not a cross-examining party's obligation to put every inconsistency in a witness's evidence to that witness. The cross-examination in this case cannot be criticized for its lack of thoroughness on either side. The facts are in my view quite simply obscure in many respects, and, as I have said, I formed the view that much of the evidence on both sides was simply reconstruction, and frequently vulnerable to the pressures of litigation and wishful thinking. It is for me at the end of the day to do my best to arrive at the probable factual position. I am satisfied that Mr. Dunn had a fair opportunity of explaining his position.

Mr. Reilly had been expressly instructed not to allow for contingencies, unexpected problems or crew work, and his specific figures made no allowance for general overhauling. His original witness statement said this of the specific figures which appeared in his report:

> In the course of our discussions, John Dunn had requested me to add a section to my report dealing with the "Cost to upgrade to Hellespont standards" which I understood to mean the cost of upgrading to the standards required by oil majors. The figures I inserted in that section are the figures I felt comfortable with at the time, based upon my own experience and discussions with superintendents at PSMSL's offices that morning. If I had thought more or less should have been allowed for these items, or other major items required repair, I would have said so in my report. It was not within my brief to make any contingencies for unknown items or to assess the cost of work to be carried out by the vessel's crew or in-house team and I did not do so. I recall discussing these figures with John Dunn and Captain Powell who, I believe, also felt they were reasonable estimates. I remember also discussing the steelwork with John Dunn and Captain Powell at some length. We were both aware from my report of my inspection that considerable steelwork would have to be replaced in all the segregated ballast tanks, including the forepeak. Because I had been unable to gain full access to the ballast tanks, I felt unable to estimate the cost of steelwork repairs, and I therefore put a "question mark" against this item in my report.

In his supplementary statement, Mr. Reilly said that he believed that he was asked by Mr. Dunn or one of his colleagues not to make any specific allowance for items which would be overhauled by the vessel's crew or repair team, and suggested that, if any allowance was to be made for other overhauling, U.S.$80,000 to U.S.$100,000 would be appropriate.

Mr. Anderson also said this in his original witness statement in relation to the position on Aug. 16, 1989:

> Before I joined them, JD and SR had already discussed and agreed that approximately US $1 million was needed in respect of several particular items which are noted in SR's inspection report and I do not remember there being much discussion about these specific items.

The different picture which Mr. Anderson gave of events at the very end of his evidence does not suggest that the specific costs were viewed as covering anything other than the items to which Mr. Reilly related them:

> What I recollect, the thing that I would be interested in basically was that summary section where [Mr Reilly] would be talking about the vessel and how much each item would cost, and we would review that, and then we talked about the steel. Definitely, we looked at, I think — we reviewed that data.

The upshot is that I do not accept that Mr. Dunn viewed Mr. Reilly's figures as covering any matters other than those to which they specifically related. But it is clear, in my view, that other overhauling, not covered by Mr. Reilly's specific figures, must and would have been envisaged by someone of Mr. Dunn's experience. Mr. Dunn's evidence was that (leaving aside the state of her ballast tanks) he gained a satisfactory impression of the vessel's condition, that he would not have known what provision to make for any unexpected problems that might emerge, that, if he had wanted a more precise estimate he would have asked a surveyor since that was not his job and that he did not feel that there would be any significant repairs for work which could not be taken care of by the vessel's crew or a repair team. Later in this judgment, I shall consider the expert evidence about the level of costs to which a detailed assessment of the likely overhauling required would have led (see Part VI.1 and Appendix A). Mr. Dunn himself did not undertake or instruct any such exercise. Nonetheless, I believe that he would have had in mind that allowance must be made for overhauling costs, over and above the specific items for which Mr. Reilly provided and the steelwork, and, further, that these would include some work which could only be done by contractors, as opposed to crew.

I find it difficult to think that Mr. Dunn regarded this as insignificant. He should not have done. Further, it is clear that he cannot have regarded the steelwork required as insignificant. The likelihood appears to me that he took a broad brush view of the

total of all costs likely to be incurred upon acquisition of *Ardent*. That was what Mr. Anderson must have wanted, and some parts of his evidence were in terms which would be consistent with this:

> [Q.] Did you ever tell the other directors of the Red Sea Fund that your inspector had told you that we may face unexpected problems because this was a vessel which had not been maintained properly? [A.] No, because that is what the $2 million was supposed to do, bring it up to the Hellespont standards. We knew that the vessel had not been maintained properly.
>
> [Q.] Turn back to [the page of Mr Reilly's report costing specific items for repair]. Where . . . can you find anything in that to cater for the unknown, for the unexpected problems that Mr Kazazis is specifically drawing your attention to? [A.] I do not know. As far as I was concerned, I assumed that they had talked it over between themselves and Mr Dunn, and this was the estimate they were coming up with.

The "this" in the last answer was, I think, a further reference to the U.S.$2 m. It is right to add that in other parts of his evidence, Mr. Anderson said that the U.S.$1 m. was for steelwork alone, but, when questioned specifically about this, he could say only that he believed and was "under the impression" that it was for steelwork only, and did not recall it being for anything else. In re-examination he also indicated the he had no actual recall of the precise way the conversation about the U.S.$1 m. went. Mr. Anderson's evidence also made it clear that the whole discussion, such as it was, with him on Aug. 16, 1989 was short. Mr. Anderson put his participation at about 20 minutes to half an hour.

The likelihood in my judgment is Mr. Dunn was pressed for an overall figure and gave Mr. Anderson an overall figure in the sum of U.S.$2 m. to cover all repairs. This figure was not a simple sum of U.S.$ 1,050,000 (for Mr. Reilly's specific items, or for those items including "slack" as Mr. Dunn suggested) and U.S.$1 m. for steelwork. It was an overall assessment. A major factor in arriving at it was certainly the open question mark in respect of steelwork. I do not think that Mr. Dunn was thinking of anything like as much as 300 tonnes. The U.S.$2 m. was also intended to allow for general overhauling. Save that it embraced Mr. Reilly's specific items and figures, the U.S.$2 m. was not the result or object of any process of detailed calculation or breakdown.

III.10 *Was the figure of U.S.$2 m. an estimate or an allowance for all eventualities?*

In addition to Mr. Dunn's statement that he believed the U.S.$2 m. very conservative, Mr. Anderson said in evidence that his "impression at the time was that the overall estimate of U.S.$2 million if anything erred on the generous side". Mr. Bouckley recalled that he was told that repairs might cost as little as U.S.$1.5 m., evidence which I accept, although Mr. Bouckley's dating is suspect. I accept that Mr. Dunn did believe that U.S.$2 m. was a generous figure and that the overall repair costs would be contained within the U.S.$2 m. and could well be less.

Whether there was an adequate foundation for such a belief is a matter which I will consider in detail in Parts IV and V of this judgment. But it is clear that Mr. Dunn's overall figure was not the result of any analysis of actual sums which might be required for overhauling, steelwork or other events. Further, it cannot be viewed as a total which allowed for "any" eventualities which could be foreseen on Aug. 16, 1989. When pressed by Mr. Anderson for a figure, Mr. Dunn took a broad brush budgetary figure which he thought generous and likely to suffice. But he did not arrive at it by any calculation or analysis of what eventualities might materialize, still less of what a "worst case" scenario might represent, and it did not objectively cover either.

This view of the position also accords with the way in which Mr. Dunn himself put it to Mr. Bouckley, as noted by Mr. Bouckley, on Sept. 26, 1989 after delivery had been taken of *Ardent*:

> John says the ship isn't in bad shape, and he still anticipates the repairs will be done with the $2MM budget. The only word of caution he has made is they still have to empty the ballast tanks and see what condition they're in because they know there is work to be done on them. Obviously, until they've emptied the tanks they won't know the exact work that is needed.

This does not suggest that Mr. Dunn thought that he had allowed for *all* eventualities, rather that he had a budget which he believed to be generous but could not be certain about until inspection of the tanks after emptying.

Again on Oct. 12, 1989, as Mr. Bouckley noted, Mr. Dunn reported that —

> . . . the Ardent's expenses, which are still an estimate, are more or less as expected. They still don't know when she's likely to start loading, but John estimates it will probably be another forty days before this happens. He's waiting to hear how long the steelwork will take to complete in the ballast tanks before he has a better idea. This timing is more or less in line with what John thought the time frame would be when we were in Athens. Basically, the Ardent needs much of the engine room, etc. replaced and this is what they're doing.

III.11 *Mr. Papachristidis' involvement*

It is not easy to evaluate Mr. Papachristidis' evidence or position. None of Mr. Papachristidis, Mr. Anderson and Mr. Dunn claimed any real recollection of any discussions with Mr. Papachristidis about *Ardent*, either on Aug. 16 or subsequently. At the end of the day I am unable to place any great reliance on the accuracy of the attempted reconstructions of conversation or conversations to which Mr. Papachristidis was party, and Mr. Papachristidis' involvement remains shadowy. He was in the office on Aug. 16, and Mr. Anderson was due to leave on vacation on Aug. 18, when Mr. Papachristidis also flew abroad. All three of them believed that Mr. Anderson and Mr. Dunn would have discussed *Ardent* with Mr. Papachristidis on Aug. 16, but whether together or separately is quite unclear. There is no reason at all to doubt that there would have been some reference to *Ardent* between them, in view of the closeness of their working relationship. Into how much detail the conversation would have gone is a different matter. Although it is a long time ago, it appears to have left no impression now on any of their minds. Mr. Papachristidis believed that he would have read both Mr. Reilly's report and Captain Kazazis' telex, although he stressed the limitations of his technical understanding. He thought that he would have discussed the overall budget of U.S.$2 m. with particular reference to steelwork, and would have been aware that Mr. Reilly had not gained full access to the segregated ballast tanks. Commenting on the understanding which he would have had in his witness statement he said:

> . . . everything I read about the hull was positive, except for the severe wastage in the top section of the segregated ballast tanks. I knew from my experience at the time that the spaces in a ship that are most vulnerable to corrosion are precisely these areas. This is because a vessel's ballast tanks are seldom filled to the brim. The anodes (which were generally found to be totally wasted and which therefore had clearly been doing their job) are not able to exert the cathodic protection in that part of a tank which is not immersed. Generally speaking, however, a combination of anodes and remaining coatings in the immersed section of ballast tanks will ensure a fair degree of protection. In other words, the findings of Reilly and Kazazis as to the upper reaches of the segregated ballast tanks, whilst of concern to me would not constitute a departure from the general pattern of corrosion aboard a ship and would not of itself have condemned the balance of the ballast tanks.

Mr. Reilly's report in fact indicated that *Ardent* had no coatings. Whether anodes have been "doing their job" must depend on when they were last renewed. Mr. Papachristidis' comforting conclusion regarding the corrosion noted and its implications for the balance of the permanent ballast tanks do not reconcile easily with Mr. Reilly's actual report, or with the suggested discussion about steelwork. Mr. Papachristidis in evidence suggested that, since the cargo tanks were reported to be in relatively good condition, it would have been logical to assume from Mr. Reilly's report that the ballast tanks would also be in relatively good condition. Neither logic nor experience justifies the suggestion, and elsewhere Mr. Papachristidis acknowledged that the percentages of corrosion in permanent ballast tanks reported by Mr. Reilly and Captain Kazazis were very high. In each connection, as elsewhere throughout his evidence, he suggested that he would have relied on the interpretation and advice given by others, here Mr. Dunn. I do not accept that Mr. Papachristidis, with his experience and grasp of affairs, was incapable of independent thought or initiative on such matters. The likelihood is that he did not devote any great time or effort to analysing or discussing the position in respect of *Ardent*.

In particular, and as I have already indicated, I do not accept that there was discussion at this stage of steelwork costing anything like U.S.$1 m. Such discussion as there was no doubt involved Mr. Anderson putting forward *Ardent* as a suitable candidate for the fund and discussing her market value and, in that light, an appropriate price level and Mr. Anderson and/or Mr. Dunn informing Mr. Papachristidis of Mr. Dunn's estimate of up to U.S.$2 m. for upgrading. Mr. Papachristidis claimed no specific recall, though saying that it was inconceivable that he would not have read Mr. Reilly's report and Captain Kazazis' telex before discussing the vessel with Mr. Anderson and Mr. Dunn. He would not have picked up either any discrepancies between the two or any items not specifically costed by Mr. Reilly, save for the permanent ballast tanks. He would have known of the fact that they had not been inspected. He could not recall whether Mr. Dunn told him of Mr. Reilly's inability to place any figure on their repair, but would at least have seen the question mark on Mr. Reilly's report. He would have understood that Mr. Dunn's estimate of U.S.$2 m. was put forward in that context. Assuming all of this to be so, the conversation left no mark on the memory of anyone. A memorandum of Dec. 11, 1989 suggests that by then Mr. Papachristidis had no, and certainly no clear, memory of any conversation prior to the acquisition of *Ardent* in which repair costs of U.S.$2 m. had been mentioned for *Ardent* alone. It is thus difficult to accept that Mr. Papachristidis went into the matter in any detail or himself made a serious attempt to evaluate the vessel. He must, I

think, have been content to rely on Mr. Anderson and Mr. Dunn, as indeed his evidence stressed.

III.12 *The decision to recommend Ardent*

The defendants' case is that it was decided on Aug. 16 to recommend *Ardent* to Red Sea for purchase and that the recommendation was made to and approved by Red Sea directors on the same day. The plaintiffs challenge this and suggest that both the decision and the recommendation were later. Although this is not itself a critical issue, it acquired added significance in the context of a suggestion by the plaintiffs that the delay in deciding to recommend *Ardent* reflected initial disfavour with which Mr. Dunn viewed *Ardent* and/or inner dissension between Mr. Dunn who (they say) was against the purchase and others (in particular Mr. Anderson, but also Mr. Papachristidis) who favoured it.

That, at least, serious consideration was being given to a purchase of *Ardent* appears to be confirmed by two draft offers submitted to Mr. Anderson by Mr. Rayner for consideration on Aug. 17 and apparently copied by someone within the Papachristidis organization to Mr. Dunn. The first draft called for the vessel to be delivered in substantially the same condition as when inspected, and for sellers to demonstrate prior to delivery that her equipment was in good working order. The second "for compensation purposes" was on "more straightforward as is" terms. However, neither included any price and no offer was formulated. Mr. Rayner suggested at one point that the second draft reflected some indication from owners that they would now only sell "as is" before drydocking. I do not accept that he had any real recollection on this or that this was so. The actual offer when made was in fact on terms reflecting the first rather than second draft.

After the two drafts, attention continued to be given to other available vessels on the market, which were the subject of communications between Mr. Dunn and Mr. Rayner on Aug. 22. The meeting of Aug. 23 was set up by Aug. 18, and centred on the question whether Red Sea should acquire a total of four vessels (as was in the event decided) or five (as Mr. Reddy had wished). For this purpose between Aug. 21 and 23, Miss O'Donnell-Keenan prepared on instructions (though she could not identify from whom these came) a number of scenarios, catering for the possibility that either four or five vessels in total were acquired. Mr. Papachristidis was involved in the meeting, and took the sensible view that his organization had enough to manage with four vessels. A decision to limit the fund to four vessels was taken. The possibility of acquiring as the fourth vessel a storage vessel (in fact *Ardent*) was discussed.

On the next day, Aug. 24, 1989, Mr. Bouckley sent a fax to Mr. Baarma with "the three likely scenarios". These were the three scenarios postulating the purchase of four vessels and considered at the previous day's meeting. Two of them postulated a fourth vessel costing U.S.$14 m., while the third postulated a cost of U.S.$17 m., in each case with additional drydocking costs of U.S.$500,000. Mr. Bouckley identified as "the most likely" one of the two involving a fourth vessel costing U.S.$14 m., and ended "We have started negotiations on 4th Vessel". Earlier, as it would appear, on the same day Mr. Dunn had instructed Mr. Rayner by telephone to send out an offer to buy *Ardent* for U.S.$11.5 m., a copy of which Mr. Rayner then sent to Mr. Dunn. Also on the same day Mr. Dunn spoke to Mr. Vouzounerakis and then sent him a copy of the proposed memorandum of agreement and asked for telex confirmation that it was in order to ask the brokers to make the offer (which it would appear had by then already been made).

Mr. Dunn, who was closely involved in the actual offer made but not at the meeting of Aug. 24, 1989, was not aware of any decision to "go for" *Ardent* prior to about Aug. 24. He said that Mr. Anderson, although on holiday, was "constantly in touch with Mr. Papachristidis and Mr. Rayner and they would have decided to go ahead with the vessel". The contact is borne out by Mr. Anderson's witness statement and other indications. According to his own itemized bill, Mr. Anderson initiated short calls to PL on 23rd and (on four occasions) on Aug. 25, a longer call to Mr. Rayner of Clarksons at home on Aug. 23 and two other longer calls to London on Friday Aug. 25, the first to TK Shipping, owners of a vessel called *Golden Sunray* and the other immediately afterwards to Clarksons. Mr. Anderson believed that he also received an incoming call from Mr. Papachristidis after the Aug. 23 meeting. Mr. Papachristidis addressed to Mr. Anderson a note (which was either faxed or communicated orally) leading to Mr. Anderson's call to TK Shipping on Aug. 25. The note suggested that, since the owners of *Ardent* were not answering calls, PL "should try" *Ocean Sunray*. Mr. Anderson's call led him to the conclusion that this vessel was too expensive and not of interest. Mr. Anderson made three further calls to PL on Aug. 31 and one on Sept. 4. This information does not carry matters very far, but it is consistent with a decision only being made to pursue *Ardent* on and after Aug. 23.

Mr. Anderson's account, largely based on reconstruction, was that he was sure that he would have spoken to Mr. Bouckley, Mr. Henderson and Mr. van Brummen as directors of Red Sea on Aug. 16 or 17, before leaving on vacation on Aug. 18, and obtained their authority in principle to offer for

Ardent, but that something must have interrupted any pursuit of that vessel. He believed that it was the issue, not resolved until Aug. 23, whether to acquire a total of four or five vessels. Mr. Henderson, himself on holiday in mid-August, recalled no contact by Mr. Anderson. Mr. Bouckley's belief was that *Ardent* was not recommended to him until he received a telephone call, while still in London, from "someone within the Papachristidis organization". This was late on Aug. 23 or early on Aug. 24, after which he returned to New York. Monday Aug. 28 was a bank holiday in London, and it was not until Aug. 29 that he was able to contact Mr. Dunn by telephone, when he ascertained that they were on the verge of concluding a favourable deal. He said that Mr. Anderson thereafter rang him in New York to recommend the vessel, said that they had negotiated a discount of U.S.$2 m. on a price of U.S. $14 m. and hoped to do the repairs with a possible U.S.$200,000 saving. According to Mr. Bouckley, Mr. Anderson also said that the recommendation was subject to a satisfactory bottom survey and still later confirmed that such a survey had been satisfactorily completed.

If there was after the meeting of Aug. 23, 1989 some further conversation with Mr. Bouckley about the acquisition of *Ardent* either on 23rd or early on Aug. 24, 1989, it is difficult to identify with whom it can have been or to understand why it was necessary to leave it until after the meeting. It was not suggested that Mr. Dunn spoke to Mr. Bouckley then, though he certainly spoke with Mr. Bouckley about the purchase later on Aug. 29. Mr. Dunn said that recommendations for the board would have come from Mr. Papachristidis or Mr. Anderson. Mr. Papachristidis had effectively no relevant memory of events, but believed Mr. Anderson's account of a recommendation communicated by Mr. Anderson before his departure on holiday represented the most logical sequence of events. Mr. Papachristidis believed that the decision to go for *Ardent* would have been reached during the meeting.

The plaintiffs submit that the two scenarios postulating a fourth vessel costing U.S.$14 m. are inconsistent with any prior decision that the fourth vessel should be *Ardent*. Her cost could however be regarded as U.S.$14 m. if one added back the U.S.$2 m. allowed for repairs. That would not fit with the additional drydocking costs of U.S.$500,000 mentioned in each scenario. I do not however attach much significance to this inconsistency. On the view which I formed of Miss O'Donnell-Keenan and her role, she did not necessarily have a full understanding of the commercial aspects of the business, and there may have been some misunderstanding. It remains the fact that different scenarios were prepared and that *Ardent* cannot be expressly identified in any of them. This does not mean that *Ardent* was not seriously in contemplation, but it does suggest, consistently with other documentary indications, that she was not the only candidate in mind at the time as a fourth and last vessel.

The probability appears to me that *Ardent* was in contemplation as a possible fourth vessel from Aug. 16 onwards, but that PSMSL and PL remained interested in looking at other vessels and that this was not simply because of the uncertainty whether the fund would purchase four or five vessels in total. It is also true that no-one could be certain that the fund would succeed in buying *Ardent*, if and when it made an offer. I do not however believe that any real grounds existed in the second half of August, 1989 for thinking that *Ardent* was the subject of any other immediate interest or would become unavailable for purchase in the near future. The vessel had been on the market for a considerable time. Clarksons had asked owners' brokers how many others had inspected, and been told on Aug. 16 three or four others. All that Mr. Rayner could say was that he would have enquired who had inspected and that "I do not remember any other buyer offering at the time, but maybe I have just forgotten". There is no suggestion by owners' brokers and no documentary indication of any follow up or active expression of interest by any other prospective buyer. Within PL and PSMSL, the likelihood is, I consider, that *Ardent* was perceived as a serious possibility on and after Aug. 16, but that it was by no means a foregone conclusion that an offer would be made for her. Mr. Dunn would have known that there had been no such offer and was in contact with the brokers about other vessels. There is a fair inference that it was thought or hoped that there would prove to be other, more attractive vessels.

I have come to the conclusion that Mr. Bouckley is probably right in saying that it was only on Aug. 23 or 24 that *Ardent* was first identified to him as a vessel which PL actually proposed should be purchased as the fund's fourth vessel and that the recommendation to purchase was effectively made and at least implicitly accepted by Mr. Bouckley then and there, in likelihood during the meeting of Aug. 23, 1989. I do not accept Mr. Bouckley's evidence about a conversation with Mr. Anderson shortly after Aug. 29, or for that matter Mr. Baarma's suggestions (largely abandoned in cross-examination) that Mr. Anderson spoke with Mr. Baarma direct by telephone prior to the acquisition of *Ardent*. Mr. Bouckley was the channel by which Mr. Baarma was kept informed of the position. The likelihood is that the process of recommendation and approval, as it actually occurred once it had been decided to go for only four vessels, was informal and quick. It has been laden by the present

dispute with more significance and greater formality than it appeared to have at the time. The Red Sea directors were relying on PL and/or PSMSL to identify a fourth tanker of appropriate size, age, condition and price, and were unlikely to question an unqualified recommendation of a particular tanker of the right size, age and price. There may well have been conversations between Mr. Anderson and Mr. Bouckley after the former's vacation ended on Sept. 4, 1989. It seems likely that Mr. Anderson did then mention that PL and/or PSMSL hoped that *Ardent*'s repairs might cost as much as U.S.$500,000 less than the budgeted U.S.$2 m., and that he also mentioned the provision for a diver's inspection in the sale contract. I do not however accept that Mr. Anderson purported in such conversations to recommend or seek Mr. Bouckley's approval for the purchase of *Ardent*, in respect of which a contract had already been agreed. Nor did he indicate that completion of the purchase was conditional on a satisfactory bottom survey.

The plaintiffs' case goes further. In their submission, there is material from which the Court can and should infer that Mr. Dunn's attitude to *Ardent* was or remained unfavourable, and that he cautioned Mr. Anderson and, to the lesser extent that he was involved, Mr. Papachristidis against any purchase of *Ardent*. The bases for this submission were unimpressive. The first, and strongest, of them consisted of a conversation which Mr. Bouckley had with Mr. Papachristidis in October, 1990, by when relations between the banks supporting Red Sea and PL and PSMSL had deteriorated. Immediately after that conversation, Mr. Bouckley wrote a note to Mr. Baarma. The note records Mr. Bouckley as saying as that it was unfair to put all the blame on Mr. Dunn and that Mr. Anderson was in his eyes the main culprit, and Mr. Papachristidis as responding that:

> . . . the people who made the decision were Lou Anderson and himself with John Dunn trying to warn them that they were making a mistake. He said that ultimately John Dunn signed off on the three purchases in order to make it a "team" decision.

Mr. Papachristidis denied that the note was a true record of any conversation or that the account attributed to him was true. However, I accept Mr. Bouckley's good faith, and that he made the note shortly after a conversation with Mr. Papachristidis about Mr. Dunn's role. I do not think that means that Mr. Bouckley achieved a precise recollection or transcription of the effect of Mr. Papachristidis' words. Further, as he himself accepted, all he could do was attempt to reflect what Mr. Papachristidis said. All this took place over a year after the relevant events. Clearly, Mr. Papachristidis was minded at that stage to concur with Mr. Bouckley's comment about the unfairness of blaming Mr. Dunn alone. It is at least possible that in so concurring he went further than reality in an opposite direction. The suggestion that Mr. Dunn signed off "three purchases" to make it a team effort can, so far as appears, have no basis in reality. The earlier vessels were separately bought and the decision in respect of *Ardent* was a discrete decision. What does emerge from the note, and is capable of credence in my view, is firstly that Mr. Papachristidis regarded Mr. Dunn as a member of a team involved in the purchase of *Ardent* and secondly that Mr. Papachristidis viewed Mr. Dunn as the least responsible of the three in relation to the purchase. This would at least correspond with my view that Mr. Dunn would not have been entirely insulated from commercial discussions whether or not to purchase any particular vessel, but would have been the least influential of the three on such matters. As to the suggestion that Mr. Dunn tried to warn Mr. Papachristidis and Mr. Anderson that they were making a mistake, this may, conceivably, relate to or derive from Mr. Dunn's initial refusal and reluctance to give Mr. Anderson any figure for overhauling. Mr. Papachristidis was not of course present when that took place. Whether and when Mr. Anderson or Mr. Dunn said something to Mr. Papachristidis to reflect Mr. Dunn's reluctance is speculation.

The other two matters relied on stem from supplementary witness statements made on May 3, 1996, some eight days into the trial, by Mr. Henderson and Mr. Reddy. Mr. Henderson spoke of a conversation with Mr. Dunn, he believed after a September, 1990 board meeting, in which Mr. Dunn recounted that he had, at some unstated date, told "them" (Mr. Anderson in particular and also Mr. Papachristidis) "that if they continued to acquire vessels in the manner in which they were they would run into trouble". Mr. Henderson said that he had made no reference to this in earlier statements, because he had felt that it was "off the record". While I do not doubt Mr. Henderson's good faith as a witness, I cannot attach significance to this recollection. Mr. Dunn had no recollection of the conversation. Mr. Dunn may well have made some self-justificatory reference to Mr. Henderson about warnings which he or his department had given about certain risks attaching to PL's and PSMSL's expansion of their activities in 1989. The contemporary documents show discontent within Mr. Dunn's technical department at the burdens placed on them in the context of maintenance, by the purchase of so many and elderly vessels. Further than that I do not think it possible to go. A statement said to have been recalled by Mr. Dunn a year after the relevant purchases and only recorded

in writing by Mr. Henderson over five further years later is inherently unreliable.

Mr. Reddy attested to a conversation with Mr. Dunn on a flight from Hamburg in May, 1991, during which he asked Mr. Dunn why Red Sea faced the problems it did and Mr. Dunn replied that it was because Mr. Anderson "ran amok" and Mr. Papachristidis had been preoccupied with the Tisch deal. Mr. Reddy said that his recollection of this conversation had been revived five years after the event. Mr. Dunn accepted that they had spoken on the flight about the reason for Red Sea fund's lack of success, compared he said to the HTL fund, and said that he had explained the difference by saying that the Red Sea ships "were much more difficult". This anodyne account, which would have told Mr. Reddy nothing which was not well-known, seems unlikely itself to represent the full picture. However, I am also quite unable to accept Mr. Reddy's account. If it were right, then Mr. Dunn would have delivered himself of a most undiplomatic comment, which would surely have been of great contemporary interest to Mr. Reddy and would not have been forgotten. Mr. Reddy's evidence was also generally unimpressive and in my judgment unreliable. The upshot is that I gain no assistance from this conversation either, though I do accept that Mr. Papachristidis' involvement in *Ardent* was probably limited by other preoccupations, particularly the Tisch deal.

III.13 *The price paid*

I now consider in greater detail the price of U.S.$12 m. agreed for purchase of *Ardent*. It represented a considerable increase over the sellers' original price indications of U.S.$9 m. on Mar. 6, 1989 and U.S.$9.5 m. on Mar. 22, 1989 increasing to U.S.$10 or U.S.$10.5 m. (through different brokers) at the end of May, 1989. The prices quoted over this period compare well with the price achieved on sale of *Saint Andrew*, a 1973 Japanese build 84,040 tonne vessel sold by her owners for U.S.$9.6 m. in late April/early May, 1989. Comparison with the asking price for *Ardent* between March/May, 1989 requires allowances to be made for various factors: (i) age, (ii) country of build, and (iii) deadweight. I find on the broking evidence that appropriate adjustments for these factors were at the time regarded as being (i) a 6 per cent. to 7 per cent. allowance per annum for age, provided that the vessels were within about three to four years of each other in age, (ii) a 5 per cent. to 10 per cent. discount for Spanish instead of Japanese build, with $7\frac{1}{2}$ per cent. being a useful rule of thumb and (iii) a pro rata correction for differences in tonnage, at least for vessels of between 80,000 and 100,000 deadweight. In the case of *Saint Andrew*, a fourth relevant factor exists, namely that she was being sold after drydocking, which on the evidence would tend to increase her value on sale. Taking the first three factors, the price paid for *Saint Andrew* would imply a value of between U.S.$9.5 and U.S.$9.63 m. for *Ardent* in late April/early May, 1989.

It was common ground between the brokers that prices such as these would, in the absence of contrary information, be understood in the market as indicating the price of a vessel in reasonable condition for her age.

The market was described in evidence as "hot" and as rising throughout almost all of 1989, levelling off at the very end of 1989 and falling back slightly by March, 1990. The rise in market value of vessels of the relevant size during the period April to August, 1989 was up to, though not more than, about 25 per cent. Mr. Marsh made an unconvincing attempt during his expert evidence to suggest a larger increase. Figures produced by Messrs. Fearnleys show a 30 per cent. increase in the slightly longer period of March to September, 1989, a 26 per cent. increase from April to September and a 25 per cent. increase from May to September, 1989.

Applying this sort of percentage increase to the price suggestions given over the period March to May, 1989, the expectation would be of a value of between U.S.$11.75 m. and U.S.$13 m. in August, 1989 for *Ardent* in reasonable condition. Mr. Rayner and Mr. Marsh responded to the effect that a broker's attention would normally be focused on recent or current prices. No doubt this is so, but there were very few if any truly comparable sales in or about August, 1989, and Mr. Marsh's own expert report sought to draw assistance from two sales as distant as December, 1989 and March, 1990. The former, relating to *Sea Grace*, would after adjustment give a value in excess of U.S.$14 m. for a vessel of *Ardent's* size, age and build, but it took place at a higher market level and related to a vessel five years younger and so outside the age range for relevant comparison according to Mr. Marsh. The latter, *Touraine*, was close to *Ardent* in size and only three years younger and her sale, although seven months later, took place when the market had come back off down from its peak. It would after adjustment suggest a value of between U.S.$12.25 and U.S.$12.70 m. for a vessel such as *Ardent*.

Mr. Marsh in his oral evidence introduced reference to *Vestelegia*, of 1977 build and therefore again outside the age parameters which he himself would take. If one were to take her price of U.S.$17.75 m. on July 5, 1989 and adjust it, the result would be values for a vessel such as *Ardent* of between U.S.$12.4 and U.S.$13.05 m., on discounts for age running from 7 per cent. to 6 per cent. per annum and treating her Belgian build as equivalent to Japanese build and so taking a 7.5 per

cent. discount on that score. On this last point Mr. Marsh's evidence was again unimpressive. He started by asserting that Belgian build was regarded as the same in the market as Japanese, but rapidly backtracked when asked to do a detailed calculation, and took instead a 2.5 per cent. discount, which would give values running from U.S.$13.34 m. to just over U.S.$14 m. Account would have to be taken of the further rise in the market from July 5 to the second half of August. Even so, I am not satisfied that the *Vestelegia* would imply a value for *Ardent* at the latter date greater than U.S.$13 to U.S.$13.7 m. She is in any event of limited value as a comparison because she is so much younger.

Mr. Anderson and Mr. Rayner both referred to the third vessel recently purchased for the fund, *Erato* which became *Arrow*, a 1974 Japanese built vessel of 87,439 deadweight purchased for U.S.$15.5 m. on Aug. 16, 1989. Mr. Anderson's comparison of *Erato* in his witness statement was, however, superficial in the extreme, since it totally ignored the vessel's Japanese build. Taking that factor into account, *Erato* would imply a value for *Ardent* of around U.S.$13.7 to U.S.$14 m. The problem about using *Erato* as a benchmark for the market is not, as the plaintiffs at times seemed to suggest, that it is also the subject of this litigation, but that it is simply another vessel purchased for the fund on PL's recommendation. Its use, by itself alone, involves the risk of seeking to hold oneself up by one's own bootstraps. Mr. Anderson said in response that he only took the *Erato* price because it too was considered to be a market price. That brings one back to the objective evidence of the market.

Returning to *Ardent*, her owners' price indication had increased by Aug. 9, 1989 to around U.S.$12 m. When communicating this to Clarksons, her owners' brokers added:

> However as brokers would suggest yr buyers to inspect and make outright offer after inspection when believe owners will become more reasonable.

Mr. Rayner did not transmit this comment, but suggested that he would have done so in one of the several conversations he had with him each day. In that case it is not clear why he did not simply retransmit the comment. Whatever the position in that respect (and Mr. Anderson was not asked specifically by either side whether he recalled any such conversation), the brokers' comment suggests a possible concern on their part that owners' asking price might be unattractive to prospective buyers. This was moreover for a price which at that stage, before any inspection, would be assumed to be the price of a vessel in reasonable condition. When on Aug. 24 Clarksons did make an offer on the fund's behalf, it was in the sum of U.S.$11.5 m., and was accompanied by this comment by Mr. Rayner:

> We have explained to Hellespont Shipping that we need to move fairly quickly on this negotiation to prevent the drydocking commencing and we believe that even the above opening offer represents a very realistic level for this vessel.
>
> In my opinion a Japanese built vessel of a similar size and age in reasonable condition would be worth between USD 12.75/13 million max today.
>
> (A) This vessel however is Spanish built which must be worth 500,000/750,000 level
>
> (B) The technical department of Papachristidis Ship Management Services have advised that need to spend around USD 2 million on the vessel.
>
> I think that you are well aware of the level that I believe that we can strike a quick deal so look forward to your close counter to the above, I sincerely believe that your clients should grab this [opportu]nity with both hands before my buyers have second thoughts.

Mr. Rayner said that he was seeking to talk down the vessel by both (A) and (B), although in relation to (B) he was simply repeating what he had been told by Mr. Anderson.

After various intermediate counters by sellers and buyers, the price of U.S.$12 m. was eventually agreed on Aug. 29, 1989. Mr. Rayner did not recall whether he had given any advice to Mr. Anderson on the market; he might have done, but Mr. Anderson was well capable of working out where the market was for himself. Mr. Anderson's evidence was that he considered from his assessment of the tanker market and discussions with Mr. Rayner that an overall cost for *Ardent* of U.S.$14 m. (U.S.$12 m. price plus U.S.$2 m. repairs) accorded with the market price of a vessel of similar age and size in reasonable condition. He went on (as I have said, without adverting to the distinction between Japanese and Spanish built vessels) to refer to *Erato/Arrow* as indicating —

> . . . that a vessel of the ARDENT's size and age in reasonable condition would be worth in the region of U.S.$14.7 million.

He could not recall whether he had actually made the comparison at the time, but would have thought he would have done. In cross-examining Mr. Anderson, Mr. Eder put to him that the calculation in his witness statement was manifestly wrong, and indicated that if Mr. Anderson would agree that the U.S.$14.7 m. was wrong, he could move on. After a further exchange, Mr. Eder put again:

> ... the $14.7 million is plainly wrong. At most it is 14 million. You never thought, at the time, that the vessel was worth in the region of £14.7 million? [A.] No, I thought that fair market value was $14 million, yes.

On that basis Mr. Eder moved on. In these circumstances, Mr. Anderson's evidence that he thought that *Ardent* would have a value as high as U.S.$14 m. in reasonable condition is unchallenged. Further, it seems to me inherently likely. On any view, even though it was hoped to do the repairs more cheaply, Mr. Anderson had in mind that they might cost U.S.$2 m. He must have rationalized the purchase of *Ardent* for U.S.$12 m. in his own mind on that basis. The plaintiffs have not pleaded or indeed made any case to the effect that Mr. Anderson's view of the market was one which he was not reasonably entitled to hold. For the purposes of assessing the reasonableness or unreasonableness, gross or otherwise, of the defendants' conduct, I proceed on the basis that Mr. Anderson and the defendants could and did reasonably hold the view that the market value of *Ardent* after repairs would reach U.S.$14 m. But I add that this seems to me on the outer edge of any assessment of market value which could have been reasonably held by Mr. Anderson.

Whether, in any objective sense, the market for a vessel of *Ardent's* size, age and build in reasonable condition could be said to have reached U.S.$14 m. in the second half of August, 1989 is another question. It may not be significant at this stage, although it could have relevance on an assessment of damages. The fact that the view taken by one man — Mr. Anderson — was not unreasonable and led to the fund actually buying *Ardent* cannot, as I see it, mean axiomatically that the price paid by the fund represented a realistic market price. For example, the price for her would not necessarily have correlated with her value on an immediate resale on the market. On the evidence which I have heard, although the market was hot and still rising, the price paid for *Ardent* was in excess of any market price which could be deduced from other sales or objective information, if one assumes that the vessel would incur repair costs of anything like U.S.$2 m. on top of the price paid. On the evidence as a whole, I would put the actual market price for a vessel of *Ardent's* size, age and build in reasonable condition as not more than U.S.$13.25 m. in the latter part of August, 1989.

III.14 *Events following delivery*

The vessel was delivered on Sept. 20, 1989. A board meeting of Red Sea took place in Athens on Sept. 22. It was resolved to postpone any decision on repayment of debt until Mr. Dunn had ascertained the repairs and maintenance work needed to bring the vessels up to a suitable standard. While in Athens, Mr. Bouckley took the opportunity to look over *Ardent*. On Sept. 26, after Mr. Dunn had had the opportunity to go on board, Mr. Dunn spoke to Mr. Bouckley, whose note of the conversation is set out in Part III.10 above.

On Oct. 11, 1989 Mr. Dunn informed Mr. Bouckley that the best estimate for repairs to *Ardent* was that they would probably last another 40 days, and still cost U.S.$2 m. adding "see inspection report". Orally, he said that the expenses were "still an estimate" and that he was waiting to see how long the steelwork would take to complete before he had a better idea. On Dec. 4, 1989, Mr. Anderson told Mr. Bouckley that the costs were going to be considerably in excess of those originally estimated, and would end up at around U.S.$3.5 m. Mr. Bouckley's note of the further conversation reads as follows:

> I asked why the Ardent had cost considerably more than the market estimate. Anderson said they did not do a full survey and thus did not find all the problems until afterwards. I was not, myself, aware that a full survey was not done and am checking my correspondence. Sami [i.e. Mr Baarma]: did you know a full survey had not been done? There are possible liability considerations we may have to consider here. If you recall I was worried about the cost of putting the Ardent into shape after I went on board her and followed this up with John Dunn: see my memo of October 12th.

Thereafter, steps were taken by Red Sea directors to obtain an independent appraisal of the situation. A report was obtained from Denholm Shipping Services Ltd. They were not called as experts, and their report was only referred to incidentally before me.

IV. THE DEFENDANTS' DUTIES

IV.1 *The Commercial and Technical Advisory Agreements* (the CAA and TAA)

The starting point for consideration of any contractual or tortious duties owed by the defendants is the CAA and TAA, and in particular two clauses in effectively identical terms found in each. PL and PSMSL rely upon these clauses to exempt them from any contractual or tortious liability which they may otherwise have incurred. The personal defendants rely upon them to negative or exempt them from any tortious liability.

The first clause is cl. 2 headed "Indemnification of [Commercial/Technical] Advisor" and the second is cl. 7.9 (in the CAA) or cl. 7.10 (in the TAA). Clause 2 of the CAA provides:

2. *INDEMNIFICATION OF COMMERCIAL ADVISOR*

The Corporation will, to the maximum extent permitted by law, indemnify and hold harmless the Commercial Advisor and its officers, directors, employees and agents ("Indemnities"), and the Corporation shall release the Indemnitees, from any and all judgments, interest on such judgments, fines, penalties, charges, costs, amounts paid in settlement, expenses and attorneys' fees incurred in investigating, preparing or defending any action, claim, sit, inquiry, proceeding, investigation or appeal taken from the foregoing by or before any court or governmental, administrative or other regulatory agency, body or commission, whether pending or threatened, whether or not an Indemnitee is or may be party thereto, including interest on the foregoing which, in the good faith judgment of the Commercial Advisor, arise out of, relate to or are in connection with the performance of its duties hereunder ("Indemnified Damages"), except for any such Indemnified Damages that are found by a court of competent jurisdiction to have resulted from the bad faith, gross negligence or willful misconduct of, or the fraud of, the person seeking indemnification.

Clause 7.9 of the CAA provides:

7.9 *Liability of the Commercial Advisor.*

Neither the Commercial Advisor nor any of its officers, directors, employees or agents shall be liable, responsible or accountable, whether directly or indirectly, in contract or tort or otherwise to the Corporation for any losses, claims, damages, liabilities or expenses (collectively, "Damages") asserted against, suffered or incurred by the Corporation or any shareholder thereof arising out of, relating to or in connection with any action taken within the scope of duties of the Commercial Advisor under this Agreement or omitted to be taken by the Commercial Advisor with respect to (a) the management or conduct of the business and affairs of the Corporation or any person in which the Corporation has an interest, (b) the offering and selling of interests in the Corporation or the shareholders thereof and (c) the management or conduct of the business and affairs of the Commercial Advisor insofar as it relates to the Corporation including, without limitation, all activities of the Commercial Advisor in the conduct of other business engaged in by it which might involve a conflict of interest vis-a-vis the Corporation or in which the Commercial Advisor realizes a profit or has an interest, except, in each case, Damages resulting from acts or omissions of the Commercial Advisor which (a) were the result of gross negligence, (b) constituted wilful misconduct, (c) constituted fraud or (d) constituted bad faith. The Commercial Advisor shall not be liable to the Corporation for any action taken or omitted by officer, director, shareholder, employee or agent of the Corporation. The Commercial Advisor may consult with counsel, accountants and other professional advisors in respect of the affairs of the Corporation and, so long as the Commercial Advisor shall have used extreme care and diligence in selecting such counsel, accountants or other professional advisors, as the case may be, the Commercial Advisor shall be fully protected and justified in acting, or failing to act, if such action or failure to act is in accordance with the advice of such counsel, accountants or other professional advisors.

Clauses 2 and 7.9 of the TAA contain like provisions in respect of the "Technical Advisor".

These clauses were entered into for the benefit of the relevant advisers' officers, directors, employees and agents as well as the adviser itself. As such, it is common ground that, under the law of New York, any relevant officer, director, employee and agent was and is entitled to enforce the benefit of each clause in his favour as a third party beneficiary. The scope of the clauses raises a number of issues of construction.

Both the experts called on New York law were highly qualified to assist. Mr. Kenney is a trial lawyer who qualified in 1970 and has specialized for over 15 years in negligence including professional negligence claims. He has been president of the Federal Bar Council and has taught trial advocacy programmes at Harvard University, Cornell Law School and elsewhere. Judge Frankel was called in 1949, practised as a government attorney and then in private practice until 1962, was then professor of law at Columbia University, sat as a United States District Judge from 1965 to 1978 and then returned to private practice, in which he remains to this day. He has written extensively on legal topics. Both experts gave helpful evidence, and referred me to material principles and authorities. On matters of construction their evidence is admissible to inform me of the relevant principles, and the meaning of any relevant terms of art, under New York law. Here, the evidence focused on the existence and meaning of suggested terms of art. The defendants contend that the terms "wilful misconduct" and "gross negligence" are assigned particular meanings under New York law, at all events in the context of exculpatory clauses.

IV.2 *Clause 2*

I start with the issue whether cl. 2 is relevant to the plaintiffs' claims against the first, fourth and fifth defendants in their capacities as officers, directors, employees and agents of the second and/or

third defendants. The plaintiffs submit not. It concerns, they say, exposure on the part of an officer, director, employee or agent towards third parties, not towards the very adviser who undertakes the obligation to indemnify. There is authority under New York law considering a clause in similar wording, but without the phrase "and the Corporation shall release the Indemnitees": *Hooper Associates Ltd. v. AGS Computers Inc.*, 74 N.Y. 2d. 487, 548. The case contains some statements of principles governing construction which strike a familiar note in this jurisdiction:

> Words in a contract are to be construed to achieve the apparent purpose of the parties. Although the words might seem to admit of a larger sense, yet they should be restrained to the particular occasion and to the particular object which the parties had in view. . . . This is particularly true with indemnity contracts. When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. . . . The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances.

The Court said that all the subjects of the clause:

> . . . are susceptible to third-party claims . . . None are exclusively or unequivocally referable to claims between the parties themselves or support an inference that defendant promised to indemnify plaintiff for counsel fees in an action on the contract.

The Court's conclusion was:

> Construing the indemnification clause as pertaining only to third-party suits affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect . . . .

Applying these principles to the construction of the present agreements, a similar conclusion results. The overwhelming flavour of cl. 2 is that of indemnification against third party claims. Its subject-matter is "judgments, interest on such judgments, fines, penalties, charges, costs, amounts paid in settlement, expenses and attorneys' fees . . . ". Most of these would never arise at all if the clause applied to liability incurred by an indemnitee towards the indemnifier. Costs, expenses and attorneys' fees could be incurred, but they are much more obviously referable to costs, expenses and fees incurred in the context of a judgment, fine, penalty, etc. obtained by or paid to a third party. Further, if cl. 2 were treated as applicable to liability to the indemnifier, the clause would overlap with cl. 7.9 (or 7.10). The contractual scheme is in my view clear. Clause 7.9 (or 7.10) deals with liability inter se, while cl. 2 deals only with third party liabilities.

IV.3 *Clause 7.9/7.10*

The clause contains a saving or qualification to its basic principle of exception. The saving relates to —

> . . . damages resulting from acts or omissions . . . which (a) were the result of gross negligence, (b) constituted willful misconduct, (c) constituted fraud or (d) constituted bad faith.

In *Metropolitan Life Insurance Co. v. Noble Lowndes International Inc.*, 84 N.Y. Rep. 2d Series 430, the Court applied "the interpretation tool of ejusdem generis" to a qualification on a limitation clause for "international misrepresentations, or damages arising out of . . . willful acts or gross negligence", saying:

> . . . the phrase "willful acts" should be interpreted here as referring to conduct similar in nature to the "international misrepresentation" and "gross negligence" with which it was joined as exceptions to defendant's general immunity from liability for consequential damages . . . .

The Court's conclusion was that:

> . . . the term willful acts as used in this contract was intended by the parties to subsume conduct which is tortious in nature, i.e. wrongful conduct in which defendant willfully intends to inflict harm on plaintiff at least in part through the means of breaching the contract between the parties.

While the draftsman of the present contract took care to list separately four situations, it is clear that he had them all in mind as exceptional and it is evident that the concepts of wilful misconduct, fraud and bad faith have some elements in common. Here too, therefore, it may be that the four situations were viewed as similar or at least connected. The defendants thus submitted to me that the four situations should be construed ejusdem generis as regards the mental element involved. That finds no real support in the reasoning or decision in *Metropolitan Life*, where the class identified was of acts tortious in nature (as distinct from a simple international breach of contract in one's own commercial interests). Further, in the present case, the wording of the clause itself indicates possible differences between gross negligence and the other concepts. It addresses gross negligence which *results in* acts or omissions causing damage. In the other three situations, the acts or omissions *constitute* wilful misconduct, fraud or bad faith. One possible conclusion is that wilful negligence, fraud and bad faith were viewed as integral elements of the acts or omissions damaging the other party, while gross negligence was viewed

as conduct occurring separately from, although resulting in, an act or omission damaging the other party.

The trial proceeded without submissions being addressed expressly to the burden of proof in respect of the four situations in which contractual immunity is not afforded. I sought confirmation about the position when writing my judgment, and received written submissions from the plaintiffs to the effect that the burden lay on the defendants to disprove wilful misconduct, gross negligence, etc. and from the defendants to the opposite effect. In my judgment, the case was conducted, as the defendants submitted, on the basis that the burden lay on the plaintiffs and this is anyway the right analysis under English law, and, from such indications as exist, under New York law. But, in the event, I do not consider that this case turns on the burden of proof.

Under New York law, it is contrary to public policy for a party to contract out of liability for "willful misconduct" or "gross negligence". The two experts agreed that there are New York authorities defining the concept of "willful misconduct" in this and other contexts. They were also agreed upon the following definition:

> ... an international act of unreasonable character which is performed in disregard of a known or obvious risk which is so great as to make it highly probable that harm will result.

The experts also agreed that "gross negligence" in the context of exculpatory clauses had been defined or described by the highest New York Court as —

> ... conduct that evinces a reckless disregard for the rights of others or "smacks" of intentional wrongdoing.

The precise nature of the state of mind involved in both these definitions or descriptions gave scope for argument.

Authority for the experts' definition of "willful misconduct" is found in three authorities: *Seminara v. Highland Lake Bible Conference Inc.*, 112 A.D. 2d 630, 492 N.Y.S. 2d 146 (N.Y. App.Div. 1985), *Gardner v. Owasco River Railway*, 142 A.D. 2d 61, 534 N.Y.S. 2d 819 (3d Dep't. 1988) and *McDuffie v. Watkins Glen International Inc.*, 833 F. Supp. 197, 203 (W.D.N.Y. 1993). In the first case, the Court cited Prosser & Keeton on The Law of Torts (5th ed. 1984) par. 34 at p. 213, which contains this passage:

> International acts of unreasonable character, performed in disregard of a known or obvious risk so great as to make it highly probable that harm will result, are considered wilful conduct in the realm of tort law.

Judge Frankel in his first report also pointed out that, in *McDuffie* (a case where the plaintiff was arguing that there was wilful misconduct, so that as a matter of New York public policy the defendant could not rely on the protection of an exculpatory clause), the Court not only quoted the above definition from *Gardner*, but also quoted a New York Pattern Jury Instruction as authority for the proposition that wilful misconduct means —

> ... a failure to use even slight care, or conduct that is so careless as to show complete disregard for the rights and safety of others.

In his oral evidence, however, Mr. Kenney drew a distinction between "wilful misconduct" and "gross negligence" according to which the former would include, whereas the latter would not, a requirement of "consciousness of what will happen", or "an intent requirement and knowledge". Judge Frankel in his oral evidence said that "wilful misconduct" required both consciousness of and an intention to bring about the consequences of what the actor was doing. He also said that, thinking about the issue and reviewing the authorities subsequent to his first report, he had come to the conclusion that consciousness of the consequences was also a requirement of "gross negligence".

There are numerous authorities describing gross negligence in the context of exculpatory clauses as "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing". I start with a case predating them, *Hong Kong Export Credit Insurance Corporation v. Dun & Bradstreet*, 414 F. Supp. 153 (S.D.N.Y. 1975). In that case a Federal District Court applying New York law held that —

> Gross negligence means that the defendant has not only acted carelessly in making a mistake, but that it was so extremely careless that it was equivalent to recklessness.

Later, it repeated that:

> ... gross negligence ... implies great negligence and the want of even scant care. It has been defined as a disregard of the consequences which may ensue from the act and indifference to the rights of others.

The defendant in that case had undertaken to supply information regarding bankruptcy, but had failed to send an isolated report about an attachment. The Court held that no reasonable man could say that it had been indifferent or reckless with regard to its procedures or practices as to the mailing of reports.

The first case to use the description quoted by the experts was *Kalisch-Jarcho Inc. v. City of New York*, 58 N.Y. 2d 377 (1983), an authority in the highest New York State Court, the Court of Appeals. The Court had to consider the adequacy of

a jury direction which had indicated that an exculpatory clause protecting against delay in contract works would be ousted if the jury found that the delay was caused by conduct constituting "active interference". The Court concluded that this was an incorrect instruction, and put the position as follows:

> [6–8] More pointedly, an exculpatory clause is unenforceable when, in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing. This can be explicit, as when it is fraudulent, malicious or prompted by the sinister intention of one acting in bad faith. Or when as in gross negligence, it betokens a reckless indifference to the rights of others, it may be implicit (*Matter of Karp v. Hults, 12 A.D. 2d 718, 209 N.Y.S. 2d 128, affd. 9 N.Y. 2d 857, 316 N.Y.S. 2d 99, 175 N.E. 2d 465*).
>
> [10–13] To support such a conclusion however, the jury would have to find more than "active interference", which, incidentally, was not a contract term. For whether conduct is "active" or "passive" does not determine wrongdoing, and "interference", which most commonly translates as "intervention" (Webster's International Dictionary [2d ed. 1950], at p. 1294), does not connote willfulness, maliciousness, abandonment, bad faith or other theories through which runs the common thread of intent. So taken at face value by the jury, the charge was calculated to expose the city to liability for conduct within the umbrella of the exculpatory clause. Accordingly, although the request to charge perhaps could have been more precisely put, the city, at the very least was entitled to the amplifying instruction that unless Kalisch-Jarcho proved that "the City acted in bad faith and with deliberate intent delayed the plaintiff in the performance of its obligation", the plaintiff could not recover.

The Court here identified two categories of misconduct which it regarded as "smacking" of intentional wrongdoing "explicit, as when it is fraudulent, malicious or prompted by the sinister intention of one acting in bad faith" and implicit, "when, as in gross negligence, it betokens a reckless indifference to the rights of others". This leaves unstated the precise mental element involved in "implicit" misconduct. The impressionistic phrase "smacks of intentional wrongdoing" does not provide the answer. The citation of *Karp v. Hults* is however of interest. It was a case concerning the Commissioner of Motor Vehicles' power to suspend an operator's licence on finding that he had driven "in a manner showing a reckless disregard for life and property of others". The Court said:

> It is true that momentary failure of attentiveness and of control, resulting in accident, may in some circumstances constitute no more than ordinary negligence; but to relax attention and control while operating upon a modern, high-speed, divided highway at the rate of speed reasonably inferable from the facts of this case is to invite catastrophe of extreme severity.

There is no necessary requirement or flavour of subjective consciousness of the consequences in this language. Judge Frankel distinguished the case as concerning the general law, rather than exculpatory clauses, but it was cited in *Kalisch-Jarcho* in the latter context. Judge Frankel said that, whatever the position may then have been, the concept of gross negligence in the context of exculpatory clauses had now acquired a special and more restricted meaning, requiring conscious disregard of consequences.

That was expressly not the view of Judge Goettel, again the United States District Court for the Southern District of New York, in *Federal Insurance Co. v. Honeywell Inc.*, 641 F. Supp. 1560 (S.D.N.Y. 1986), where he disagreed with a definition in New York Jurisprudence and cited a New York Pattern Jury Instruction on gross negligence, which is interestingly but confusingly identical to that which, as I have already mentioned, was cited by Judge Frankel as applicable to "wilful misconduct".

The main weight of the opinion expressed by Judge Frankel in oral evidence rested on four recent cases: *Sommer v. Federal Signal Corp.*, 79 N.Y. 2d 540, 583 A.D. 2d 317, 598 N.Y.S. 2d 235 (1st Dep't. 1992), *Colnaghi U.S.A. Ltd. v. Jewelers Protection Services*, 79 N.Y. 2d 1027, 584 N.Y.S. 2d 430 (1992), *Stuart Rudnick Inc. v. Jewelers Protection Services*, 194 A.D. 2d 317, 598 N.Y.S. 2d 235 (1st Dep't. 1993) and *Fireman's Fund Insurance Co. v. ADT Systems Inc.*, 847 F. Supp. 291 (E.D.N.Y. 1994). The first two of these cases were again before the New York State Court of Appeals. In *Sommer* the Court was concerned with an operator of an alarm service who had allowed himself to become confused into misunderstanding instructions to "activate" the service (which had unknown to the person giving them already been re-activated after maintenance) and had, without seeking clarification, concluded that he was being asked to de-activate it. He had then ignored (genuine) fire signals which were some seven or so minutes later received. The Court said this:

> Gross negligence, when invoked to pierce an agreed-upon limitation of liability in a commercial contract, must "smack of international wrongdoing" (*Kalisch-Jarcho, Inc. v. City of New York, 58 NY 2d, at 385, supra*). It is conduct

that evinces a reckless indifference to the rights of others (id; see also, Restatement [Second] of Contracts 195 [1] [intentional or reckless conduct vitiates contractual term liability]).

In a related context, the Legislature has expressly adopted a reckless indifference standard. Under CPLR article 16, a joint tortfeasor whose culpability is 50% or less is not jointly liable for all of plaintiff's non-economic damages, but severally liable for its proportionate share (CPLR 1601 [1]). This limitation of liability, however, does not apply to a person who acted with "reckless disregard for the safety of others." (CPLR 1602 [7].)

[2] Just such a standard is applicable here. We therefore conclude — as did the trial court and Appellate Division — that while Holmes' exculpatory and limitation of liability clauses are enforceable against claims of ordinary negligence, those clauses cannot restrict Holmes' liability for conduct evincing a reckless disregard for its customers rights.

The court's role on a motion for summary judgment is to determine whether there is a material factual issue to be tried, not to resolve it.

[3] Holmes' view of the evidence is that the company's conduct did not rise to the level of reckless indifference. Holmes urges that the dispatcher's failure to report the alarms was the result of a mere miscommunication, a mistake cause in part by the engineer's confusing instructions. Another reasonable view of the evidence, however, is propounded by 810: that instead of pausing to dispel any confusion surrounding the subscriber's instruction to activate its system the dispatcher — without verification or investigation — rushed to his own conclusion, recklessly indifferent to the consequences that might flow form a misperception.

Whether this indeed is a case of a simple mistake or reckless indifference is for a jury to determine.

The citation of par. 195 of the restatement is of interest, because, I was informed, par. 195 refers for a definition of intentional or reckless conduct to par. 500 of the restatement which gives the following two-pronged definition:

500. Reckless Disregard of Safety Defined

The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

See Reporters Notes

Special Note: The conduct described in this Section is often called "wanton or wilful misconduct" both in statutes and judicial opinions. On the other hand this phrase is sometimes used by courts to refer to conduct intended to cause harm to another.

Comment:

a. Types of reckless conduct. Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know, as that term is defined in 12, of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so. An objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man in his place would have, although he does not himself have it.

. . .

For either type of conduct, to be reckless it must be unreasonable; but to be reckless, it must be something more than negligent. It must not only be unreasonable, but it must involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent. It must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence.

b. Perception of risk. Conduct cannot be in reckless disregard of the safety of others unless the act or omission is itself intended, notwithstanding that the actor knows of facts which would lead any reasonable man to realize the extreme risk to which it subjects the safety of others. It is reckless for a driver of an automobile intentionally to cross a through highway in defiance of a stop sign if a stream of vehicles is seen to be closely approaching in both directions, but if his failure to stop is due to the fact that he has permitted his attention to be diverted, so that he does not known that he is approaching the crossing, he may be merely negligent and not reckless. . . .

c. Appreciation of extent and gravity of risk. In order that the actor's conduct may be reckless, it is not necessary that he himself recognize it as

being extremely dangerous. His inability to realize the danger may be due to his own reckless temperament, or to the abnormally favourable results of previous conduct of the same sort. It is enough that he knows or has reason to know of circumstances which would bring home to the realization of the ordinary, reasonable man the highly dangerous character of his conduct.

. . .

f. International misconduct and recklessness contrasted. Reckless misconduct differs from intentional wrongdoing in a very important particular. While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from acts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless. However, a strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which his act results.

g. Negligence and recklessness contrasted. Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.

The description in par. 500 is of particular clarity and assistance. It was accepted by Judge Frankel and the defendants as representing correctly the general legal conception of "gross negligence". Despite the reference to par. 195 (and so indirectly to par. 500) in *Sommer*, Judge Frankel maintained that the proper reading of this and later authorities was that "gross negligence" had acquired a narrower meaning, importing subjective consciousness of the risk, in the context of an contractual exemption clause.

In *Colnaghi* the Court was concerned with a failure to wire a skylight in an art gallery, through which thieves made entry to steal 20 paintings. Citing *Sommer*, the Court said:

> New York law generally enforces contractual provisions absolving a party from its own negligence (*Sommer v. Federal Signal Corp. 79 NY 2d, at 53, supra; see, Melodee Lane Lingerie Co. v. American Dist. Tel. Co., 18 NY 2d 57, 69; Ciofalo v. Vic Tanney Gyms, 10 NY 2d 294, 297–298*). Public policy, however, forbids a party's attempts to escape liability, through a contractual clause, for damages occasioned by "grossly negligent conduct" (*Sommer v. Federal Signal Corp., 79 NY 2d, at 554, supra*). Used in this context, "gross negligence" differs in kind, not only degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or "smacks" of intentional wrongdoing (*Sommer v. Federal Signal Corp., 79 NY 2d, at 554, supra*).
>
> Colnaghi's allegations do not meet this standard. The failure to wire a skylight, while perhaps suggestive of negligence or even "gross negligence" as used elsewhere, does not evince the recklessness necessary to abrogate Colnaghi's agreement to absolve Jeweler's from negligence claims (*see, Gutter Furs v. Jewelers Protection Servs., 79 NY 2d 1027, 1029, supra* [expert's opinion that alarm company should have installed a second detector and a shock sensor, ascertained how inventory was to be arranged and conducted a post-occupancy inspection, taken together, raises no issue of fact on reckless indifference]; *compare, Sommer v. Federal Signal Corp., 79 NY 2d, at 555, supra*).

In parenthesis, it appears from a footnote in the later *Fireman's Fund* case that the plaintiffs' expert's affidavit in *Colnaghi* had stated that the alarm company's actions fell "far below professional standards and customary practice in the industry".

Judge Frankel relied upon the judgment in *Colnaghi* for the distinction "in kind" drawn between gross negligence and ordinary negligence in the present context. Nothing however suggests that the Court, with its references to *Sommer* and a substantial overlap in membership with the Court which decided *Sommer*, was intending in any way to affect or alter the view of the meaning of "gross negligence" indicated in *Sommer*. The phrase "evince a reckless disregard for the rights of others" is capable of applying to an objective state

of mind, where actual consciousness of consequences is not present. The difference in kind between recklessness and gross negligence applies to both categories of recklessness recognized in par. 500 of the Restatement. The second sentence of par. 500(g) refers to both categories. The third sentence is dealing with a different point, namely the extreme nature of the risk involved in recklessness. The last sentence, as I read it, applies once again generally to all recklessness, as defined throughout par. 500. The reference in *Sommer* to "gross negligence as used elsewhere" refers to looser usage of the phrase in the simple sense of serious negligence. Finally, *Stuart Rudnick* and *Fireman's Fund* are cases in a lower Court which follow *Sommer* and *Colnaghi* and add nothing material.

With the exception of the early cases of *Hong Kong Export Credit* and *Kalisch-Jarcho* itself, the cases considered up to this point were all decided in the context of exculpatory clauses in contracts relating to security or alarm systems under which the party liable would normally be taken to have assumed a duty to exercise reasonable skill and care for the plaintiff's safety or property, for which he might in the event of breach be held in contract and also, it appears, in tort. The conclusion I reach in this context is (1) that the public policy of New York does prohibit the party otherwise owing such a duty from exculpating himself from liability for its breach in circumstances amounting to wilful misconduct or gross negligence—this is effectively common ground — and (2) that "gross negligence" is here regarded as embracing conduct involving both kinds of recklessness referred to in the Restatement.

I have limited the context to circumstances where New York public policy arises for consideration and in which the party liable would owe a duty of reasonable skill and care. To demonstrate why, I turn to the last and highly instructive authority of the New York State Court of Appeals to which I was referred. That is *Metropolitan Life Insurance Co. v. Noble Lowndes International Inc.*, 84 N.Y. Rep. 2d 430; 643 N.E. 2d 504, 618 N.Y.S. 2d 882 (1994). Again there was a considerable overlap in membership with the Courts deciding *Sommer* and *Colnaghi*. The case concerned a limitation of liability for loss of profit and other consequential damages, with an exception "for intentional misrepresentation, or damages arising out of... wilful acts or gross negligence". The contract was for the licensing of software, together with the provision of customized enhancements to suit the plaintiff's health insurance business at a cost not to exceed U.S.$390,000. The defendant withdrew from the project after the plaintiffs had rejected two sets of enhancements and refused the defendant's demand for an upward adjustment of the contract ceiling price for enhancements. The motivation for its refusal further to perform was —

> ... its desire to eliminate contractual obligations which it perceived to be an obstacle to any sale of its computer division to a company known as Erisco.

The Judge directed the jury that the exception of "willful acts" required —

> ... a finding that the defendant's conduct was malicious, i.e. the intentional perpetration of a wrongful act injuring plaintiff without justification.

The jury found that the defendant's acts were wilful. The Appellate Division reversed this finding, holding that the exception required the commission of a tort. The Court of Appeals disagreed with the Appellate Division's reasoning, but upheld the result. What is important for present purposes is that the Court treated the issue as one of pure construction:

> The issue here is not how we and other courts have construed "willful" in other contexts, such as in interpreting statutes using that term or in formulating or applying legal principles in tort or contract law. Rather, the issue is what the parties intended by "willful acts" as an exception to their contractual provision limiting the defendant's liability for consequential damages arising from its "non-performance under this agreement". Thus, to the extent that the Appellate Division opinion holds that tort law principles apply in all cases in which the word willful is at issue or thereby limits the legal meaning of the word, we do not agree. However, because the law of contracts as pertinent and applied to this contractual dispute leads us to the same result, we now affirm.

The Court of Appeals identified several principles of contract or construction which it regarded as of assistance: the fact that contract damages do not normally depend upon whether or not non-performance was intentional or inadvertent; the policy of the law in giving full effect to a clause allocating the risk of economic loss between the parties; specific clauses in the contract, which it regarded as clearly inconsistent with a restriction of the limitation clause to inadvertent breaches; and the imbalance in the parties' respective potential liabilities involved in the plaintiff's construction. The other clauses showed, in particular, that the parties were agreeing to limit the plaintiffs' remedies for non-performance, even when this persisted after notice. The Court concluded:

> In excepting willful acts from defendant's general immunity from liability for consequential damages under section 7 of the Agreement, we

think the parties intended to narrowly exclude from protection truly culpable, harmful conduct, not merely intentional nonperformance of the Agreement motivated by financial self-interest. Under the interpretation tool of *ejus-dem generis* applicable to contracts as well as statutes, the phrase "willful acts" should be interpreted here as referring to conduct similar in nature to the "intentional misrepresentation" and "gross negligence" with which it was joined as exceptions.

Public policy was there referred to as a consideration arising after the Court had arrived at a proper definition of the limitation and its exception upon a true construction of the parties' agreement. However, the Court did point out that the construction at which it had arrived mirrored in effect that adopted in its earlier decisions on public policy.

In the light of this authority, the issue before me as to the scope of cll. 7.9 and 7.10 is essentially one of construction, and depends on the character and wording of the particular contract. Judge Frankel was in my judgment right to identify the purely commercial nature of a relationship as a material matter when considering both the operation of public policy and the construction of a particular exception. However, the authorities suggest to me that the New York Courts would not simply stop there. They would be likely to have regard to the precise nature of the commercial relationship. There is a distinction between the nature of the contract in the *Metropolitan Life* case and the nature of the contracts or relationship in issue in the authorities dealing with security. The former contract was a pure supply agreement, under which it could not be said that the provider of software and services undertook any duty to exercise reasonable skill and care to protect the plaintiffs' economic position or interests. The latter were decided in a context where the provider of services was expressly engaged with a view to the protection of the plaintiffs' proprietary and economic interests. In that context, as I have held, New York public policy is capable of invalidating attempts to contract out of liability on grounds of wilful misconduct or gross negligence, although the defendant's conduct was reckless in a sense not involving actual consciousness of risk on the part of the defendant. Here, the CAA and TAA were contracts under the advisers undertook duties which were essentially designed to promote and protect the plaintiffs' relevant commercial and technical interests. As a matter of construction, therefore, it would not be surprising if cll. 7.9 and 7.10 were, upon their true construction, to reflect a similar approach to that adopted by New York when identifying New York public policy. There is some attraction in treating the exceptions in cll. 7.9 and 7.10 as a simple reflection of the requirements of New York public policy. Both parties emphasized this in their respective submissions, although taking different views of those requirements. This was not however the approach adopted in the *Metropolitan Life* case, and to apply it inflexibly would be contrary to the need to construe the particular contract according to its own terms. In the present case, so far as it has relevance, it reinforces the conclusion to which I would anyway come.

Viewing the particular words of the present contracts, four concepts are separately identified. They may overlap (e.g. in the case of wilful misconduct and fraud), but the draughtsman has recognized a distinction, to which I have already pointed, between acts or omissions *resulting from* gross negligence and acts or omissions *constituting* wilful misconduct, fraud or bad faith. Whether one looks to the authorities decided and the principles identified in the context of New York public policy or to the simple meaning of the words without attributing to them any special meaning under New York law at all, the concepts of "gross negligence" here appears to me to embrace serious negligence amounting to reckless disregard, without any necessary implication of consciousness of the high degree of risk or the likely consequences of the conduct on the part of the person acting or omitting to act.

If the matter is viewed according to purely English principles of construction, I would reach the same conclusion. "Gross" negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence. But, as a matter of ordinary language and general impression, the concept of gross negligence seems to me capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or indifference to an obvious risk. The difference in the way in which the concepts in cll. 7.9 and 7.10 are expressed appears to me entirely consistent with the phrase receiving its ordinary meaning and embracing both situations.

As to authority, I was not referred to the criminal field, where "gross negligence" features in the law of manslaughter. In essence, the position there is that a breach of a duty of care will amount to manslaughter if its seriousness in all the circumstances is such that a jury considers that it should be characterized as a crime. See *R. v. Adamoko*, [1995] 1 A.C. 171. The analogy in the civil field would be to explain gross negligence as conduct so seriously negligent that the defendant should not be entitled to rely on the exemption clause. The test involves an element of circularity, but Lord Mackay in *Adamoko* said that it was "necessarily a question of degree, and an attempt to specify that degree more

closely is . . . extra likely to achieve only a spurious precision". Although, in the present context, the question cannot be left to a jury and it will be necessary to attempt to identify and evaluate various factors bearing on the decision, the question whether any negligence in the present case was "gross" appears to me ultimately still very much a matter of degree and judgment.

I was cited authorities from the civil field. The plaintiffs directed me to *Shawinigan Ltd. v. Vokins & Co. Ltd.*, [1961] 2 Lloyd's Rep. 153; [1961] 3 All E.R. 396 and the defendants to *Fraser v. Furman*, [1967] 2 Lloyd's Rep. 1. The latter case, decided in the context of construction of insurance policy cover against negligence and applied by later authority to property insurance, adopts a subjective approach to the mental element required before an insured may be said to have breached an express duty to take reasonable care or reasonable steps under the policy. Mr. Justice Megaw in *Shawinigan* on the other hand adopted an objective view of the mental element involved in recklessness in the context of a proviso in the London Lighterage Clause exempting from liability for unseaworthiness of the carrying barge, provided that the lighterman had not "knowingly or recklessly" supplied the unseaworthy barge. *Shawinigan* is clearly much closer in context to the present case, and I find assistance in the following passages from Mr. Justice Megaw's reasoning:

> . . . Mr. Justice Devlin had said this [in *Albert E. Reed & Co., Ltd. v. London & Rochester Co. Ltd.*, [1954] 2 Lloyd's Rep. 463, 475]:
>
> "The term 'recklessly', I think, does not really give rise to much difficulty. It means something more than mere negligence or inadvertence. I think it means running an unjustifiable risk. There is not anything necessarily criminal, or even morally culpable, about running an unjustifiable risk; it depends in relation to what risk is run; it may be a big matter or it may be a small matter."
>
> . . .
>
> The essence of the matter, therefore, as I see it, in the definition of Mr. Justice Devlin, must be in the word "unjustifiable" — "deliberately running an unjustifiable risk?" Counsel for the defendants says that it must be viewed subjectively. The test must be whether the doer of the act himself realized when he did the act, not only that he was taking a risk, but that the risk was unjustifiable. That would mean that if a man drove a car exceptionally fast along a private highway he could not properly be said to be driving recklessly if he himself was so confident of his own skill, or so obtuse or so selfish that he regarded the risk as justifiable. That is a proposition that I cannot accept. If, however, the question whether the risk is justifiable is to be viewed objectively by the standard of the reasonable man possessed of the knowledge and the circumstances which the doer of the act has or ought to have had, then I do not see that the deliberateness of the taking of the risk is an essential element. In my view, one who does something which he himself honestly, but foolishly, regards as involving no risk, may be reckless.
>
> . . .
>
> In my view "recklessly" means grossly careless. Recklessness is gross carelessness — the doing of something which in fact involves a risk, whether the doer realises it or not; and the risk being such having regard to all the circumstances, that the taking of that risk would be described as "reckless". The likelihood or otherwise that damage will follow is one element to be considered, not whether the doer of the act actually realised the likelihood. The extent of the damage which is likely to follow is another element, not the extent which the doer of the act, in his wisdom or folly, happens to foresee. If the risk is slight and the damage which will follow if things go wrong is small, it may not be reckless, however unjustified the doing of the act may be. If the risk is great, and the probable damage great, recklessness may readily be a fair description, however much the doer may regard the action is justified and reasonable. Each case has to be viewed on its own particular facts and not by reference to any formula. The only test, in my view, is an objective one. Would a reasonable man, knowing all the facts and circumstances which the doer of the act knew or ought to have known, describe the act as "reckless" in the ordinary meaning of that word in ordinary speech? As I have said, my understanding of the ordinary meaning of that word is a high degree of carelessness. I do not say "negligence", because "negligence" connotes a legal duty.

Whether cll. 7.9 and 7.10 are interpreted according to United States or English principles, the conclusion which I reach is that the concept of gross negligence in these clauses does not involve, necessarily, any subjective mental element of appreciation of risk. It may therefore include, taking the language of the American Restatement, conduct which a reasonable person would perceive to entail a high degree of risk of injury to others coupled with heedlessness or indifference to or disregard of the consequences. The heedlessness, indifference or disregard need not be conscious.

The formulation in the restatement emphasizes as the important factor the "high degree of risk" which ought reasonably to have foreseen. During

oral evidence in response to questions in chief, Judge Frankel introduced a further theme, namely that the word "serious" should be placed before the word "risk" so that the concept should read "conduct which a reasonable person would perceive to entail a high degree of *serious* risk of injury . . . ". Further, the defendants submitted that the heedlessness, indifference or disregard should (a) relate to "*probable*" consequences "of serious injury"; and (b) consist in "a *complete absence* of any attempt to avoid or minimize the serious risk of injury". Neither Judge Frankel's evidence nor the defendants' submissions persuaded me that the concept of gross negligence was subject to rigid restrictions of this nature.

This is not to say that such factors, going as they do to the crassness or blatancy of a defendant's conduct, may not be important to a decision whether negligence was gross. I see no difficulty in accepting that (a) the seriousness or otherwise of any injury which might arise, (b) the degree of likelihood of its arising and (c) the extent to which someone takes any care at all are all potentially material when considering whether particular conduct should be regarded as so aberrant as to attract the epithet of "gross" negligence. In *Shawinigan* Mr. Justice Megaw was making just such a point in the last paragraph quoted above. The American Restatement appears, at least superficially, to be concentrating on (b), when using phrases such as "the high degree of risk involved", "the highly dangerous character of his conduct" and "a strong probability that harm may result". These phrases may be sufficiently flexible to embrace or allow consideration of other factors, such as (a) and (c). I would be surprised if they were not. In any event, as a matter of construction of the present contract, I consider that all such factors must be potentially relevant. This cuts both ways. For example, if *obvious* steps have been completely omitted to guard against or cater for a risk that could have *very serious* consequences, then the fact that in many or most cases the risk was *not* likely to materialize would not automatically defeat a charge of gross negligence. Ultimately, as it seems to me, no single factor can be determinative. All the circumstances must be weighed and balanced when considering whether acts or omissions causing damage resulted from negligence meriting the description "gross" and forfeiting the contractual immunity prima facie afforded by cll. 7.9/7.10.

IV.4 *Scope of liability of PL and PSMSL*

It follows from the above analysis that, in circumstances falling within the scope of cll. 7.9 and 7.10 respectively, PL and PSMSL are under no contractual liability in the absence of (for present purposes) wilful misconduct or gross negligence. To the extent that they are under any parallel liability in tort in the same circumstances, it must be subject to similar qualification.

The plaintiffs suggest that their claims against PL and PSMSL fall outside the language of cll. 7.9 and 7.10. Their case is that PL and PSMSL recommended *Ardent* for purchase and/or gave repair estimates without any proper basis (in particular without having arranged any adequate records or physical inspection), misrepresented her condition, failed to warn (as to the risks of acquiring her and a whole number of other matters), negotiated an "as is" purchase and failed to negotiate any proper discount. The suggestion is that, in acting or failing to act in these respects, PL and in so far as they were involved PSMSL were not acting or omitting to act —

> . . . within the scope of duties of [PL or PSMSL, as the case is] with respect to (a) the management or conduct of the business and affairs of [Red Sea or Turnbridge] . . . [or] (c) the management and conduct of the business and affairs of [PL or PSMSL, as the case is] insofar as it relates to [Red Sea] . . . .

The phrase "with respect to" is said to be narrower in effect than the earlier phrase "arising out of, relating to or in connection with any action taken or omitted to be taken" within the scope of PL's or PSMSL's duties. There is in my view no substance in this suggestion. Between them it was for PL and PSMSL to identify, investigate, evaluate and make appropriate recommendations to Red Sea in respect of vessels for acquisition by Red Sea or Turnbridge. All the criticisms of PL and PSMSL relate to alleged acts or omissions within the scope of their duties with respect to the management or conduct of the affairs of Red Sea or Turnbridge, and of the business or affairs of PL or PSMSL (as the case is) relating to Red Sea. The last sentences of cll. 7.9 and 7.10 do not suggest any limitation on the scope of the earlier language of the clauses. They simply introduce a limited immunity in cases where professional advice is followed, conditional on the exercise of "extreme care" in the choice of professional advisers.

IV.5 *The respective roles of PL and PSMSL*

As a matter of contract, the role of PL was to provide commercial advisory services relating to the tankers, while that of PSMSL was to provide technical advisory services. The CAA refers to PL performing and rendering "administrative, consulting and other services" including without limitation "providing general business advice, including

recommendations as to, and identification of, acquisitions and dispositions of tankers". The TAA refers to PSMSL performing and rendering "technical, operational, administrative, consulting and other services" including without limitation "performing services with respect to the operations of the Tankers including establishing requirements for the operation of the Tankers... ". The CAA therefore identifies, while the TAA does not, the area of tanker acquisition which is under scrutiny in this case.

Nevertheless, it is the defendants' case that PSMSL, through Mr. Dunn, performed an important role in this area, in relation to *Ardent*, which they describe as follows: making a technical assessment of the vessel, after she had been identified by PL; arranging for and co-ordinating for that purpose the services of other independent contractors such as Abstech and Mr. Reilly and professionals from other companies such as Captain Kazazis; reviewing the reports and advice received from them; and discussing with PL PSMSL's resulting technical assessment.

PL's role on the other hand, the defendants describe as being, firstly, to identify vessels within the parameters of interest to Red Sea. Broadly that meant a medium sized tanker built between 1971 and 1977 and (after the acquisition of *Archer* for some U.S.$20 m. had led to protest) it involved looking for an older and cheaper vessel to counterbalance the negative impact of her purchase on the fund's projected profitability. Secondly, they were to arrange for and co-ordinate the services of other experts or consultants, such as PSMSL, and to discuss with them their advice on such matters as the vessel's technical condition and the costs of any works required; finally they were to make an overall assessment, including as to price, to determine whether the vessel was worth recommending to the Red Sea board, and were to handle the purchase, including the negotiation of its terms. Broadly, it is Mr. Anderson, with some involvement and overriding responsibility on the part of Mr. Papachristidis himself, who is identified as fulfilling these tasks on behalf of PL.

As a matter of theory, and (it may well be) of original intention within the Papachristidis organization, the suggested division of roles creates no difficulty. In the real world, the close working relationship between the three main protagonists within the Papachristidis organization and the absence of one or other from the Papachristidis offices from time to time meant a greater degree of overlap in their roles and a less clear-cut distinction. The primary enquiry must be who was actually involved and what actually happened.

IV.6 *Did Mr. Papachristidis, Mr. Dunn and Mr. Anderson owe any and if so what duties in tort when acting on behalf of PL and/or PSMSL?*

(a) The law

The answer to this question depends in each case upon whether the relevant individual owed personally a duty of care in respect of his acts or omissions about which the plaintiffs complain in this action. In the light of *Henderson v. Merrett Syndicates Ltd.*, [1994] 2 Lloyd's Rep. 468; [1995] 2 A.C. 145, the plaintiffs do not quarrel greatly with the use as a "convenient shorthand" of the concept of assumption of responsibility, while emphasizing that the test whether responsibility should be regarded as having been assumed is objective. It is also common ground that the application of the test is fact intensive; it requires close attention to all the circumstances and features of the particular case.

The plaintiffs draw analogies on the facts with features present in *Henderson v. Merrett*. They submit that, like the managing agents there, the relevant individuals here accepted the plaintiffs under their "management" and held themselves out as possessing special expertise on which the plaintiffs relied. They emphasize in this connection the importance of Mr. Papachristidis and Mr. Anderson to the operations of PL and of Mr. Dunn to the operations of PSMSL. They point to the recognition of their importance in references in the Red Sea PPM and prospectus to Mr. Papachristidis as the founder and owner and to all three as "key persons" or "key management personnel". It should be noted however that the same documents made very clear that the actual contracts for services were to be with PL and PSMSL.

The plaintiffs point out that at first instance in *Henderson v. Merrett*, [1997] L.R.L.R. 265 Mr. Justice Cresswell held the active underwriter personally responsible in tort for negligence in effecting the syndicate's reinsurance to close. But the circumstances there were that the effecting of such reinsurance was specifically referred to, in explanatory notes to the relevant Lloyd's byelaw, as "the responsibility of the managing agent in consultation with the active underwriter" and was recognized in evidence by the active underwriter himself as his "most important function". More generally, great caution is required in extrapolating conclusions from as special a relationship as that between a managing agent or active underwriter and an indirect Lloyd's Name into the present entirely different situation. Lord Goff himself voiced strong suspicions that the situation which arose in that case was "most unusual": see at p. 499, col. 1; p. 195G.

Apart from the general guidance given in *Henderson v. Merrett* and *Marc Rich & Co. A.G. v. Bishop Rock Marine Co. Ltd.*, [1995] 2 Lloyd's

Rep. 299; [1995] 3 W.L.R. 227, the most relevant authorities in the present context are *Punjab National Bank Ltd. v. De Boinville*, [1992] 1 Lloyd's Rep. 7 at pp. 17–19 per Mr. Justice Hobhouse and at p. 37 per Lord Justice Staughton, *Trevor Ivory Ltd. v. Anderson*, [1992] N.Z.L.R. 517 and *Williams v. Natural Life Health Foods Ltd.*, (unreported, Dec. 1, 1995, Mr. Justice Langley; affirmed by a majority Dec. 5, 1996). The judgments in these cases identify further authorities which I need not cite. The *Punjab* case was referred to in the House of Lords in *Henderson v. Merrett* though on a different point, and in the Court of Appeal in *McCullogh v. Lane Fox & Partners* (unreported, Dec. 19, 1995) where Lord Justice Hobhouse summarized it as deciding in relation to employees that the relevant consideration was the role they played in the transaction, not the fact that they were the servant or agent of another. In *Punjab* itself individual brokers entrusted with the whole or nearly the whole of the tasks which their principals undertook were held to owe tortious duties of care to the relevant clients. Mr. Justice Hobhouse's judgment at first instance makes clear that the existence or otherwise of duties of care on the part of (i) an employer and (ii) a particular employee are separate matters. The former does not necessarily depend on the latter, any more than the latter derives necessarily from the former:

> Where the transaction is one which gives rise to a duty of care owed in tort by the individual's employer to the relevant plaintiff it does not always follow that there will be a like duty of care owed by the individual employee as well. . . . The relevant tests of tortious liability are objective taking into account the actual facts applicable to the relevant defendant. (See pp. 18–19.)

Similar statements are to be found in the judgment of Mr. Justice Hardie Boys in the *Trevor Ivory* case, at pp. 526 (foot) to 527 (top). The judgments in *Trevor Ivory* contain illuminating analyses of the authorities (although, by reason no doubt of its date, not of the *Punjab* case) and of factors which may bear on the recognition or otherwise of individual responsibility in the case of a "one-man" company with which a contract is made to obtain the services of the individual behind the company. The plaintiff company owned a raspberry plantation. It engaged as consultant the first defendant, a one-man company, which, through its alter ego the second defendant, advised the plaintiff to use a particular herbicide to control growth of couch grass. He did not advise the plaintiff to remove foliage near the ground in order to protect the raspberry plants from the spray and the crop was badly affected. The New Zealand Court of Appeal distinguished the enquiry arising in the context of the tort of negligence, which depends on the existence of a duty of care, from that arising in respect of some other torts, particularly torts of strict liability such as breach of copyright: see per Mr. Justice Hardie Boys at p. 527. Further, in statements entirely consistent with the recent approach of the House of Lords, the Court emphasized that there is more to the recognition of a duty of care than foreseeability and proximity. General considerations of justice and policy enter into the enquiry. Cooke, P. (as he was) identified in this connection at p. 524 the potential relevance of considering whether conduct was likely to give rise to personal injuries or simply to property or economic loss claims. The *Marc Rich* case highlights this. Further, a case of exposure to pure economic loss like the present may be viewed as lying at a more extreme point on the spectrum than a case of exposure to property damage: see e.g. per Lord Goff in *Henderson v. Merrett* at p. 499, col. 1; p. 196A–B.

Cooke, P. further cited with approval the reasoning of the British Columbia Court of Appeal in *Sealand of the Pacific v. Robert McHaffie Ltd.*, [1974] 51 D.L.R. (3d) 702 in a case where plaintiffs sought to pursue a careless employee (McHaffie) personally:

> Here McHaffie did not undertake to apply his skill for the assistance of Sealand. He did exercise, or fail to exercise, his skill as an employee of McHaffie Ltd. in the carrying out of its contractual duty to Sealand. Further, while Sealand may have chosen to consult McHaffie Ltd. because it has the benefit of Mr. McHaffie's services as an employee, it was with McHaffie Ltd. that Sealand made a contract and it was upon the skill of McHaffie Ltd. that it relied.

The importance of a deliberately constructed contractual framework has been recognized in numerous cases, to which Lord Goff adverted in *Henderson v. Merrett* at p. 499, cols. 1 and 2; pp. 195G–196F. The scheme in *Henderson v. Merrett* did not militate against the recognition of a tortious duty of care towards indirect Names on the managing agents' part. The tortious duty mirrored the contractual duties which the managing agents had undertaken to the members' agents for Names' benefit; it doubtless also reflected the commercial reality that the Names (direct and indirect) would regard themselves as being "on" the managing agents' syndicate, would know that their underwriting was being handled by the managing agents and would receive, directly or via members' agents, reports reflecting this.

More generally, Cooke P. expressed concern that liability in negligence should not erode the principles of limited liability and separate identity

(p. 523). He expressed no doubt about the proposition that it was open to the owner of a one-man company to assume personal responsibility for the exercise of care, citing in this connection *Fairline Shipping Corporation v. Adamson*, [1975] Q.B. 180. There the director had indicated expressly that he regarded himself, and not his company, as concerned with the storage, in peculiar circumstances further identified by Mr. Justice McGechan in *Trevor Ivory* at p. 529. Cooke P. continued:

> ... it seems to me that something special is required to justify putting a case in that class. To attempt to define in advance what might be sufficiently special would be a contradiction in terms. What can be said is that there is nothing out of the ordinary here.

In *Williams* Mr. Justice Langley reviewed the authorities and, on the facts, concluded that the case before him was "an exceptional case" where the director did assume personal responsibility in the knowledge that the plaintiffs would rely on his personal knowledge and experience. The case concerned negligently prepared sales projections issued by the defendant company, Natural Life Foods Ltd., to the plaintiffs, upon which the plaintiffs relied in taking up an ill-fated health food franchise in respect of premises in Rugby. The defendant company had been recently set up by the director, who had had previous experience of operating a health food shop in Salisbury. Both the defendant company and the director were held liable for negligent misstatement. A key element in the decision was the fact that the relevant health food shop franchising business was newly established and the projections were and could only be based on the director's personal knowledge and experience in establishing and operating his own health food shop in Salisbury. Mr. Justice Langley also found that the director had personally approved the sales projections issued to the plaintiff in respect of the Rugby premises, overruling objections from the company's franchising director relating to the suitability of the site.

In the Court of Appeal, the majority relied heavily on these factors in affirming Mr. Justice Langley's conclusion that special circumstances existed setting the case aside from the ordinary and justifying a finding of personal liability for negligence in the completion of the projections, despite the company's separate corporate identity and responsibility. The leading judgment of Lord Justice Hirst contains a full review of the authorities and indicates that the correctness of the principles in *Trevor Ivory* was not challenged. The difficulty in the Court of Appeal lay in their application to the particular facts.

The Court of Appeal treated the same general principles as applicable to the case of negligent misstatement before it as applied in *Fairline*, where the issue was whether there was personal responsibility for property, and in *Trevor Ivory*, a case of negligent advice. In that light, there is no difficulty in concluding that such principles apply in the present case, which is one of an allegedly negligent or grossly negligent recommendation.

My attention has also come to the twin authorities in the Supreme Court of Canada of *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299; 97 D.L.R. (4th) 261 and *Edgworth Construction Ltd. v. N. D. Lea and Associates Ltd.*, [1993] 3 S.C.R. 206. They indicate that in Canada a distinction in approach exists according to whether the claim against an employee is for breach of an alleged duty of care in respect of property damage (duty recognized) or for negligent misstatement (duty denied). No absolute distinction of that nature appears in any English authority, although, as I have indicated, it is no doubt relevant to take into account as one factor the nature of any responsibility suggested. If and so far as any such distinction were relevant, a case of an allegedly negligent recommendation, such as the present, would anyway appear to fall into the latter category recognized in the Canadian cases.

(b) The facts

The corporate and contractual structure which was set in place in the present case has I consider fundamental importance. Red Sea itself was the corporate conception of the banks and the Papachristidis group, but was clearly intended to exist and operate quite separately from them. The four individual shipowning companies followed a familiar pattern of one-ship ownership, designed to ensure that their individual assets and liabilities remained separate from those of any entity. The two Papachristidis companies, PL and PSMSL, were put forward as entities, separate from other group or associated companies, to undertake the functions contained in the CAA and TAA. Mr. Reddy told me that it was because that was known and understood and because Chase viewed them as "paper companies" that Chase sought and obtained from other Papachristidis companies (HSC and two associated companies) covenants contained in a placement agents agreement relating to the PPM.

Under the CAA and TAA Red Sea obtained by contract the undertakings of PL and PSMSL, within their respective spheres. Red Sea never at any time sought express collateral undertakings from the personal defendants in respect of their handling of the matters entrusted to PL and PSMSL. Had they done so, it is improbable to suppose that they would have been forthcoming. In the *Williams* case, as I

have pointed out, the representations in question related to personal experience outside the scope of the relevant company's activity. Here, the personal liability in negligence sought to be imposed on the individual defendants as officers of PL and/or PSMSL is in respect of matters falling directly within PL's and PSMSL's responsibility under the CAA and/or TAA. Further, although all three principal officers of PL and PSMSL are criticized as negligent, the roles they played did not cover the whole field of PL's and PSMSL's activity. PL and PSMSL undertook a whole range of responsibilities, commercial and operational, managerial and technical, and had a number of employees as well as engaging outside advisers. Although they had overall responsibility for PL and PSMSL, the actual functions of Mr. Papachristidis, Mr. Anderson and Mr. Dunn cannot be regarded, together or a fortiori individually, as coterminous or co-extensive with those undertaken by PL and PSMSL.

Both sides rely on cll. 7.9 and 7.10 respectively of the CAA and TAA. The personal defendants submit that these clauses militate against the recognition of any duty of care at all. But, if necessary, they say that they are entitled as third party beneficiaries to the protection of the clauses under New York law. In this connection they submit that the clauses, upon their true construction, exonerate them entirely from liability or alternatively protect them against all damages (as defined) except any resulting from acts or omissions resulting from or constituting gross negligence, wilful misconduct, fraud or bad faith.

The plaintiffs acknowledge that the clauses cannot and do not *create* any contractual or tortious duty on the part of the personal defendants. They pleaded that the personal defendants could not rely on the clauses at all. At trial, they conceded that English law would allow the personal defendants as third party beneficiaries to claim such protection as the clauses conferred on them, since that was the effect of New York law, to which the CAA and TAA are subject. I did not hear argument on the precise extent to which this concession might actually represent English law. The theory behind it is presumably that the proper law of the contract should regulate relations between parties to the contract and third persons as closely connected to the parties in the making of the contract as the present personal defendants. The plaintiffs submit however that there is no warrant for reading the clauses as excluding all liability on the part of such individuals. They point out that under New York law an exclusion of all liability would be invalid in relation to gross negligence, wilful misconduct, fraud or bad faith. Their case at trial was thus that the clauses were consistent with a conclusion that the personal defendants assumed liability for damages resulting from acts or omissions resulting from or constituting gross negligence, wilful misconduct, fraud or bad faith.

I turn to the construction of the clauses. The defendants found their submissions on the fact that each clause starts with a general exoneration of liability or responsibility on the part of the relevant company and its officers, directors and employees or agents, while the exception refers only to damages "resulting from acts or omissions of the [Commercial/Technical] Advisor". They say that this means that only the advising company was ever to have any liability, and that the only alternative would be ludicrous, namely that it was intended that the company and all officers, etc. would be liable if the advising company was guilty of gross negligence, etc. I do not accept either submission. Each clause starts by identifying the beneficiaries of its protection. It then defines the scope of the losses in respect of which they are to be protected. That is "any losses, claims, damages, liabilities or expenses (collectively "Damages") . . . arising out of, relating to or in connection with any action taken within the scope of the duties of the . . . Advisor under this Agreement or omitted to be taken by the . . . Advisor with respect to . . . ". This language contemplates that "Damages" as defined may arise out of actions or omissions within the scope of the advisor's duties. In the exception, the phrase "Damages resulting from acts or omissions of the . . . Advisor" simply repeats the same conception, with a slight degree of shorthand. It contains therefore nothing to indicate that officers, directors, etc. are not to be liable or responsible in case of gross negligence, etc. On the contrary, they cannot claim the clause's benefit, if their gross negligence has led to acts or omissions of the advising company resulting in damages.

This conclusion is in my judgment reinforced by the phrase "in each case" in the exception. Grammatically, the phrase refers most naturally to the respective cases of the advising company and its officers, directors, employees or agents identified at the outset of the clause. The only other possibility is that the phrase may have been intended to emphasize that the exception applied to each of the areas where action or omission might occur, identified just before it as (a), (b) and (c). Even if that were, however, the intention, it would not lead to a conclusion that the sole effect of the exception was to preserve the liability or responsibility of the advising company in cases of gross negligence, etc.

The fact that New York law would not recognize the validity of any exclusion of gross negligence in my judgment lends further support to the same conclusion. The defendants' response is that the

principle of New York law, whereby clauses purporting to exclude all liability are invalid in relation to gross negligence, wilful misconduct, fraud or bad faith, applies in the context of liability for the tort of negligence under New York law, and there is nothing to show that it has any relevance to tortious liability under, in this case, English law. That may be so. However, the clauses were drafted with New York law in mind. Whether or not the exceptions which they contain precisely mirror the restrictions on the ability to exclude liability under New York law, it is improbable that the draftsman meant simply to disregard those restrictions in respect of officers, directors, employees and agents in the manner implicit in the defendants' submission.

Thus, if English law would otherwise regard the personal defendants as having assumed any tortious responsibility, the effect of the clauses would be neither to negative any such assumption nor to exclude all liability in the event of any failure of performance. Rather, it would mean that there could have been no unqualified assumption of a duty of care. The responsibility assumed could only have been to avoid causing "Damages" (as defined in each clause) by acts or omissions resulting from gross negligence or constituting wilful misconduct, fraud or bad faith, or (putting the matter the other way round) for liability limited to "Damages" so caused. To state the matter in this way is to demonstrate the unusually qualified nature of any tortious responsibility or liability which can have been assumed.

That any tortious responsibility or liability would be unusually restricted does not mean that it cannot have been assumed. On the central question whether it was here assumed, the clauses seem to me to be ultimately neutral. Their language clearly derives from the New York legal background of the CAA and TAA. Even in the context of New York law, it is not clear that there would, with or without such clauses, exist a personal duty of care on the part of officers and directors in the position of the personal defendants towards Red Sea or its subsidiaries. Assuming that there would be, the language of the clauses still lends no support to the plaintiffs' case that the personal defendants should be treated under English law as having assumed any tortious responsibility whatever towards the plaintiffs, even in circumstances of gross negligence. In the event of wilful misconduct or fraud, recognized English torts could assist plaintiffs without any need to show a relationship involving a duty of care. In a case where what is alleged is a breach of a duty of care under English law, the existence of exempting provisions which go as far as permissible under New York law appears to me to have no real bearing on the issue whether the personal defendants should be treated as having assumed towards Red Sea or its subsidiaries any duty, or any duty restricted by the language of the clauses.

In the light of the other factors which I have already identified, I do not consider that it would be appropriate to treat the personal defendants as undertaking any duty of care, even a duty limited to responsibility for gross negligence, wilful misconduct, fraud or bad faith or carrying with it an exception from liability except in such circumstances. I do not regard this as either a special or an exceptional case. Red Sea and its subsidiaries should be held to the contractual framework which was deliberately negotiated. Even if the personal defendant were grossly negligent, there is no basis for treating them personally as having undertaken responsibility in respect of the substantial commercial risks of a financial nature inherent in the success or failure of the relevant transactions.

IV.7 *Mr. Anderson's position as an officer of Red Sea*

That Mr. Anderson owed to Red Sea duties as a director of Red Sea is not in issue. The relevant duty can be summarized for present purposes as obliging him, when acting as a director of Red Sea, to act with the skill and care to be expected of a reasonably competent person with his expertise and knowledge: see e.g. Palmer's Company Law, vol. I, par. 8.406; *Dorchester Finance Ltd. v. Stebbing*, [1989] B.C.L.C. 498 at pp. 501–502 per Mr. Justice Foster. The issue for present purposes is when and in what respects Mr. Anderson falls to be treated as having acted for Red Sea or its subsidiaries.

The substance of the plaintiffs' pleaded case is that no sensible distinction can be drawn between Mr. Anderson's activities on behalf of PL and/or PSMSL and his activities as an officer of Red Sea and its shipowning subsidiaries. Thus it is pleaded that he acted in an executive capacity on behalf of Red Sea and its subsidiaries, and that his acts as such embraced (1) the identification of vessels, (2) any discussions with person other than Red Sea directors concerning *Ardent's* inspection reports and estimated repair costs and whether she should be recommended for purchase as well as (3) recommending *Ardent* to fellow Red Sea directors. The pleading alleges that it is impossible and unnecessary to seek to disentangle the capacities in which Mr. Anderson acted. Orally, the plaintiffs did not limit the full width of this case, but emphasized that it was enough for their purposes that Mr. Anderson should be treated as acting for Red Sea at the third stage when making the recommendation to Red Sea and to other Red Sea directors. At this stage at least, the plaintiffs submit, his knowledge about *Ardent* and the matters making her inappropriate for the fund should have been made available to Red Sea and to the relevant shipowning subsidiary. In so far

as he knew (or, presumably, should have appreciated) that it was inappropriate to recommend *Ardent* or to do so without qualification or warning, he should have informed Red Sea and other Red Sea directors and was in breach of duty as a director of Red Sea in not doing so. The submission was also expanded to apply in the context of the fifth plaintiff as the company owning *Ardent*. Although Mr. Anderson was not formally a director of the fifth plaintiff, the fifth plaintiff's affairs were controlled by those acting for Red Sea and the submission was that Mr. Anderson should be treated as owing to the fifth plaintiff like duties to any which he owed to Red Sea.

I start by considering the nature of Mr. Anderson's appointment as an officer of Red Sea. His appointment was as chairman of the board of directors. As such his role would be to preside over meetings of the board and shareholders and to ensure that issues on the agenda were fully and fairly discussed. The minutes record Mr. Anderson informing the board of vessels then being inspected, and the board resolving that the technical adviser (or, as Miss O'Donnell-Keenan corrected it, the commercial adviser with the assistance of the technical adviser) be requested to arrange for the purchase of vessels as soon as possible. Actual authority was given during the meeting on June 15, 1989 to the appointed managing director, Mr. Vouzounerakis, to enter into contracts for the purchase of vessels. Mr. Anderson in communicating information to the board about the current position regarding vessels being inspected was, in my view, acting as an officer of PL and/or PSMSL. The CAA and TAA were approved for execution with PL and PSMSL at the same meeting. PL and PSMSL were the companies which were requested to arrange for the purchase of vessels as soon as possible. To treat Mr. Anderson in his capacity as chairman of Red Sea as undertaking responsibility for the very functions which were entrusted to PL and PSMSL appears to me unjustified.

I have mentioned in Part II.2 the procedure contemplated on June 15, 1989 whereby Red Sea board members would receive recommendations in advance of prospective purchases and would have an opportunity to discuss and approve or disapprove. Mr. Anderson was one such board member. It was his duty as a director of Red Sea to consider whether to accept any recommendation which PL and/or PSMSL made to Red Sea. As an officer of PL he would inevitably have been intimately involved in deciding whether and what recommendation should be put forward in respect of any particular vessel. The essence of the plaintiffs' case is that, at latest when any recommendation was put forward to the board members of Red Sea for consideration, Mr. Anderson fell to be treated as knowing in his capacity as a director of Red Sea about any inappropriateness in the recommendation and any inadequacy in the process of inspection and assessment leading up to its making which was within his knowledge as an officer of PL and/or PSMSL — a fortiori, submit the plaintiffs, when Mr. Anderson was the actual person through whom the recommendation was to reach other directors of Red Sea. I have already found that it is not in fact established in relation to *Ardent* and Mr. Anderson did in fact fulfil this function (although each side submitted that he did, albeit identifying quite different occasions).

I do not in any event accept the plaintiffs' submissions regarding the knowledge to be imputed to Mr. Anderson as an officer of Red Sea. It was no part of Mr. Anderson's role *as chairman of Red Sea* to undertake any of the functions entrusted to PL and PSMSL or to acquire or communicate knowledge of events leading up to a decision by PL and/or PSMSL to make an unqualified recommendation to Red Sea. The evaluation of individual vessels and the formulation of recommendations (whether with or without any qualification or warning) was a matter for PL and/or PSMSL. Red Sea relied exclusively on PL and PSMSL for such matters. If and when PL and PSMSL determined to make an unqualified recommendation in respect of any vessel, as occurred with *Ardent*, the board members of Red Sea, including Mr. Anderson, were entitled *qua board members* to take the recommendation at face value. It was no part of Mr. Anderson's function or duty *qua director of Red Sea* to review or re-appraise the process by which PL and PSMSL had determined to make an unqualified recommendation to Red Sea. Any criticism of the appropriateness of the recommendation or of the process leading up to it is a matter between Red Sea and PL or PSMSL, not between it and Mr. Anderson. Any other conclusion would attach to Mr. Anderson's chairmanship and limited role on behalf of Red Sea and its subsidiaries an expansive responsibility derived in reality from his role on behalf of PL and PSMSL, acting under the contractual arrangements which they made with Red Sea.

The potentially disproportionate consequences of the exposure which the plaintiffs seek to impose on Mr. Anderson as their officer are also worth observing. PL and PSMSL benefit by carefully constructed contractual protections. Officers of PL and PSMSL would benefit by the same protections, if contrary to my view they were to be regarded as assuming any personal responsibility at all. But Mr. Anderson is, the plaintiffs submit, liable for (in effect) the very same conduct for which they criticize PL, PSMSL and the personal directors of PL and PSMSL, without any contractual protection at all. That is the plaintiffs' case. The defendants

submit that, if Mr. Anderson's capacities are so closely entangled as not to be capable of separation, then he must be able to continue to claim the protection of cll. 7.9 and 7.10 in the CAA and TAA, even if and so far as he is liable as an officer of Red Sea. I have difficulty in seeing how this could be so.

Alternatively, the defendants submit that Mr. Anderson is entitled to the benefit of art. 103 of Red Sea's articles of association. Article 103 reads as follows:

> The Directors, Officers, employees and agents for the time being of the Company when acting in relation to any of the affairs of the Company shall be indemnified out of the assets of the Company from and against judgements, fines, amounts paid in settlement and expenses incurred in defence of any action commenced against any such Director, Officer, employee or agent which they or any of them shall or may incur or sustain by reason of any act done or omitted in or about the execution of their duty in their respective offices, except such (if any) as they shall incur or sustain by or through their own acts or omissions in bad faith or involving improper benefit, fraud, breach of fiduciary duty, gross negligence or wilful misconduct.

To this the plaintiffs make two responses. The first is that art. 103 formed no part of the terms of Mr. Anderson's appointment as director. His appointment was recorded by letter agreement dated June 14, 1989 sent —

> ... to foster the continuous involvement by you as a director of the Board of Directors ....

The letter went on:

> This letter agreement sets forth the terms and conditions of this involvement.
>
> 1. *Involvement.* You agree to continue to act as a director of the Company commencing on the date hereof and through the earlier of: (a) your resignation (as described in (2) below), and (b) your removal by the shareholders of the Company as provided by the Articles of Association of the Company.

After provisions regarding resignation and notices, cl. 4 read:

> 4. *Miscellaneous.* No provision of this Agreement shall be modified, waived or discharged unless such waiver, modification or discharge is agreed to in writing and signed by you and such officer as may be specifically designated by the Board....

The last two clauses provided for the validity of the rest of the agreement if any provision should be invalid and for execution of the agreement in counterparts.

It is now common ground that there is nothing under Cayman Islands law, which governs the incorporation of Red Sea, to invalidate art. 103 if incorporated in any agreement to appoint Mr. Anderson as a director. But the plaintiffs submit that there is nothing making Mr. Anderson's appointment subject generally to the articles, and that cl. 4 positively excludes incorporation either of the articles generally or of art. 103 in particular. I should not have been inclined to accept that submission. The plaintiffs further submit that, even if art. 103 is incorporated, it does not assist Mr. Anderson. It indemnifies only —

> ... from and against judgements, fines, amounts paid in settlement and expenses incurred in defence of any action commenced against any- ... Director, Officer, employee or agent which they or any of them shall incur or sustain by reason of any act done or omitted in or about the execution of their duty....

The language is not strictly grammatical, but however it is read it is limited to claims or expenses in proceedings commenced by a third party — compare *re City Equitable Fire Insurance Co. Ltd.*, (1924) 19 Ll.L.Rep. 93; [1925] Ch. 407 at p. 430 where Mr. Justice Romer expressed a similar view obiter in relation to wording in the article there under review. Willingness to indemnify in respect of third party claims does not necessarily equate with willingness to release from liability to the company itself. Article 103 does not in my judgment constitute any such release, and its protection would therefore have been of no assistance in the present action by Red Sea.

The conclusions which I have reached regarding the limited nature of Mr. Anderson's role on behalf of Red Sea leave little scope for the defendants' riposte that, if it was within Mr. Anderson's knowledge, as a director of Red Sea, that an outright recommendation to acquire *Ardent* was inappropriate, or inappropriate without qualification or warning, the same knowledge falls to be imputed to Red Sea and to the fifth plaintiff so as to defeat their claims. The plaintiffs' assertion that Mr. Anderson fulfilled an executive role on behalf of Red Sea led at one point even to a submission by the defendants that PL's and PSMSL's functions were limited to making a recommendation. If any qualification or warning required to be given in relation to the recommendation, it was, they said, up to Mr. Anderson, acting purely in his capacity as a director of Red Sea, to bring the relevant matters to the attention of Red Sea. PL's and PSMSL's only commitment was to allow him in this way to use as an officer of Red Sea the knowledge which he had acquired as an officer of PL and PSMSL. The submission would clearly undermine the contractual structure and the role and responsibilities

placed on PL and PSMSL. It fails once it is recognized that it was no part of Mr. Anderson's role *as chairman of Red Sea* to undertake any of the functions entrusted to PL and PSMSL or to communicate knowledge of events leading up to a decision by PL and/or PSMSL to make an unqualified recommendation to Red Sea.

Mr. Lyon further submitted that PL and PSMSL never in fact resolved to make unqualified recommendations, but left it to Mr. Anderson to use whatever knowledge he had in whatever way was appropriate in discussing any particular vessel with other Red Sea directors. That submission is not made good on the facts. Firstly, it is not shown that it was Mr. Anderson who was responsible for discussing *Ardent* with other Red Sea directors. Secondly, the likelihood is that the conversations between Mr. Dunn, Mr. Anderson and Mr. Papachristidis led to a conclusion that it was worth trying to purchase *Ardent* for around U.S.$12 m., with repair costs of U.S.$2 m. in mind, and that she should be recommended accordingly. I do not consider that it was contemplated that Mr. Anderson would become involved in discussions with other Red Sea directors about the background or basis of the recommendation, nor did he. The whole process of recommendation has, as I have said, become laden with a formality and significance which I do not believe that it possessed at the time. In one way or another, there is no reason to doubt that Mr. Bouckley at least was given notice of the proposed purchase in advance. But the reality is that, once PL and PSMSL had identified and recommended without qualification a vessel falling within the parameters previously set and meeting Mr. Baarma's concerns regarding age and price, the agreement of the Red Sea directors was to all intents and purposes assured. The Red Sea directors were relying on PL and PSMSL as specialist advisers to identify and recommend an appropriate vessel. There was no basis on which they could take matters further.

Had it been part of Mr. Anderson's role as chairman of Red Sea to communicate such knowledge, so that he was in breach of duty owed to Red Sea and/or the fifth plaintiff in not doing this, I should still not have accepted the defendants' submission that his knowledge should necessarily be attributed to Red Sea or the fifth plaintiff so as to defeat their claims against the defendants. Whether knowledge possessed by an individual officer is to be attributed to the company of which he is officer is not answered by determining that the officer owed a duty to pass his knowledge to the company or other officers of the company. The Court may of course infer as a matter of fact that the duty has been duly performed, but this is no more than a rebuttable presumption.

In support of these propositions I refer to *El Ajou v. Dollar Land Holdings plc.*, [1994] 2 All E.R. 685 and *Meridian Global Funds Management Ltd. v. Securities Commission*, [1995] 2 A.C. 500. The judgment of Lord Justice Hoffmann with which Lord Justice Rose agreed in *El Ajou* identifies three categories of case where knowledge of an agent is imputed to his principal: (i) where an agent's knowledge affects the performance or terms of a particular contract, (ii) where his principal has a duty to investigate or make disclosure and (iii) where an agent is authorized to receive communications. Neither (i) nor (ii) applies in the present context. In *El Ajou* (iii) was inapplicable because Mr. Ferdman had received information about the relevant matters while acting as agent for third parties, not for the company ("DLH"): see at p. 703d. So here any relevant knowledge acquired by Mr. Anderson was acquired by him while acting for PL and/or PSMSL, not for Red Sea or its subsidiary. Lord Justice Hoffmann went on to consider whether Mr. Ferdman, in his capacity as broker employed by DLH and/or as chairman of DLH (in which connection the Court of Appeal also held him to have been acting as DLH's directing mind and will in respect of the relevant transaction), owed to DLH a duty to communicate to DLH the knowledge which he had come by acting for the third parties; and, if he did, whether that meant that such knowledge was to be imputed to DLH. Lord Justice Hoffmann was inclined to agree that he did owe such a duty: p. 703f. But he held that, in the absence of any duty on DLH to investigate, knowledge so acquired by Mr. Ferdman was not to be imputed to DLH if he did not actually communicate it to DLH: pp. 703h–704j. So here, even if Mr. Anderson was under a duty to communicate to Red Sea directors knowledge of factors relevant to PL's and/or PSMSL's recommendation of *Ardent*, still such knowledge is not to be imputed to Red Sea, since he did not actually communicate it. There is no suggestion that Mr. Anderson was the directing mind and will of Red Sea for the purposes of attributing his knowledge on that ground. The directing mind and will was the board as a whole, which alone had responsibility for approving or disapproving any recommendation.

The *Meridian* case reinforces this conclusion. The advice of the Privy Council was given by Lord Hoffmann. He emphasizes the common sense underpinning of the principles governing attribution of knowledge. The question whether knowledge of an agent should be attributed to his principal depends upon the context and purpose of the question. Here the context and purpose is a defence to the effect that the plaintiffs' complaint about the making of an unqualified recommendation without warning must fail, because the plaintiffs through

Mr. Anderson were aware of the factors which made the recommendation unsuitable or of the qualifications and warnings which should have accompanied it. The only persons whose knowledge could sensibly be attributed to Red Sea and the fifth plaintiff in this context would be the Red Sea board as a whole. PL and PSMSL cannot sensibly be regarded as having fulfilled their contractual duties to Red Sea merely because one of their officers was a member of Red Sea's board. Even if Mr. Anderson informed other directors of the recommendation, which is not shown in the case of *Ardent*, still his knowledge could be no substitute for communication to the whole board, if he did not in fact pass it on.

V. GROSS NEGLIGENCE — BACKGROUND MATTERS

V.1 *Expert evidence*

I start with an issue regarding the need for expert evidence and the extent to which any need was met. The issue arose in the context of the plaintiffs' criticisms of Mr. Papachristidis, Mr. Anderson and Mr. Dunn. The plaintiffs submit that many of their criticisms do not raise any particular matters of expertise, and that so far as they do such expertise is supplied by the evidence of Mr. Henderson and Mr. Houghton.

The roles of Mr. Papachristidis and Mr. Anderson were primarily commercial, not technical. It was incumbent on them to assess from all angles the appropriateness of any vessel identified as a possible purchase for the Red Sea fund. On the technical side, they would rely on Mr. Dunn's appraisal. This does not exclude the possibility that there were some technical aspects so obvious that Mr. Papachristidis and Mr. Anderson were bound to have regard to them, irrespective of Mr. Dunn. Wider commercial considerations which they would consider would include a vessel's age and price, any features which made it more or less attractive for trading purposes (although as a medium-sized oil tanker there appears to have been little special about *Ardent*), the availability and merits of other vessels for purchase and actual and anticipated market conditions.

The defendants submit that the assessment which Mr. Papachristidis and Mr. Anderson were called on to make was one which is incapable of sensible or proper review by a Court without the assistance of someone who has fulfilled the same role. According to this submission, the plaintiffs, in order to make good any criticisms of Mr. Papachristidis and Mr. Anderson, would have to call someone with equivalent experience as an owner or manager in evaluating and deciding whether to acquire elderly second-hand tankers, on the basis of technical advice from an engineer or technical expert in Mr. Dunn's position. If this submission were right in principle, the nature of any admissible expert evidence would seem to require even tighter definition. The evidence of an owner or manager would not by itself be sufficient. The present issue concerns the appropriateness of the purchase of *Ardent* for a fund which was being advised by and whose vessels were to be managed by PL or PSMSL. A possible criticism of Mr. Dunn's thinking is that he viewed vessels acquired by the fund as if they were part of a single fleet, consisting of all vessels managed by the Papachristidis group, and that this led him to accept an approach to repair costs based to some extent on averaging over the whole fleet, when repair costs incurred on any Red Sea fund vessel would fall exclusively on that fund. The defendants' submissions on expert evidence suggest that the only admissible evidence would have to come from a technical adviser/manager responsible for the technical appraisal of a limited number of vessels to be considered for acquisition and subsequent management on behalf of a third party fund.

In my judgment, the defendants' submissions expand the scope of expert evidence beyond its proper sphere. Taking first Mr. Papachristidis and Mr. Anderson, I consider that their positions with respect to PL and PSMSL and the fund can and should be considered, and the appropriateness and reasonableness of their conduct in relation to the fund can and should be evaluated, by the Court. There is no need or indeed place for the expert evidence which the defendants suggest as essential. I find of assistance two particular passages which the plaintiffs cited. The first is from *R. v. Bonython*, [1984] S.A.S.R. 45 at p. 46, where the Supreme Court of New South Wales said this:

> Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which the witness would render his opinion of assistance to the court. The second question is

whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court.

The second passage is in *Davie v. The City of Edinburgh*, 1953 S.C. 34 at p. 40:

Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the functions of the jury or Judge sitting as a jury any more than a technical assessor can substitute his advice for the judgment of the Court. Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the Judge or jury.

The issues before me do not involve questions of compliance with accepted standards of conduct laid down by any institute or, so far as appears, by common usage. They involve questions of the reasonableness of business conduct in specific situations. The words of Mr. Justice Oliver (as he was) in *Midland Bank Ltd. v. Hett Stubbs and Kent*, [1979] 1 Ch. 384 at p. 402 are pertinent:

I must say that I doubt the value or even the admissibility, of this sort of evidence, which seems to be becoming customary in cases of this type. The extent of the legal duty in any given situation must, I think, be a question of law for the court. Clearly if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks he would have done had he been placed, hypothetically, and without the benefit of hindsight, in the position of the defendants, is of little assistance to the court.

That was said in the context of litigation against a firm of solicitors and evidence given by a solicitor. It applies a fortiori where as here there is no recognized profession with established rules and standards involved, the case concerns the business activity of providing shipping advisory and management services and the suggestion is in effect that I need to hear evidence from other advisers or managers as to what they would have done hypothetically and with hindsight in the present situation. Such evidence would be bound to lead to extensive cross-examination to ascertain whether they had ever been in, or had ever experienced, the situation presently under consideration. Even then it would not derive from any objectively ascertainable standard or consensus within a recognized profession.

Mr. Dunn stands in a different position to Mr. Papachristidis and Mr. Anderson. He was and is a qualified engineer of considerable technical as well as managerial experience. The basic question is the reasonableness of the procedures adopted and assessment made in the case of *Ardent* and, in particular, of his U.S.$2 m. allowance for repairs. I have already doubted whether it would be realistic to regard his role as stopping necessarily at the point where he gave Mr. Anderson and/or Mr. Papachristidis material to enable them to decide whether *Ardent* was suitable for recommendation. But I accept that, once he had given his assessment of repair costs, his views and voice in any subsequent discussions where he was present would have been much less significant or influential on the broader decision whether to purchase than those of Mr. Papachristidis and Mr. Anderson.

Even if Mr. Dunn's role was confined simply to communicating his assessment of *Ardent* and of repair costs, the defendants submit that, to make any criticism of Mr. Dunn, the plaintiffs would need to call someone who had fulfilled an equivalent role. I do not accept this submission. On any question of technical experience or knowledge, for example on the risks of corrosion and the costs and time likely to be involved in repairs, Mr. Houghton has the relevant expertise. The defendants do not challenge his expertise to give evidence on the preparation and execution of repair specifications, the drawing up of budgets and the maintenance and drydocking of vessels (though not, they say, medium sized crude oil tankers). As to whether Mr. Dunn acted reasonably, or grossly negligently, in giving Mr. Anderson and/or Mr. Papachristidis a U.S.$2 m. figure for repairs on *Ardent* to use for the purposes of a decision whether or not to recommend the vessel for acquisition, either the issue is a technical issue within the scope of Mr. Houghton's expertise, or, to the extent that other factors are involved, they are not matters of expertise on which the Court needs any other expert evidence. Whether or not he was party to the decision to recommend or not, Mr. Dunn was involved in the first instance in assessing the vessel and repair costs from a technical angle, and in the second instance in communicating his assessment to others, for a purpose of which he knew, in terms which would give them an appropriate basis for a decision whether or not to recommend the vessel. Whether in this context he sufficiently identified the uncertainties about the vessel's condition, the difficulties of giving any

estimate and the resulting risks are questions to be determined firstly by considering the technical evidence and then by making a common sense judgment.

To the extent that expert evidence may be material in relation to the conduct of Mr. Papachristidis, Mr. Anderson and Mr. Dunn in deciding to recommend *Ardent* for purchase, the plaintiffs also submit that it is to be found in the evidence of Mr. Henderson and Mr. Houghton. Mr. Henderson is a party to this litigation. He was a straightforward witness, who expressed some strong views with considerable conviction. His contemporaneous memoranda confirm him as blunt speaking and forceful. However, his experience does not lie in any area which might be regarded as matching or overlapping Mr. Papachristidis', Mr. Anderson's or Mr. Dunn's. Until he became involved with the Red Sea and Papachristidis fleet, he had effectively no involvement with tankers. His career involved the management of dry cargo vessels and small, generally new chemical tankers. He has not acted in the sale or purchase of any vessels. He is not an expert on the inspection of any vessels, or on corrosion in oil tankers. Indeed he said at one point, perhaps over-modestly, that he was not an expert in anything. He had some strong views on the importance of class records. If expert evidence is necessary, it seems to me that Mr. Henderson does not supply it. That is not to say that some of his views on technical and shipping matters do not have force as a matter of common sense. However, his evidence did also indicate at points a personal aversion towards Mr. Anderson and (as Mr. Henderson perceived it) his highhandedness, to which Mr. Henderson attributed the mistaken purchase of *Ardent*. Mr. Anderson was undoubtedly a forceful character. But I consider that Mr. Henderson's evident distaste in relation to Mr. Anderson's method of conducting himself tended to lead him too readily to sweeping conclusions about Mr. Anderson's role and responsibility in relation to *Ardent*.

Mr. Houghton is, like Mr. Dunn, a qualified engineer. After time at sea he has had a range of experience on shore since 1966. For four years until 1970 he was a ship-repair manager at Cammell Laird, Birkenhead working predominantly on oil tankers, then he was a superintendent with National Bulk Carriers Inc. of New York, who had taken delivery of six VLCC's and had six other tankers between 60,000 and 85,000 tonnes and six similar-sized ore carriers, all these vessels being 12 to 15 years old. The largest part of his career was spent as a superintendent with Cunard Steamship Co. Ltd. from 1973 to 1991, where he was mainly involved with produce carriers but had some contact with oil tankers. After periods managing special projects, he undertook during 1973 some six to eight condition inspections on vessels including product tankers and five pre-purchase inspections of tankers including two medium-sized oil tankers of about 12 and 16 years old. Since 1993 he has worked with Vine Gordon & Co. Ltd., consulting engineers and marine surveyors, again with some experience of pre-purchase inspections. His dealings with persons on the same managerial and technical levels as Mr. Papachristidis and Mr. Anderson were effectively limited to dealings with the managing director and technical director respectively of Cunard and the technical director of Bolton Marine Management during 1992. With the technical director of Cunard he was responsible for making a technical assessment of a medium-sized oil tanker considered (and in the result rejected) for purchase by Nigerian National Petroleum Co. ("NNPC") in the late 1970s. Although Mr. Houghton's experience has never placed him in the role of Mr. Dunn, he seems to me qualified to give evidence as to the nature of the evaluation which would be expected of someone performing Mr. Dunn's role, so far as that involves technical matters.

Mr. Lyon made strong criticism not of Mr. Houghton's bona fides but of his impartiality and evidence. I do not accept this general criticism. There were areas where Mr. Houghton expressed views outside his expertise, based on his own perception of the position in the light of his long experience and common sense. He was, for example, drawn into expressing views about how a reasonable tanker owner or buyer would behave. The fact that he is a relatively recent recruit to the specialist field of expert evidence may have played some part in this. He also made some mistakes and some comments which he later qualified or withdrew. Mr. Spence was not immune from the latter failing. To take two examples: both experts became involved in very detailed examination of Lloyd's Register of Shipping records relating to *Ardent*, in analysing which each made errors; both experts also made erroneous assumptions about the time required to pump out the ballast tanks — on examination it proved that this would have been an extremely simple operation for *Ardent* to undertake, since she was equipped with an electrical pump. Both sides' experts also took and held views which were, as it happened, largely favourable to their own side. But I do not regard Mr. Houghton as any more open to a charge of partisanship than Mr. Spence, in this or any other respect. In general I was impressed both by the evident competence and conscientiousness which Mr. Houghton displayed when giving evidence on matters within his experience and expertise and with the content of such evidence. I did not regard him as evasive.

V.2 *Corrosion*

Advanced corrosion was in 1988 and 1989 a recognized problem in the segregated ballast tanks of elderly tankers of the vintage of *Ardent*. That corrosion is likely to be less severe as one descends from the top of a permanent ballast tank is true as a general proposition. Corrosion flourishes above and around the waterline. Anodic protection of an uncoated tank can only operate below the waterline. Even so, the extent and depth of corrosion in any particular tank cannot safely be predicted. Further, what is normal is not invariable. The impact and seriousness of corrosion at any level is subject to the pattern of usage and other factors affecting the particular tank. As the surveyor inspecting the forepeak of *Armour* commented in the light of his inability to see the lower levels of the forepeak of that vessel: "it is felt that while the upper levels are in acceptable condition the lower levels would give cause for concern". The incidence of corrosion will further depend on whether the tanks were or had ever been coated, and, in so far as they were uncoated, on the replacement of anodes when exhausted. It will also be influenced by patterns of usage and humidity of the tanks. Mr. Papachristidis and Mr. Dunn were aware of such matters. Mr. Dunn in particular knew that corrosion could be savage in uncoated and unprotected ballast tanks. Mr. Anderson was aware that corrosion was often a concern in older tankers, but said that he relied on Mr. Dunn to tell him whether it was a concern in relation to any particular tanker. Mr. Papachristidis was also accustomed to rely on Mr. Dunn for assistance on technical matters.

To indicate the effect of corrosion, Mr. Houghton produced a report indicating that corrosion rates of 1.00 mm per annum in the upper sections and 0.5–0.6 mm per annum in the lower sections of ballast tanks were common, and could result in wastage of between 15 per cent. and 40 per cent. of original scantlings in vessels of between nine and 11 years old. *Ardent's* scantlings appear to have been between 10 and 20 mm thick. Classification societies would be expected to condemn steel which had suffered a 20 per cent. diminution in thickness. The process of corrosion speeds up with the age of the steel, as the cracking of hard surface scale exposes the underlying bare steel to fresh attack.

Mr. Dunn knew that corrosion could necessitate major steel renewals. He had not had experience of savage corrosion in the ballast tanks of any Papachristidis vessel, because of the care the Papachristidis group took in the protection of tanks. The Papachristidis group in the 1980s had effectively no experience of oil tankers, or indeed other vessels, of the age and size of *Ardent*. In fact, prior to 1988–1989, when a number of tanker funds were set up, no-one seems to have viewed old tankers as an area for large-scale investment. Mr. Dunn's experience during his career was limited to occasions when he had had to replace 40 to 60 tonnes at most. He kept up however with the technical literature which referred to corrosion problems of ageing tankers and had heard of other operators' experiencing steel renewals of 80–100 tonnes in ballast tanks on third or fourth special surveys.

Several reports on other vessels which were considered and either rejected or accepted on behalf of HTL highlighted the problem. Mr. Holding inspected m/t *Thiseas* on July 15, 1988. She was a vessel built in 1976. Mr. Holding reported that she had passed her second special survey in September, 1985 and been drydocked only six months before his inspection. Her hull appeared in good condition, her cargo tanks were very clean and showed only minor corrosion. However, all her permanent ballast tanks were affected by severe corrosion, the aft peak worst of all. The condition of her ballast tanks was so poor that he felt unable to recommend her purchase. The brevity of the inspection of the aft peak made the extent of steel renewals required difficult to assess, but "sufficient was seen to suggest that something in the order of 150 to 200 tonnes of new steel will be required". This being "a very high cost area to renew steel", Mr. Holding estimated a cost in the order of U.S.$750,000 to U.S.$1 m. in this tank alone. Annexed to the report were photographs showing extreme internal wasting and corrosion in the aft peak.

Mr. Dunn saw this report in 1988, but said in evidence that he "did not particularly recall it" at the time when vessels were being considered for Red Sea. He said that he would not have been interested in *Thiseas* anyway because of her Fiat engine. He found Mr. Holding's suggestion that 150 to 200 tonnes would require renewal in the aft peak unbelievable. Notwithstanding the contrast between the condition of *Thiseas'* permanent ballast tanks and other tanks and parts, he maintained that, if it was not possible to see any segregated ballast tank, "you can still judge from the conditions of other tanks within the vessel" what the condition of the permanent ballast tanks was. The most that he would accept was that a visual inspection of permanent ballast tanks was preferable and would give an immediate impression as to how serious any corrosion was. I did not find this evidence impressive. *Thiseas* was a striking case, and Mr. Dunn was, on his own account, attentive to the experiences of other shipowners with regard to corrosion. This report should have impressed itself as a warning of the risks and dangers of corrosion in permanent ballast tanks, even where other tanks appear in good condition.

Mr. Dunn also said that, in respect of a vessel which has passed special survey three years previously, "you can assume that the classification society has done their job properly" when considering the likely condition of permanent ballast tanks. He accepted that in the case of *Thiseas* he would have been misled had he made any such assumption. It is unnecessary in this context to consider whether he would have been misled because class cannot have inspected the permanent ballast tanks fully or properly three years previously (as Mr. Dunn's answers would seem to imply) or whether corrosion may sometimes simply accelerate and cause major problems within three years after a satisfactory special survey. On either view, *Thiseas* represented a warning against unchecked reliance on a vessel's classification — particularly classification pursuant to a special survey some years previously — in assessing the condition of permanent ballast tanks.

Two other vessels whose class records were inspected in May, 1988 were *Atlantic Dignity* and *CYS Excellence*. Mr. Jerry Semple reported that the vessels were sisterships built in Japan in 1975 with a deadweight of 90,000 tonnes and that:

> Although both have suffered extensive steelwork repairs in recent years, there is a strong suspicion further extensive repairs will be required in the ballast tanks in the near future. The "ATLANTIC DIGNITY" has carried out a considerable amount of corrosion repairs in 2P WPT in 1985 [a mistake for 1987] and if this reflects the standard of protection and maintenance onboard then suspicions to the above are reasonably justified.

Mr. Dunn said that Mr. Semple "was just being very cautious, as Jerry is". He also said that, if there had been repairs to the proper standard, he would not expect more and more repairs. But he accepted that if there was not proper maintenance, if anodes were not put back, then it was a possibility. On inspection by Mr. Karoussos, *Atlantic Dignity* did prove to require "extensive steel repairs" in her Nos. 2 permanent ballast tanks, although in other respects to be in good condition.

A third vessel put to Mr. Dunn in evidence was *Nicola Prosperity*, bought on behalf of HTL after two inspections by Mr. Pearce in August and September, 1988. On the first inspection, her No. 3 segregated ballast tank was found to be in very poor condition. On the second, much more extensive inspection was undertaken of both port and starboard ballast tanks, which were found in poor condition at and for the uppermost 3–4 metres below the deckheads, as well as of her forepeak and after peak tanks, which were found in much better conditions. A "very special deal" was concluded with the sellers, Shell, which enabled the Papachristidis organization to have repaired basically everything they wanted, and the vessel was bought.

Atlantic Dignity, *CYS Excellence* and *Nicola Prosperity* appear to me to illustrate the caution called for when faced with possibly extensive corrosion in permanent ballast tanks.

V.3 *Storage vessels*

It is obvious that the pattern of usage of the cargo tanks of a vessel serving as a storage vessel is likely to differ from that of a vessel engaged in trading, and there may be some consequential difference in the pattern of usage of ballast tanks. In the case of *Ardent* the limited class records obtained by PSMSL indicated that those cargo tanks which in trade would be available for use as additional ballast tanks had been converted to use exclusively as cargo tanks. The implications of use as a storage vessel on the likely pattern of permanent ballast tank usage are not clear. The plaintiffs have failed to establish that they would necessarily or probably expose those tanks to an increased risk of corrosion, or that this should have been appreciated by Mr. Papachristidis, Mr. Anderson or Mr. Dunn. The most that can be said is that purchase of a storage vessel involves elements of uncertainty not involved in the purchase of a vessel with a recorded pattern of regular trading, and that there is a particular risk in the case of a storage vessel that machinery not immediately required would not have received the maintenance attention which would be required for normal trading. The fact that Mr. Anderson indicated that PSMSL was looking at a storage vessel on Aug. 3, 1989 and that Mr. Papachristidis referred to *Ardent* on Aug. 23, 1989 as a storage vessel itself suggests a recognition that vessels so used may present some different characteristics or differences in a condition from vessels continuously employed in normal trading. Among the aims of a pre-purchase inspection would be to reduce the uncertainty and obtain an idea of the extent of the maintenance undertaken and required in respect of a storage vessel.

V.4 *Ardent's age*

I have mentioned the Papachristidis group's lack of experience of tankers of the age and size of *Ardent*. With the recent exception of the 17-year old *Armour*, *Ardent* was older than any other vessel acquired by Mr. Dunn, being already three years past her third special survey. *Hellespont Faith*, built in 1981 with a new cargo section built in 1981, was acquired in 1972 and bareboat chartered to first class charterers (Sanko) until 1985. She presents a different proposition to a vessel of unknown history acquired on the open market. The closest other purchases in terms of age were those acquired for

the HTL fund in 1988, vessels then aged 12, 13, 14 and 15 years old respectively. Some four or so crude oil tankers acquired by the Papachristidis organization at much younger ages continued to be owned and managed in 1989, by when they were between 13 and 16 years old. The Papachristidis' organization's experience with them offered no reliable guide or assistance when it came to evaluation of an unknown 17-year old vessel with known problems such as *Ardent*. The ULCCs which Mr. Dunn mentioned in evidence were also not comparable vessels. They were vessels within the Papachristidis fleet which had been reactivated after being laid up. The different character of the vessels owned and the high standards applied by the Papachristidis organization in the past appear to be born out by statistics produced by Mr. Papachristidis showing a maximum of 25 tonnes installed in any Papachristidis vessel on any drydocking.

Mr. Dunn did not dispute that the critical time in terms of expenditure for vessels built in the early 1970s was when they came to be 15 to 20 years old. Indeed, he said that was why he had allowed U.S.$2 m. in respect of *Ardent*. He did however take issue in evidence with a note from three very experienced, reliable and capable surveyors in PSMSL dated July 7, 1989, where they expressed the view that —

> It should be remembered that in the halcyon days of the early 1970's, with ship construction having by that time embraced the concept of mass produced "cheap" ships to relatively simple designs, the then current school of thought advocated a working life of 10–15 years — "throw-away" ships. This was a direct reversal of shipbuilding's traditional role, where one-off ships were constructed to individual owners requirements, often to heavy scantlings for an undefined life, and up to that time many owners were operating ships for well in excess of 20 years.

Both Mr. Dunn and Mr. Spence strongly dissented from this passage, particularly the references to "throw-away" or "cheap" ships. The language is, I accept, heightened and cannot be taken literally. The position appears to be that scantlings were reduced, but in the context of an improved ability to calculate stresses and improved welding techniques. Lighter scantlings could however make any corrosion more significant in percentage terms. Further, PSMSL's surveyors' memorandum was written against a background of intense concern about the age of the Papachristidis fleet (which the acquisition of Red Sea fund vessels could only increase) and about the difficulties which PSMSL were facing in keeping up with maintenance work. Making all due allowance for heightened language, exaggeration and legitimate differences of opinion, this memorandum sounded what I regard as a justified note of caution about ageing vessels and the problems of maintenance they were likely to present. It confirmed the need, established by other considerations in any event, for as full a records and pre-purchase inspection as possible.

V.5 *Maintenance in the 1980s*

In a paper given on Sept. 8, 1989, by Mr. T. C. Mathieson, executive vice-president of Det norske Veritas Classification A/S, he said:

> The ageing world fleet
>
> The average age of the world fleet is now almost 16 years, and with the present levels of deliveries of newbuildings and scrapping of tonnage, the average age is continuing to rise rapidly. Whilst tankers until a few years back were scrapped due to reasons of economy before they reached the age of 15, the present tendency is to keep them alive until they become technically obsolete. The average age of tankers being scrapped at present has increased to approximately 20 years. . . .
>
> The technical standard of the world fleet has deteriorated, at least for a significant portion of the fleet. A major reason for this is the increased age combined with a lack of long term preventive maintenance in many shipping companies during the recession over the past 10–15 years.
>
> We all know that we have been through a number of lean years where mere survival in the short term has been the order of the day. Funds have simply not been available for other purposes than to keep the vessels running for the next few voyages.
>
> During these years, many shipping companies have been forced to slim their organizations of qualified technical personnel, with the result that some basic knowledge within technical fields are now absent.
>
> It can also be suspected that the increasing trend of management companies operating their vessels on behalf of the owners, and that of "asset playing" owners with limited knowledge of the operational and technical aspects of shipping has had an overall negative effect on the long term preventive maintenance of ships. It should, however, be emphasized that serious management companies basing their business strategy on long term relationship with vessels and their owners probably are among those maintaining the vessels' standards best in today's market.

The conclusions to the paper said that the following were "main messages to be remembered":

> Old vessels may be of a variety of technical standards depending on their past maintenance

history. The condition of old vessels should never be taken at face value, a thorough inspection should be carried out by personnel having relevant qualifications. A vessel having frequently changed ownership during its lifetime, should be carefully considered as such a history may indicate that less than adequate maintenance has been carried out.

Old vessels today will stay around for a number of years to come. Investments in upgrading/maintenance will therefore be required and also likely to prove to be very profitable.

For tankers, corrosion of internal structures in the permanent ballast tanks is a particularly important problem area. If corrosion has not yet resulted in critical scantlings, such tanks are recommended to be sandblasted and recoated. If corrosion has reached critical proportions, it should be considered to renew complete sections of the vessel (comprising the ballast tanks with boundary bulkheads) instead of piecework steel renewals which will only give temporary relief.

...

Thickness measurements should never be relied upon unless carried out by very reliable personnel or confirmed to be correct by random double checking, and should always also cover structures in internal ballast tanks.

These were broadly accurate statements of the position. The matters stated would or should have been within the knowledge of each of Mr. Papachristidis, Mr. Anderson and Mr. Dunn throughout 1989, before the actual delivery of the paper. Mr. Papachristidis pointed out that the recession in the freight market only lasted until 1986, but agreed that some owners took shortcuts throughout the period up to 1989. Mr. Anderson was not cross-examined on some of the aspects covered, although his evidence was not inconsistent with their being within his general knowledge. Mr. Holding and Mr. Pearce had been careful, in reports on vessels inspected in 1988 and 1989, to identify any general lack of maintenance as a major consideration. Lack of maintenance during the recession was not of course universal. These reports would have been seen by Mr. Dunn and (at least where the vessel became a candidate for purchase) by Mr. Papachristidis and Mr. Anderson. Mr. Mathieson's report refers to the high standards of some managers. The Papachristidis group had over the years maintained high standards, but by mid-1989 difficulties in maintaining their expanding and ageing fleet to their charterers' and to Mr. Papachristidis' own high standards were manifesting themselves. In assessing the suitability of any elderly vessel for the Red Sea fund, Mr. Papachristidis, Mr. Anderson and Mr. Dunn should have given particular attention not only to any identifiable repairs revealed as necessary by her inspection, but also to her general state of maintenance and to the maintenance costs likely to be incurred by the fund both immediately and in the future if she was acquired. The practical significance of this was or should have been to emphasize to Mr. Dunn the need for as full a pre-purchase inspection as possible, combined with a need for as much information as possible about the vessel's past history, including sight of her class records. Mr. Papachristidis and Mr. Anderson would in the first instance leave these matters to Mr. Dunn and PSMSL. They would await his assessment of the position regarding repairs and maintenance. But Mr. Papachristidis in particular would have been able to discuss the basis of that assessment at least generally with Mr. Dunn, if he wanted.

V.6 *Pedigree*

Mr. Mathieson's paper identified a need for extra care in respect of vessels changing ownership frequently during their lifetime. Mr. Papachristidis, Mr. Anderson and Mr. Dunn would, I find, all have been aware of this as a factor to bear in mind when considering any vessel. *Ardent* had had five different names, as appeared by the Abstech report, two of them prefixed with the word "Ocean". Although this could be consistent with a single owner, it raised a considerable possibility that she had had a number of different owners, which appears in fact to have been the position to the knowledge of Mr. Papachristidis. Mr. Papachristidis recognized the prefix "Ocean" in *Ocean Maid* and confirmed in Lloyd's Register that she had been owned by a friend of his father, Mr. Teryazos, who had died in 1981 and whose vessels were managed by Stathatos. Mr. Kazazis' telex, which Mr. Papachristidis would also have seen, stated that the vessel's current owners had bought her some two and a half years previously from Tsakos Co. Mr. Papachristidis knew nothing of the current owners or their managers, Marontree Shipping S.A. Nothing detrimental was actually known about any of the owners, save for Captain Kazazis' reservation about *Ardent's* maintenance over the last two years; Mr. Teryazos' friendship with Mr. Papachristidis' father was presumably regarded as a favourable factor. I accept, in the light of Mr. Houghton's evidence, that no real comfort could derive from the repairs done in December, 1987, preparatory to the vessel entering service as a storage vessel. But, pedigree in the sense of multiple ownership is in my view a minor factor in the present case, adding only limited emphasis to the need for appropriate records and pre-purchase inspections.

V.7 *Spanish vessels*

Speaking of ship construction, Mr. Papachristidis said that "there are mixed feelings about Spanish built vessels" which were known to him when considering *Ardent*. Mr. Anderson was aware that the market applied a discount in relation to them compared with Japanese vessels, a discount which Mr. Marsh confirmed. The plaintiffs drew attention to a memorandum dated May 31, 1989 from Mr. Holding to Mr. Anderson, copied to Mr. Dunn, in which Mr. Holding expressed the view that *Ardent's* Spanish build would mean that her scantlings were small, that spare parts for any Spanish made equipment would be hard to come by, and that her age made these even more significant. Mr. Papachristidis and Mr. Dunn strongly disagreed with this memorandum, both in its suggestion that the structure of Spanish vessels called of itself for caution and in its suggestion that spare parts would be a problem. That different people had different views about Spanish vessels does not assist the plaintiffs. I find that no particular significance attaches to *Ardent's* Spanish build in the context of this case.

V.8 *Pre-purchase inspections*

This heading embraces pre-purchase inspections of a vessel's classification records and of the vessel herself.

(1) *General*

On the evidence it was at all material times common practice for second-hand tankers to be purchased on the market on the basis of relatively limited information about their actual physical condition, and for owners offering such vessels for sale to restrict the information available accordingly. Unless a purchaser happened to know the vessel in some other way, the two main sources of information available would normally consist in inspection of class records and a "superficial" inspection of the vessel. "Superficial" inspection refers to a relatively brief inspection which would not normally involve opening up of machinery or extend to every space within the vessel, even where access was available. While on board, a surveyor would also aim to obtain further information by discussion and inspection of documents on board. A prospective purchaser would on the basis of all the information thus obtained make a general judgment about the condition of the vessel's equipment and hull, using his own general knowledge and experience. The limitations of this process were and, so far as I am aware, are accepted by purchasers, despite the element of uncertainty resulting. The hulls and machinery of different tankers will have experienced and be in different conditions and be subject to damage or deterioration of differing extent in different respects and places. Aspects of a tanker's condition may thus remain unknown and effectively unknowable until after acquisition. Despite the size, value and second-hand nature of the tankers in which the Red Sea fund was interested, it would not be realistic to expect an investment fund like Red Sea, or those advising it, to have insisted on some entirely different approach; this is particularly the case at a time when the market was rising with relatively few vessels on offer and also when a number of other investment funds appear to have been interested in acquiring vessels.

The fact that only limited information would commonly be available is however no justification for failure to obtain even that information, rather the contrary. Since I have not accepted the plaintiffs' suggestions that PL and PSMSL gave express assurances of "thorough inspections", the extent of the inspections which could and should have been undertaken before any decision to recommend or acquire *Ardent* must be judged on the other material before me.

(2) *Class records*

I find that in 1989 each of Mr. Papachristidis, Mr. Anderson and Mr. Dunn in probability regarded, and each certainly should have regarded, it as important to inspect full class records in the context of any purchase of a second-hand vessel. Further, they would or certainly should have viewed this as being of particular importance in the case of *Ardent* had they directed their minds to it, both because of her age and because they were acting as advisers and were considering the vessel on behalf of a third party fund. Mr. Anderson effectively accepted that full records should be inspected. Mr. Dunn would only acknowledge that it was "preferable". I consider that each in evidence downplayed what would have been his actual state of mind had he focused on the question at the time. Mr. Papachristidis said that he had a view on the subject, and that it was that Mr. Dunn should inspect whatever records he deemed sufficient to come to a conclusion. This was a hedging response. He also said that he had, after the event, discussed with Mr. Dunn why full records were not sighted, but that he could not recall when or with what result; he was however sure that no act of bad faith was involved so had no reason to be critical of Mr. Dunn. In my view, Mr. Papachristidis would have recognized categorically at all material times, if he had been giving an objective view, that full class records should have been inspected by Mr. Dunn, unless there was some real impediment to doing so, and I do not believe that any has ever been suggested. Despite Mr. Dunn's implied suggestion in his witness statement that there was some such reason, none has been identified still less shown. Mr. Spence said that he could not speak for the reasonable shipowner, but

suspected that what would interest him would be current records going back to the last special survey if possible. Accepting that there could be cases where very early classification records could be regarded as irrelevant in the light of later records, I was not impressed by Mr. Spence's evidence on this point. Moreover, even if this is accepted, it cannot cover the present case, where the records sighted related to only 18 months (from admission to class in July, 1987 to a survey in December, 1988) and did not include any hull inspection, let alone a special survey. They simply referred to the vessel having last passed a special survey with Lloyd's Register of Shipping in August, 1986. Mr. Marsh gave evidence that some clients might buy a vessel without ever seeing records; but he accepted that, in the majority of cases, full records would most certainly be inspected, and that most clients would wish to have them inspected before any physical inspection of the vessel. His evidence does not indicate that it would be normal or proper to buy an old and unknown vessel without sighting the full records, in circumstances where there would be no obstacle to sighting them. Nor does it address the particular position of advisers considering the vessel on behalf of a third party fund.

Mr. Dunn's actual attitude at the time, and the proper approach, are in my judgment illustrated by comments which he made in September, 1988 in relation to *Nissos Amorgos* that "the ... vessel's records with [norske Veritas] only go back two years and therefore to get a proper picture of the records we will need to inspect the [NKK] records in Japan", by the pressure which he later insisted should be exerted when an obstacle was presented and by further comments on Aug. 23, 1989 in relation to *Orembae* when he said that, if they were to proceed with the vessel, they would need to see both the records during classification pre-1986 with NKK and her class records since that date.

The purpose of a full records inspection is to obtain an overview of the vessel's characteristics and to identify any particular areas requiring attention on a physical inspection or otherwise of concern, e.g. outstanding recommendations or repeated problems in a particular area. Mr. Spence in his first report described the nature of a surveyor's or consultant's report on class records as follows:

> His report would ideally be succinct and should highlight aspects of the ship which impressed him as being of particular importance. These would include:
>
> (a) Status of surveys;
>
> (b) Apparent recurring difficulties;
>
> (c) Apparent need for renewal of steelwork, in particular if this is related to corrosion and/or the results of ultrasonic measurements.
>
> (d) Difficulties with machinery, in particular the main and auxiliary engines and boilers;
>
> ...
>
> (h) Whether or not the classification record is complete or partial.

I accept this description.

Mr. Spence's evidence indicates that his firm on some 30 per cent. of the pre-purchase inspections undertaken do not have sight of class records. Accepting that, it does not relate to the failure in this case, by advisers considering a vessel for a third party fund, to seek and sight full class records at any stage.

I consider, as I have already indicated, that no excuse or justification has been shown for the failure in this case to seek and sight full class records. Important questions arise as to the effect of this conclusion. The plaintiffs submit that they should have been warned that no full or proper records inspection had been undertaken, and would not then have gone ahead. That seems unrealistic. If the defendants had identified their own deficiency, they should have rectified it, by obtaining sight of the full records. It is thus necessary to consider what those records would have shown. The plaintiffs submit that they would have shown matters of concern, which would have militated against any decision to recommend the vessel. The defendants submit that they would have shown nothing untoward. I revert to this aspect in Part VI of this judgment.

(3) *Length of superficial on board inspection*

The evidence indicates that pre-purchase inspections on board are commonly brief. Even so, the pre-purchase inspection of *Ardent* appears to have been particularly brief. This is so, both by comparison with previous inspections, including those for the HTL fund, about which information was put before me and in the light of the two inspectors' wish, as I find, to continue their inspection of *Ardent* in the belief that they would find out further matters of interest to PSMSL. Originally, the defendants pleaded that similar types of survey were conducted on the Red Sea vessels to the HTL vessels. That plea, since omitted, does not appear justified. A more normal pre-purchase inspection would have extended over a longer period, and probably two days. Mr. Spence suggested as an "ideal" 14 man hours over two days, whereas Mr. Houghton suggested about 20 hours. The actual inspection involving two men took six hours, with the two spending part of the time together. The fact that no ballast tanks were inspected in empty

condition would in part explain the difference. Mr. Dunn did not accept that the inspection and Mr. Reilly's report were untoward in their brevity or otherwise, and I do not consider that either can be said to have been sparse to the point of being unacceptable. Nor can Mr. Dunn be blamed for deficiencies in Mr. Reilly's inspection and report, for example in relation to accommodation. But the apparent brevity of the inspection process and report constitute a background factor which someone in Mr. Dunn's position should I think have borne in mind along with other matters, when deciding what attitude to adopt to *Ardent*.

(4) *Permanent ballast tanks*

The importance in 1989 of inspecting permanent ballast tanks on a pre-purchase inspection of an ageing tanker follows largely from what has already been said, particularly in the context of corrosion. It was, I consider, within the knowledge of each of Mr. Papachristidis, Mr. Anderson and Mr. Dunn. Mr. Anderson acknowledged that it was unusual not to see any permanent ballast tank. In the present context of a purchase of an old vessel for a third party, I consider it was not only unusual but on the face of it inappropriate (at least in the absence of some exceptional reason, such as a recent documentary report from an authoritative source making such inspection unnecessary). Mr. Dunn's suggestions that serious reliance could in this connection be placed on the condition of other tanks or on the fact of the vessel's classification cannot be accepted. Nor can his suggestion that visual inspection would not assist, and that only ultrasonics would have had any value. What mattered was visual inspection of at least some ballast tanks, either in an empty condition or with ballast lowered to expose the upper third or so of the tank. Mr. Dunn's response to Mr. Semple's "cautious" comment in May, 1988 regarding *Atlantic Dignity* and *CYS Excellence*, that he should "endeavour to see as many ballast tanks as possible", further evidences Mr. Dunn's attitude when he gave proper attention to the point.

Neither Mr. Anderson nor Mr. Dunn could identify any past occasion when a tanker had been purchased by the Papachristidis group without either one or more of her permanent ballast tanks being inspected or, in a few cases, some special arrangement applying. In the cases of *Atlantic Dignity*, all the ballast tanks were made available and a need for extensive steel renewals identified in some. Mr. Dunn pointed out that no cargo tanks were tendered for inspection, and *Atlantic Dignity* and *CYS Excellence* were sold elsewhere before any further steps could be taken. The fact remains that proper attention was given to the critical area of the permanent ballast tanks. There were certain vessels where there was either very limited or possibly no access at all to the ballast tanks, *Bubiyan* in May, 1988, four Marathon vessels in February, 1989 and *Vestelegia* in June, 1989, but in each case special protective terms were agreed. In the case of *York Marine* full inspection was not considered because a preliminary report led to her rejection out of hand. All the ballast tanks were inspected on the first and third Red Sea vessels, *Armour* and *Arrow*. Only one was inspected on the second vessel, *Archer*. These vessels are the subject of this litigation and the position in relation to them was not fully developed.

The evidence does not go so far as to suggest that a prospective purchaser would be expected to see all or even most of the permanent ballast tanks in empty condition. Their nature makes it unlikely that all would be readily available at any one time. It is a matter of judgment, in the light also of class records, whether the number seen and their condition is satisfactory. Mr. Dunn's evidence was in effect that the need for any ballast tank inspection at all was always a question of practicality and judgment. The possibility of agreeing special terms, for example requiring inspection or repairs as part of the purchase contract, illustrates that pre-purchase inspection of permanent ballast tanks cannot be regarded as an absolute rule. But, short of special arrangements of that nature, I conclude without hesitation that Mr. Papachristidis, Mr. Anderson and Mr. Dunn, if they had addressed their respective minds to this aspect at the time would, as they should, all have recognized the general importance of insisting on inspection of at least some permanent ballast tanks in empty condition. No actual request was ever made to the owners of *Ardent* to that effect. That the captain and superintendent refused on the day to allow further inspection does not mean that a formal approach to owners through the brokers would not have succeeded. Owners' previous attitude had been relatively forthcoming. If such a request had been made, it would either have been granted, in which case the actual condition of the permanent ballast tanks would have been better appreciated, or refused, in which case it would have raised the question whether *Ardent* was worth further consideration at all. Whether there was sufficient justification for making no such request on the particular facts of this case, where Mr. Dunn had the benefit of Mr. Reilly's brief descent into the top of several permanent ballast tanks in largely full condition and considered that he could cater for their condition within the U.S.$2 m. which he gave Mr. Anderson is a central issue which I address in Part VI.3.

VI. GROSS NEGLIGENCE?

VI.1 *The scope of the issue*

To succeed against either PL or PSMSL the plaintiffs must show (i) that PL or PSMSL committed acts or omissions which either (a) were the result of gross negligence or (b) constituted wilful misconduct and (ii) that the plaintiffs suffered damages as the result of such acts or omissions. To establish that acts or omissions constituted wilful misconduct cannot be an easier task than to establish that they resulted from gross negligence. On no realistic or common sense view of the phrase does this case involve wilful misconduct. The real issue is whether it involves gross negligence.

In view of the split trial, I am not concerned with the quantum of any damages. The question before me is whether the plaintiffs incurred any potential head of loss as a result or acts or omissions of PL and PSMSL which were in turn the result of gross negligence of PL or PSMSL. The only potential head of loss now suggested is the decision to purchase *Ardent*. This constitutes a potential head of loss because the plaintiffs' case is that, but for gross negligence on the defendants' part, *Ardent* would not have been recommended at all, or would have been put forward in different terms which would have not have been accepted by the Red Sea directors. The foundation of these allegations is that *Ardent* was or should have been perceived as an uncertain and unquantifiable risk, not to be pursued further; alternatively, it should at least have been perceived that she would require more than U.S.$2 m. spending upon her, and that in this situation it was neither appropriate nor desirable to pursue her further having regard to her asking price and market value.

Assuming that the plaintiffs can attribute the purchase of *Ardent* to acts or omissions of PL or PSMSL resulting in turn from gross negligence of PL or PSMSL, the question whether they suffered any and what recoverable damages thereby will be for subsequent trial. The defendants will at that stage be able to raise, for example, the argument that fall of the shipping market was the real cause of any actual loss following from *Ardent's* acquisition. That this is a potentially significant issue is clear from the evidence of the defendants' expert tanker broker, Mr. Marsh. The market proved, with hindsight, to have reached a peak in 1989 and early 1990. Thereafter, there was first a softening and then in 1991 a drastic (and in 1989, when the Red Sea fund was conceived, unforeseen) fall, leading to collapse by early 1992. Resale values of medium sized tankers built in the mid-1970s declined dramatically. Mr. Marsh's report shows that this decline was reflected in the diminished values realized for *Ardent* and two other Red Sea vessels sold in 1993. It is clear that the original "disaster" projection for the Red Sea fund of U.S.$10 m., or at worst U.S.$8 m., as the residual value after $5\frac{1}{2}$ years of a vessel purchased for U.S.$13 m., was undermined by the market's collapse.

The purchase of *Ardent* followed, as I have held, from an unqualified recommendation made probably on Aug. 23, 1989. The recommendation was relatively informal and was accepted by or on behalf of the fund and fifth plaintiffs without much discussion. The Red Sea directors were relying on PL and/or PSMSL to identify a fourth tanker of appropriate size, age, condition and price. They were not indifferent to the vessel's qualities or condition or to the appropriateness of the suggested price. But they had insufficient expertise or information to do other than rely on PL and PSMSL, and they had no reason not do do so.

Whether or not *Ardent* was acquired was determined by the unqualified recommendation made by PL. The decision to make such a recommendation was in turn based on Mr. Dunn's endorsement of U.S.$2 m. as an appropriate overall provision for all repairs and overhauling. Amplifying the plaintiffs' case, their primary contention is that *Ardent* presented unknown and unquantifiable risks, that there was no basis for any recommendation for purchase or for any reliable estimate of how much it would cost to put her in a fit condition to trade and that the U.S.$2 m. which Mr. Dunn took was a "guestimate" with no reasonable or proper basis. *Ardent* should not therefore have been recommended for purchase. Alternatively, if she was put forward, it should have been in conjunction with a warning as to the unknown and unquantifiable nature of the risks.

In the further alternative, in the event of the Court concluding that some estimate could reasonably be given, the plaintiffs' case is that the estimate should have been that a substantial sum well in excess of U.S.$2 m. would require to be spent on her, because of the steel repairs and other work which should have been envisaged. Mr. Houghton assessed the cost of the other work, on the basis that it would be done in a shipyard, at about U.S.$1,875,000 (plus a contingency) or, on the basis that it would be done so far as possible by crew or repair crew, at about U.S.$1,550,365 (plus a contingency). In my judgment, the latter is the relevant basis and the relevant provision is about U.S.$1,213,500 (plus a contingency). Appendix A to this judgment reviews the detailed evidence and submissions on this aspect of the case. This provision falls to be compared with Mr. Reilly's specific provisions, costed at U.S.$1,005,000. It follows that, even if a provision of U.S.$1,213,500 (plus a contingency) had been made for non-steel works, a substantial part of the U.S.$2 m. which Mr. Dunn

had in mind would have remained to cover steel work. I have already concluded that this U.S.$2 m. was in likelihood arrived at by Mr. Dunn as an appropriate figure for all repairs to include unquantified overhauls not covered by Mr. Reilly's specific items.

I leave aside for a moment the limitation of PL's and PSMSL's responsibility to acts or omissions resulting from gross negligence, and consider whether the defendants' conduct met the standard of reasonable skill and care to be expected of advisers fulfilling the role which they fulfilled.

VI.2 *Was PSMSL negligent through Mr. Dunn?*

I start by focusing on the position of PSMSL, represented for present purposes by Mr. Dunn, in suggesting U.S.$2 m. as an appropriate guide to repair costs.

Mr. Dunn himself neither undertook nor instructed any detailed analysis of the nature or cost of overhauls not specified by Mr. Reilly or of steel work. He took U.S.$2 m. on a broad basis as sufficient for PSMSL's and PL's purposes. If Mr. Dunn had focused on the likely cost of other overhauls, I consider that he would have acknowledged that they required a substantial additional provision over and above the specific provisions totalling U.S.$1,005,000 allowed in Mr. Reilly's report. If Mr. Dunn had sighted the full class records and had on Aug. 16, 1989 instructed Mr. Reilly or another surveyor to consider the position in detail, as he could have done, Mr. Dunn would have confirmed this. An additional provision of between U.S.$200,000 and U.S.$300,000 (over and above that allowed by Mr. Reilly) would I consider have been appropriate. In my view Mr. Dunn with his experience ought to have recognized the need for an additional provision of this general order, even though he did not instruct a surveyor to do any detailed exercise of the nature undertaken before me in evidence and considered in Appendix A.

With respect to steelworks, there is no doubt about the awareness of all concerned on behalf of PL and PSMSL that corrosion in the permanent ballast tanks of elderly tankers represented a particularly important problem area. It required on the face of it close attention. But Mr. Dunn had no means of making any accurate assessment of the likely cost of steel repairs on Aug. 16, 1989. There had been the most cursory inspection of three out of the total of six permanent ballast tanks. All that was known was that serious corrosion had been noticed, and the condition of these tanks was "very suspect". Mr. Reilly had been unable and had, when asked, specifically declined to put any figure on steelwork.

As stated in Part III.10 above, the allowance made by Mr. Dunn on Aug. 16, 1989 did not cater for any uncertainty by taking a sufficiently large figure to cover all eventualities, which it could then be expected might foreseebly materialize. I do not therefore accept that the excess over estimated repair costs can be explained or excused on the basis that *Ardent* proved to be in a condition which could not reasonably be foreseen in relation to a vessel which had passed special survey some three years before and remained in class.

I have not accepted Mr. Dunn's evidence that he had 300 tonnes or U.S.$1 m. in mind for steelwork in 1989. As stated in Part III.9 above, I do not believe that PSMSL and PL would have pursued an interest in the vessel at all, if they had conceived that so much steelwork would be required. If they had in such circumstances pursued any interest, it would in my view have been incumbent on them to warn the directors of the Red Sea fund expressly of the "dramatic", "huge" or "rare and unusual event" — the requirement to replace so much steel in such a vessel — to which they were contemplating exposing the fund. As it is, I think that they gave no such warning, because, although they contemplated serious corrosion in the ballast tanks, they had in mind a lesser order of steel renewal and also allowed a total of U.S.$2 m. which Mr. Dunn thought was generous in relation to such an order of steel renewal.

I consider that PSMSL's conduct through Mr. Dunn leading up to PL's decision to recommend the acquisition of *Ardent* was negligent. In summary, I consider:

(1) Full class records could and should have been sighted. Had they been sighted, (i) they would have underlined the call for inspection of at least some of the vessel's permanent ballast tanks and (ii) the information in them with regard to boiler and diesel generator problems would have indicated a history of poor maintenance, and should have encouraged a searching and cautious attitude towards the vessel and towards the allowances required to be made for her overhauling, including upgrading to Hellespont standards.

(2) Mr. Dunn ought to have realized, on the information available to him on Aug. 16, 1989, that there was no sound basis for making an assessment of the seriousness of the corrosion in *Ardent's* permanent ballast tanks, other than that it could well be very serious. If he had insisted, as he should have done, on full class records being sighted, they should have underlined this.

(3) The overall assessment of U.S.$2 m., which I find that Mr. Dunn eventually gave on being pressed by Mr. Anderson, was not one which could safely be given to Mr. Anderson for him to use and rely on in his assessment of and decision whether to recommend the vessel to the Red Sea fund.

Although Mr. Dunn thought that he was being generous, he should have stood firm and said that he could give no really reliable figure, that U.S.$2 m. could be no better than a "guestimate" and that there was a risk that the vessel's actual need for steel repairs would prove to be more on further inspection.

(4) Either *Ardent* should not have been considered further at all, or, if she was, then Mr. Dunn should have insisted on at least some of her permanent ballast tanks being inspected as a precondition to any offer or at least to any commitment to acquire her.

VI.3 *Detailed consideration of PSMSL's negligence*

I now explain these conclusions in detail.

(1) *Full class records*

I have no doubt that, in failing to inspect the Lloyd's Register of Shipping class records, PSMSL through Mr. Dunn failed to exercise the care to be expected of a reasonable technical adviser in the position of PSMSL in relation to the Red Sea fund. I find that the records could and should have been obtained. It is clearly preferable to obtain such records before any inspection, and there was no reason why they should not have been obtained before the pre-purchase inspection in the case of *Ardent*. The complete omission to obtain them at any time was neither wilful nor, in a subjective sense, reckless. Mr. Dunn probably did not focus on the failure to obtain the records, or identify the absence of the records or the risks which it posed. The probability appears to be that he was simply very busy at the time, with many other concerns within the Papachristidis group, that there was internal pressure to complete the purchase of a fourth vessel for the Red Sea, against the background of a rising market and that, in these circumstances, insufficient attention was given to the matter and to the protection of the fund in this respect. There are indications that PSMSL and Mr. Dunn were by mid-1989 beginning to experience serious problems in keeping up with the technical requirements of a fleet which had expanded considerably in the recent past, in part due to the acquisition of the elderly HTL fund vessels. Mr. Papachristidis tended in my view in his evidence both to downplay and to postpone the impact of these problems.

What would the full records have shown?

(a) *Permanent ballast tanks*

I start with *Ardent's* permanent ballast tanks. The Abstech report on the Germanischer Lloyd records to which Mr. Dunn had access made no mention of the condition of *Ardent's* hull, cargo or ballast tanks. Nothing about their condition could be inferred from it. The Lloyd's report would have revealed a series of occasions on which attention had to be given to these tanks. At Piraeus in November, 1981 as part of her special survey, there were (described as "Wear and Tear Repairs"):

> ... extensive repairs carried out to heavily wasted fore peak tank top plating underdeck structure, wash bulkheads, and web frames up to a level of 3 metres below tank top plating.
>
> Entire tank top plating renewed. Entire repair carried out to original scantlings, Rule Requirements, and complete satisfaction.
>
> Tank tested and found tight.

Further, in relation to Nos. 3 permanent ballast tanks:

> First 6 longitudinals, counting from top, which found wasted cropped and renewed, on both tanks and on either side of the tank viz. side shell and inner divisional bulkheads, crossties junctions specially examined in accordance with Rule Requirements and found in order.

Three years later in Dunkirk in November, 1984 on annual survey wastage was found in the wash bulkhead top plating of No. 3 starboard permanent ballast tank over about half its length inboard, and in No. 7 port permanent ballast tank aft bulkhead and longitudinal bulkhead stiffeners. Owners requested, and Lloyd's considered satisfactory, deferment of repairs, subject to a condition of class requiring the defects to be dealt with by January, 1985. They were duly dealt with then in Nantes, when Lloyd's drew the master's attention to the fact that all sacrificial anodes in the Nos. 3 and 7 permanent ballast tanks required to be renewed at the first opportunity.

In August, 1986 the Lloyd's records would have shown that on the vessel's third special survey in Piraeus further repairs were carried out to the Nos. 3 permanent ballast tanks port and starboard and that internal wastage was again identified in way of the forepeak tank and of the No. 7 port permanent ballast tank, in respect of which conditions of class were imposed. The records included thickness determination readings of belts of deck and shell side plating, but not of internal structures. In June, 1987 at Bahrain repairs were done in the No. 7 port permanent ballast tank and forepeak and the conditions of class deleted. At the same time, according to the records, further repairs were effected to damage to the Nos. 3 permanent ballast tanks, "stated to have been due to heavy weather". Mr. Dunn acknowledged that it was "more than likely" that such heavy weather damage was associated with weakening of the tank structure by corrosion.

Mr. Houghton accepted that, with the exception of the forepeak repairs in 1981, there was nothing to suggest that these were extensive repairs or to indicate that poor maintenance was responsible. The records do not state the quantities of steel renewed, but they show class involvement in and approval of the relevant repairs. The fact that corrosion was at the top of tanks would be consistent with a normal pattern. It would also be consistent with the anodes being properly maintained and protecting the tanks lower down (although Lloyd's Register's note regarding the anodes in January, 1987 is not so reassuring in this respect).

Accepting these points, it seems to me that the records would, if inspected, have shown an apparent recurring need for repairs in ballast tanks related to corrosion, matters which Mr. Spence indicated would have been of interest. In the light of the history in the records and the general tendency for the rate of corrosion to increase as a ship ages, it would be natural to believe that by the latter part of 1989 further steel replacement would again be necessary. How much would be uncertain. In these circumstances, inspection of the records would have fortified the reasons for inspection of permanent ballast tanks on a pre-purchase inspection.

In his original report Mr. Houghton said that:

> The most significant fact revealed by the Lloyd's Class Records is that they contain no close up survey or thickness reports for the internal structure of the segregated ballast tanks, nor is there any record of a close up survey of the segregated ballast tanks having been carried out. This serious omission should, by itself, in my opinion, immediately have raised doubts and questions in the mind of any prospective purchaser. For instance, if due to some oversight the close up survey of the segregated ballast tanks had not been carried out, the lack of thickness measurements would immediately point to the need for a thorough investigation of them. On the other hand, if the close up survey of the segregated ballast tanks had been carried out, any buyer should have wanted to see the results. The vessel should not have passed her Third Special Survey without a close up survey and associated thickness measurements being taken in relation to the segregated ballast tanks. If the Lloyd's Class Records had been examined it would have been discovered that neither of these had been carried out. I am unable to explain how "ARDENT" passed her Third Special Survey without a close up survey (and associated thickness measurements) of the segregated ballast tanks.

Mr. Houghton was mistaken to suggest that Lloyd's records contained no reference to a close up survey being carried out on *Ardent's* third special survey. They contained the note: "Close up surveys were carried out satisfactorily in accordance with the Rules." However Lloyd's reports did not include the thickness measurements of internal structures, the results of which Mr. Houghton thought (although this was not a matter for him) that "any buyer should have wanted to see" if there had been any close up survey. By definition under Lloyd's rules a close-up survey is "a survey where the details of structural components are within the close visual inspection range of the surveyor" and the rules provided for:

> ... sufficient thickness measurements of structural members subject to Close-Up Survey ... to be taken for general assessment and recording of corrosion pattern.

They also contained more specific provisions for tankers over 10 and 15 years, involving in the case of the latter gaugings of two additional transverse sections of the tanker amidships. In addition to the thickness measurements required by class rules, owners may in practice request additional thickness measurements for their own purposes.

The inspection of Lloyd's Register's records which the defendants instigated in the context of the present litigation through a firm called Marspec referred simply to thickness measurement being taken on deck and shell plating. Inspection of the original Lloyd's records shows that these are the only thickness measurements which they contain. Mr. Spence in response pointed to a notation in the original records showing that item 2231 "Thickness Determination" was credited, which, as Mr. Houghton accepted, ought to mean that all the thickness measurements required by the rules had been carried out. Mr. Spence went on to say that the thickness measurements extracted and appearing on class records satisfied the requirements of Lloyd's Register's rules. In this he was wrong. The measurements abstracted included two additional transverse sections of external plating, one in way of Nos. 3 segregated ballast tanks. But the rules define the phrase "transverse section" to include "all longitudinal members such as plating, longitudinals and girders in deck, side, bottom and longitudinal bulkhead". Mr. Spence's evidence in response to this was that the fact that the measurements of internals had not been abstracted onto Lloyd's records did not mean that they had not been done in accordance with Lloyd's Register's requirements. That is so. An issue then emerged between Mr. Houghton and Mr. Spence, both experienced in looking at Lloyd's records, as to the likelihood that Lloyd's Register would not have abstracted the full transverse measurements, if taken. Mr. Houghton

demonstrated that Lloyd's Register had and has a particular form (No. 2170) for such internal transverse measurements, and said that in his experience this was used; Mr. Spence said that in his experience it was not always completed, a lot was left to the discretion of the individual surveyor and anomalies could also occur.

Looking at the matter generally, it would seem surprising if internal measurements were not taken, bearing in mind especially the internal repairs done and identified as requiring to be done on *Ardent* in August, 1986. But it is also surprising that, if internal measurements were taken, they were not abstracted. When Marspec inspected Lloyd's records in the context of the present litigation, the language which they used differentiated between the 1986 entry covering only deck and side shell plating thickness readings and a post-purchase entry dated February, 1990 covering a "full thickness determination of the vessel's hull" which included internals.

On balance, I prefer Mr. Houghton's evidence in this area, and conclude that an experienced technician looking at an abstract of the Lloyd's Register records for *Ardent* would have both hoped and expected to see an abstract of full transverse measurements. Its absence would not by itself have enabled him to conclude that none had been done. But without seeing any such abstract he could not consider or evaluate the relevant figures in the way suggested in the last paragraph of Mr. Mathieson's paper quoted in Part V.4 above. To the extent that the passing of special survey in August, 1986 was itself a matter of comfort in relation to the vessel's condition in August, 1989, the absence from Lloyd's records of any thickness measurements on internals would lessen that comfort. In the case of neither the special survey nor any thickness measurements of internals did the defendants in fact see any detailed documentation of the kind that could have been expected.

The defendants submit that nothing which would have been revealed by inspection of Lloyd's Register's records would have added to what was in fact revealed by the physical inspection carried out by Mr. Reilly and Captain Kazazis. I do not accept this. It is true that Mr. Reilly and Captain Kazazis identified serious corrosion in the permanent ballast tanks. But to know that there was a recurring problem of corrosion would have been of some relevance, although it did not necessarily involve extensive corrosion or poor maintenance in areas other than the forepeak. It would on any view have focused attention on the forepeak. Mr. Dunn said that he assumed that there was likely to be corrosion in the forepeak. It is also true that extensive work had been done in past years in that tank. I consider however that the work done would or should not have been regarded as comforting, but rather as pointing towards a need for caution about the likely state of the steel there. Had the records been seen, they should have underlined for Mr. Dunn the need to insist on inspection of permanent ballast tanks, including the forepeak. The vessel had repeatedly manifested corrosion in her permanent ballast tanks. There had been no more than a glance into the very uppermost parts of certain of those tanks. This had however indicated that she had sustained yet further severe wasting. Any assumptions made in these circumstances about the probable extent of the costs involved in her repair would be, in essence, untested and unverifiable.

(b) *Other matters*

Having dealt with the matters which would have appeared from the full class records in relation to *Ardent's* permanent ballast tanks, I turn to other aspects of the vessel's history and condition. The plaintiffs raise three categories of matter which they submit would or should have been of concern to a person in Mr. Dunn's position, had he seen the Lloyd's records. These matters, they say, would individually and/or cumulatively have pointed to a history of mechanical problems associated with poor standards of operation or maintenance, and would or should have led to a more questioning attitude to the vessel, and in any event to substantial allowances being made for likely maintenance costs in any appraisal of the vessel for possible purchase. The defendants originally admitted in their points of defence that inspection of the Lloyd's records would have revealed that *Ardent* had a history of poor maintenance, but withdrew the admission by amendment in April, 1996. In my judgment the original admission was correct.

The three categories of matter relied on by the plaintiffs relate to the vessel's boilers, diesel generators and turbo generators.

(c) *Boilers*

The Lloyd's records would have revealed boiler repairs to have been necessary on at least six or seven occasions, in 1972, 1974 (twice within a month), 1978, 1979, 1981 and 1987. The repairs were recorded as involving retubing on all occasions up to 1986 and quite likely also in 1987, when damage was found caused by "loss of water on primary side and failure of cut-out". In 1978 there was also reference to the low level shut-offs (which together with the alarms were found bypassed). Mr. Dunn described it as "disgraceful" or "outrageous" that the vessel could have been operated with the boiler cut-outs not working. The damage in 1978 was also attributed to loss of water, which Mr. Houghton explained indicated that the automatic

water controller was not then working. A feature of Mr. Dunn's note of his conversation with Mr. Reilly and Captain Kazazis, of the latter's telex and of Mr. Reilly's report was that the boiler automation was out of order or needed a complete overhaul. Both the note and the telex mentioned the extra engine room personnel required for the operation of the boilers. In his telex Captain Kazazis expressed the belief that a lot of money "should be spent in the engine room especially for boilers". Mr. Dunn said that he understood the problem to relate to automation, in respect of which Mr. Reilly made a specific allowance and that Mr. Reilly had reported that the boilers "looked to be okay". This appears to be a reference to Mr. Reilly's written report, like the comment in Mr. Dunn's witness statement to the effect that "the oil fired boilers were reported by Simon Reilly to be in good condition". In fact, Mr. Reilly's report dealt only with superficial appearance. Apart from the automation and "maybe a number of tube repairs", Mr. Dunn said that he did not believe that any money would need to be spent on the boilers, and he added that any work which did need doing could have been done by the crew or a repair squad.

Accepting Mr. Dunn's account of his thinking, and whatever Mr. Reilly may have led Mr. Dunn to believe, Mr. Houghton's evidence was that knowledge of the prior history of the boilers would have focused attention on several matters; firstly, the period over which boiler automation had been defective, secondly, the fact that no boiler water treatment records had been sighted (Mr. Reilly's report contained a question mark against this heading) and, thirdly, the extent to which there had in likelihood been poor maintenance. In particular the combination of the 1987 incident and the fact that the automation was not working in 1989 would, or should, have introduced a real doubt as to whether all would prove satisfactory on close inspection of the boilers and whether any repairs that were required, in addition to the work needed on the automation, would be capable of being undertaken by the crew or a repair gang or without significant cost. While Mr. Dunn had to rely on Mr. Reilly's and Captain Kazazis' inspection, if that was all he had, he would, and certainly should, have been less confident about the state of the boilers, particularly the tubing, if his attention had been focused on these matters. Mr. Dunn's response in evidence that he would have thought that any decent surveyor would have been looking at such matters as boiler failures overlooks the advantage of actual knowledge, as opposed to speculation, about the prior history, maintenance and internal condition of the boilers.

(d) *Diesel generators*

The Abstech report which Mr. Reilly and Mr. Dunn saw disclosed that the vessel had in December, 1987 undergone major damage affecting, and requiring complete overhauls of, her two diesel generators. The damage to one was associated with crankshaft seizure (suggesting and in fact due to lack of luboil) and the damage to the other appeared similar. In August, 1989 a major overhaul was again necessary to replace the vessel's inboard diesel generator, and was observed by Mr. Reilly. Had the earlier class reports been available, it would have been known that the vessel had experienced two yet further incidents involving damage to her diesel generators, one in January, 1986 involving her outer generator and the other in August, 1986 when both the inner and outer generators were damaged and required re-machining. Mr. Dunn and Mr. Reilly were not aware of these incidents. It is true that all Mr. Reilly could have done was ask the vessel's chief engineer if he could explain their cause. On the face of it, however, these two incidents would have added to the reasons for questioning the general standard of treatment and maintenance of this vessel. However, the known incidents of December, 1987 and August, 1989 anyway constituted reason for caution in this regard.

(e) *Turbo alternator/generator*

The turbo alternator is designed to operate off either the main engine exhaust (using steam supplied by the waste economizer or exhaust gas boiler) or the diesel turbines. In the former mode, it operates at effectively no cost, enabling the diesel generators to be shut down. Mr. Reilly reported in August, 1989 that the exhaust gas boiler could not sustain a full load on the turbo alternator, but referred to the turbo alternator itself as being "reported in very good condition" and "seen all intact". The Abstech report also mentioned that the alternator had been overhauled, cleaned, dried and varnished in December, 1987. The full class records would have revealed three incidents of damage to the turbo alternator in January, 1978, November, 1979 and May, 1980. These would have given further reason to doubt the historical adequacy of the vessel's maintenance, and quite possibly suggested some link with the diesel generator damage over the same period. But there had been no similar incidents affecting the turbo generator since 1980, and no significance can, I consider, attach to the fact that Mr. Dunn remained unaware of these old incidents.

In the light of what is said above about the vessel's boilers and diesel generators, I accept the plaintiffs' submission that, if Mr. Dunn had seen the full class records, they should have demonstrated a

need for caution about the vessel's maintenance and about the allowances to be made for overhauling.

(2) *Absence of reliable basis for assessment of the corrosion in Ardent's permanent ballast tanks*

The following points arise from what I have said in Part V.2 above:

(i) Mr. Dunn ought to have appreciated, and I have little doubt did appreciate, that the fact that a vessel had passed special survey and remained in class thereafter could not by itself constitute a reliable basis for drawing conclusions about her condition or for an offer to acquire her at any time, let alone three years after the special survey.

(ii) He ought also to have appreciated that, even if *Ardent* appeared in other respects in reasonable or good condition, this could give no reliable guidance to the condition of her permanent ballast tanks.

Thiseas illustrates both points strikingly. As to *Ardent*, on Mr. Dunn's own evidence, his attitude appears to have been coloured by a "general feeling" which he got about her. She looked, as he put it, "in reasonable shape". Mr. Dunn's evidence that he could judge the condition of permanent ballast tanks from that of other tanks within the same vessel overlooked the fact that permanent ballast tanks have a quite different life and treatment to other tanks. This is so with all vessels, but was all the more so in the case of *Ardent*, since even her clean ballast tanks had been converted to exclusively cargo use while she was at Aqaba. Further it was known from Mr. Reilly that serious corrosion existed, and that the condition of all *Ardent's* permanent ballast tanks was "very suspect".

Mr. Dunn also indicated in evidence that he drew some comfort from an assumption that the corrosion was at the top of the tank. In reality there was no or very limited comfort to be drawn in that connection at all. Mr. Reilly had seen, at most, three metres of two of the three permanent ballast tanks into which he briefly looked where he had reported "extensive contamination". Mr. Dunn said this in evidence:

> [Q.] The problem was that you simply did not know how far down it [corrosion] went. [A.] No, I assumed it was at the top of the tank.
>
> [Q.] You cannot have assumed that, because Mr Reilly told you that he suspected that the remaining tanks, the remaining parts of the tank, would be in a similar condition. [A.] I read that and discussed that with Mr Reilly, and I understood it was the top of the tank, meaning the top of the tank, not the tank all the way down, as you are inferring.
>
> [Q.] You assumed, did you, that everything under the water was perfectly satisfactory, and had no corrosion, is that — [A.] No, I did not assume that. I did not know. I assumed that it was the top of the tank that was corroded.
>
> [Q.] You did not know how far down it went, and it was as simple as that. [A.] No, I did not know.

Mr. Dunn did not therefore know at what tank level any improvement in corrosion might show itself on inspection. Further, he did not know of the pattern of usage of the tanks when the vessel was a storage vessel, and their vulnerability to corrosion depended on the maintenance of anodic protection, both relevant considerations as indicated in Part V.2 above. He in fact knew that *Ardent's* anodes were exhausted, and it was open to doubt whether this was a recent occurrence.

(ii) Mr. Dunn's thinking, as he explained it, was also influenced by his own and other people's "past experience". But *Ardent* had features of which he had had no relevant experience. He had not owned or acquired a vessel having the apparent problem presented by *Ardent's* permanent ballast tanks. His own department's papers show a sensible reluctance to become involved with any other vessel displaying similarly suspect characteristics. In relation to the acquisition of *Ardent*, Mr. Dunn was in new waters, although he himself did not appreciate at the time how risky they could be.

Mr. Dunn's reliance on "averages" had two aspects. He invoked the average experience of other shipowners. Thus, the "general knowledge of the industry as a whole" on which he relied in a passage quoted earlier in this judgment related to what "the average people would be putting in at say around the third special survey". He also relied on the fact that he himself had made budgets and worked through averaging all his life.

It is of the essence of averages that they derive from a spread of experience, and cannot necessarily assist in any particular case. Mr. Dunn acknowledged that one must consider the specific vessel:

> [Q.] Ultimately, averages do not help, do they? [A.] I believe they do. I am sorry, we make budgets through averaging. This is the way we do all our budgeting, so I cannot agree with you, Mr. Eder, . . . averaging is how we work.
>
> [Q.] As far as steel renewals are concerned, whether or not a ship is very corroded like the Ardent or like the Thiseas or whether it is not, will depend upon the particular ship, how it has been managed, how it has been operated, what has happened to it, whether it has been maintained or not, whether the anodes have been replaced or not, a whole host of matters. So, ultimately it all depends on the particular ship that you are concerned with? [A.] That is why we inspect the ship.

[Q.] Do you agree with me that ultimately it depends upon the particular ship that you are concerned with? [A.] You inspect the vessel and you get a report on that vessel, so that is the vessel you look at, yes.

. . .

[Q.] I will ask you one more time and then pass on. What I suggest to you, as far as steel renewals is concerned, one only has to look at a vessel like the Thiseas or the Ardent, that reference to averages is hopeless. You ultimately have to be concerned with the particular ship, because it depends upon how it has been traded, its particular characteristics, whether it has been maintained or not, a whole host of matters. The answer is yes, is it not? [A.] Of course, yes.

Mr. Anderson also accepted the point in the following passage:

[A.] . . . You are making the distinction of a 17-year old versus a 15 or 13-year old, and you cannot generalize. It is when you see the ship. I am sure there are instances when the 5-year old ship is in worse shape that a 72-year old [?build]. Until you inspect you do not know what you are getting and that is the purpose and that is where you evaluate, but to say that we had no experience at PSMSL in evaluating a 72 built ship, it is obvious from the report, yes, that we did not.

In relation to budgeting, Mr. Dunn's evidence suggested a possible failure to distinguish in his own mind between the overall or average experience of all the vessels managed by the Papachristidis organization and the financial implications for the Red Sea fund of purchasing an unsatisfactory or unusually costly vessel:

Mr. Justice Mance: Averaging, I can understand if you have a large enough pool; some you win, some you lose. But here it might be said that you have a rather small pool because you are effectively not buying it for your general fleet but you are buying it for a particular fund and so it might be thought that if 25 per cent of the fund's assets are going into this one ship, or 20 per cent or whatever, that is less appropriate as a subject for averaging, or an averaging approach. One ought to be more certain about what the actual characteristics of the particular ship are. [A.] Basically, yes, but I still think you can average because — and you say that we do not have a big pool. I think we probably had about 10, 12 Aframaxs of that size by the time we had taken the HTL fleet and some of our existing vessels. We do talk to other people, Shell, BP, Exxon and we — I get the flavour for that. We exchange numbers with people like that. We were experienced at that. With respect, that is the way I do budgets.

[Q.] It may not be a matter for you because it has commercial aspects, but the point I was putting to you is that although I readily accept that you had 10 or more Aframax, they were not all in this fund. They were not all in the Red Sea Fund; only a total of four vessels in the Red Sea Funds. So in financial terms, any averaging has to operate within those four vessels if it operates at all? [A.] Correct, yes.

[Q.] Otherwise if you get it wrong, the fund will not get the benefit of your having got it right elsewhere? [A.] That is true.

In Mr. Dunn's favour, it can be accepted that, although averages imply a greater spread of experience, the actual condition of *Ardent's* permanent ballast tanks appears, on the evidence before me, to have been not just appalling but exceptional. This is a word used by Mr. Houghton to describe a requirement for some 535 tonnes of steelwork, which he considered should have been identified if there had been visual inspection of the permanent ballast tanks in empty condition. He reached this figure on the basis that visual inspection would have indicated that the top half of the forepeak and top thirds of the wing permanent ballast tanks would require complete renewal. The actual requirement proved to be 607 tonnes. Even if the actual requirement had been only 300 tonnes, still *Ardent* would not have been in a condition which could have been regarded as at all typical for a vessel of her age and history. But the reason for inspection is to eliminate risks, not to confirm probabilities, and the existence of inadequately maintained vessels was a known feature of the market. Making all due allowance for risks taken by any purchaser of an elderly tanker at the time, Mr. Dunn in my judgment failed sufficiently to address the particular problem of corrosion presented by *Ardent*, in respect of which additional steps could and should have been taken, before she was considered or assessed further as a candidate for purchase by the fund.

(3) *Absence of reliable basis for an assessment of U.S.$2 m.*

There is no doubt about Mr. Dunn's good faith in making his assessment. I accept also that he believed that it should suffice and thought in fact that he was being generous. But there was no reliable basis for that belief. In respect of overhauling, he had made no assessment of costs not covered by Mr. Reilly's specific items. He should have reckoned on considerable costs in excess of those specifically allowed for by Mr. Reilly, and, in arriving at his overall figure of U.S.$2 m., probably had such costs in mind on a general basis. The amount available for steelwork was or should have been thus correspondingly reduced by

U.S.$200,000 to U.S.$300,000. In respect of corrosion and steel renewals, Mr. Dunn ought also to have realized that he had insufficient information to justify giving a U.S.$2 m., or indeed any, overall estimate to Mr. Anderson for him to use and rely on in assessing of *Ardent*, and in deciding whether to recommend her to the Red Sea fund, without exposing the fund to inappropriate risk. Mr. Dunn should have stood firm and made it clear that he was not in a position where he could give any sufficiently reliable figure.

(4) *Pursuit of Ardent without inspecting any permanent ballast tanks*

In the circumstances, either *Ardent* should and would not have been pursued further after Aug. 16, 1989; or, at the least, she should not have been pursued further without requesting fuller visual inspection of at least some of the permanent ballast tanks in a substantially empty state being insisted upon.

If fuller visual inspection had been allowed, I find that their actual condition would have been sufficiently apparent to make the vessel of no further interest. I do not accept that the only way to obtain a better picture of the permanent ballast tanks following Mr. Reilly's limited inspection would have been by ultrasonics (which sellers would certainly and unsurprisingly have refused to allow). There would have been nothing surprising about a request for visual inspection of several permanent ballast tanks in an empty state, and it would, if allowed, have yielded the necessary information. If *Ardent's* owners had declined such a request, I do not consider that PSMSL and PL could properly or would then have pursued the vessel further. There is no reason to think that the market was so thin that there was no real alternative to her or that the plaintiffs, if they had been informed of the position, would have decided to take the risk posed by the uncertainty about *Ardent's* condition. The purchase would not therefore have taken place.

I find that there was no sufficient reason for not requesting a further visual inspection of *Ardent*. It would have been easy and quick for the Papachristidis organization to request and, if agreed, to arrange. Although the market was a "hot" market, and prices were still rising, considerable time had already gone by without any suggestion of any other firm interest elsewhere. Therefore, even if it had been material to consider the prospects of losing the vessel by making such a request or inspection, there was no real reason to fear this, although it is the case that the asking price for *Ardent* had been continuously increasing over the last months and might have increased further with the market. However, the dominant concern should have been to ensure as best he could that the vessel's condition was such that she could be appropriately evaluated as a candidate for purchase by the Red Sea fund. PSMSL and PL should not have let themselves be diverted from that task by fear of losing the vessel or by a rising market.

In these circumstances, had the standard applicable been the familiar standard of reasonable skill, care and diligence, I would have held PSMSL to be in breach; I would have held that the breach led to the recommendation and purchase of *Ardent*; and that, apart from the breach, she would not have been recommended to or acquired by the Red Sea fund.

VI.4 *Was PSMSL's negligence (a) gross and, if so, (b) causative?*

I turn to the critical questions (a) whether PSMSL's conduct falls to categorized as grossly negligent in any and what respects, and (b) whether, if so, the recommendation to and acquisition by the Red Sea fund of *Ardent* resulted from such gross negligence.

In Part IV.3 of this judgment, I have considered the proper interpretation of cll. 7.9/7.10 of the two agreements, and the meaning of "gross negligence". I concluded that the test is ultimately objective, and that it would be relevant to consider the degree of risk which a reasonable person would perceive as involved in the conduct, not just by considering the likelihood of the risk materializing, but also by considering other factors such as the seriousness of the risk if it did materialize, whether any steps at all had been taken to avoid the risk and how simple it would have been to take any.

Failure to sight class records for a period covering any special survey or drydocking or going back longer than about 18 months might not, perhaps, strike a reasonable person in the shipping world as involving a "high degree of risk" or as "highly dangerous" or giving rise to "a strong probability that harm may result". But it is a step which could be easily undertaken and could yield important information in any individual case. The point of class records is that they represent an objective record of an independent third party's detailed inspection of the vessel. Bearing in mind the limitations in time and scope of most pre-purchase inspections and the absence in most cases of other information, they are in this respect of particular significance.

In the present case, inspection of full class records was an elementary and simple step that any competent adviser fulfilling PSMSL's role ought to have undertaken. This is so whether it was taken prior to any pre-purchase inspection, as is preferable and should have been the case with *Ardent*, or after. Failure to perform it carried with it an obvious

risk that significant information about the vessel and her characteristics would remain unknown to PSMSL and the Red Sea fund, that the decision whether to recommend and acquire the vessel would be based on inadequate information and that, if the decision to pursue the vessel was still maintained at all, PSMSL, PL and the fund would be deprived of information which would assist/ place a proper value on the vessel and assist/ negotiate as favourable a price as possible. The failure to take any step, over a long period, in the present case to sight the Lloyd's records was objectively heedless, indifferent and disregarding. The Abstech report commented expressly on "the short classification period with GL". It showed that during this period no special survey and no survey of the permanent ballast tanks had taken place. Mr. Reilly's brief inspection showed that the condition of the permanent ballast tanks was central to appraisal of the vessel. On the facts of this case, and by comparison with documented illustrations of the correct attitude being adopted in other cases, it is not easy to understand how or why PSMSL did not take the step which should obviously have been taken of obtaining sight of the Lloyd's records. I have already indicated possible reasons, associated with overwork and undermanning. The likelihood appears to be that PSMSL never even considered obtaining the full reports, after receipt of the limited Abstech report. I consider that PSMSL's failure to consider and take an elementary precaution must be regarded as gross negligence. Whether this led to *Ardent* being recommended and acquired is a question which I address later.

The other aspects of PSMSL's negligence identified in Part VI.3 consist in: the absence of a sound basis for making any assessment of the seriousness of the corrosion in *Ardent's* permanent ballast tanks, other than that it could well be very serious; the provision to Mr. Anderson in that situation of an overall estimate of U.S.$2 m. for repairs, in circumstances where it was not appropriate or safe to give such an estimate; and the failure, if the vessel was to be pursued at all, to insist as a pre-condition upon a proper visual inspection of several permanent ballast tanks in an empty state.

Did PSMSL's conduct in these respects involve gross negligence? If I were to pose the New York jury question, whether such conduct "smacks of intentional wrongdoing" or "betokens a reckless indifference to the rights of others", my answer would be that it does not. It is negligence, but not that serious; likewise, if I take in a narrow sense the requirement under New York law of a "high degree of risk" or "a strong probability that harm may result" or of conduct of a "highly dangerous character". The real task is however to put the question in its contractual context, and ask whether PSMSL's conduct was so negligent as to fall outside the protection against ordinary negligence which the contract was intended to give. The defendants invite attention to various factors, in particular the extent to which care was taken, the likelihood of injury materializing and the seriousness of potential injury. These factors can be amplified in the light of my previous findings:

(i) Mr. Dunn erred in approach and in the assumptions he made and factors which he took into account. But this is not a case where the vessel was not inspected at all, or where an unfavourable inspection report was wholly disregarded. He had the vessel inspected by two competent inspectors, and he spent time evaluating their inspection and report with them. It is not even a case where there was no inspection or report at all of any permanent ballast tanks, in view of Mr. Reilly's brief descent into and adverse reports on the condition of the tops of three of the six permanent ballast tanks. Mr. Dunn erred in considering that this gave him a sufficient basis on which to evaluate the vessel and to give to Mr. Anderson, under some pressure, the U.S.$2 m. figure. But this is not a case where Mr. Dunn can be said to have taken no care at all. Whereas the absence of full class records appears to have passed entirely unconsidered, Mr. Dunn addressed his mind to the limitations of the inspection and report and concluded, albeit erroneously, that they could appropriately, even generously, be met by the figure which he gave to Mr. Anderson.

(ii) The U.S.$2 m. estimate which Mr. Dunn made was on any view of the evidence substantial, both in terms of his own experience and in terms of the average experience of others in the shipping industry. Although Mr. Dunn did not arrive at it as an absolute worst case figure, it seems clear that he did not conceive that *Ardent* could prove to be in anything like as bad a condition as she in fact was and that her actual condition was, using Mr. Houghton's description, exceptional. Mr. Dunn's failures were failures to appreciate the limitations of his experience and knowledge and the limitations of average figures, in the context of elderly tankers which might prove to have been operated and maintained less competently and conscientiously by far than PSMSL's own managed vessels. Mr. Dunn also appears to have placed an unjustifiable degree of reliance on the relatively good condition of ordinary ballast tanks and on the fact of classification and a special survey three years previously. On the defendants' case, this combination of misapprehensions and misjudgments in the performance of PSMSL's duties, opening the way to exposure of the fund to a significant risk that the U.S.$2 m. figure would prove inadequate, demonstrates negligence within a not unfamiliar class, and

does not amount to that different level or order of negligence, calling for the description gross.

(iii) Any consequences of the risk which PSMSL's conduct involved were ultimately financial. They must be viewed against the background of the market and the projections which inspired all involved in the fund. The risk involved in PSMSL's negligence was that a vessel might be acquired which would not otherwise have been acquired, and, once acquired, would prove more expensive to repair than Mr. Dunn's figure allowed. But it was only the extra cost, over and above U.S.$2 m., which would represent an extra and unjustified burden falling on the fund if this risk materialized. The fund was conceived and the vessel acquired in optimistic market conditions — the optimism being shared on all sides.

The projections on which the fund was based do not suggest that it would have been a disaster if a vessel had proved somewhat more expensive to repair than had been budgeted. It was always understood that the ultimate profitability of the fund depended on the state of the tanker charter market during the life of the fund and of the sale and purchase when the vessels came to be sold. The subsequent collapse of the tanker market was not foreseen by anyone. Extra repair costs of half or even one million dollars could have disturbed the immediate programme for repayment of lenders to or investors in the fund. But the defendants can, I think legitimately, say that they would not have appeared fundamental. Throughout 1989 the tanker market had continued to rise (although with hindsight it can now be seen that it was approaching its peak). At the time, the desirability of getting into the rising market as soon as possible and the belief that there would be further rises in the market which would in practice cushion any costs overrun were both factors capable of influencing the thinking and conduct of those involved in the tanker market. That is not to say that it would have been appropriate or reasonable for Mr. Dunn to disregard the vessel's condition or for Mr. Anderson to disregard the relationship of the price paid plus cost of repairs to current market value. But in considering whether any negligence on either's part in this connection was gross, it is relevant to take into account the degree of seriousness which could at that stage be envisaged as attaching to an underestimate of the potential repair costs. Bearing in mind what were at the time perceived as a strong and solid market, it is, I think, the more possible to understand, even though not to excuse, the failure to give the vessel's condition the attention it deserved.

Against these factors must be set a factor in the plaintiffs' favour the importance of which Mr. Dunn himself emphasized. PSMSL's concern was with the physical condition of the vessel and the costs which could be envisaged to upgrade her. However buoyant a market may be or appear, an acquisition should be capable of being justified in terms of the market when the acquisition is made. PSMSL's task was directed to ascertaining and reporting on the physical condition of the vessel. PSMSL's failure to insist on a proper inspection of any permanent ballast tanks in empty condition was a matter going to the core of their particular functions.

PSMSL's failure to perform this particular core function is underlined by PSMSL's gross negligence in failing to sight full class records. The contents of the full class records must, in these circumstances, be treated as known to PSMSL, when considering whether it was grossly negligence of PSMSL to put forward the figure of U.S.$2 m. to Mr. Anderson. PSMSL's gross negligence in failing to sight the full class records cannot itself have resulted in the purchase of *Ardent*, or be causatively relevant, unless PSMSL would have acted differently if they had known the contents of the full class records. These — even if only obtained after Aug. 15/16, 1989 — should have underlined the need for inspection of some of the permanent ballast tanks in an empty state. But I do not consider that sight of them would in fact have made any difference to Mr. Dunn's actual approach or advice to Mr. Anderson. PSMSL cannot on the other hand rely on ignorance by Mr. Dunn of matters about which he was grossly negligent not to know, if knowledge of such matters would make the difference between a conclusion that there was mere negligence and a conclusion of gross negligence. Accordingly, I must judge Mr. Dunn's conduct, by treating him as aware of matters which would have been known from inspection of the full class records.

Viewing all these factors together, and assuming knowledge on Mr. Dunn's part of the contents of the full class records, should Mr. Dunn's conduct, in giving Mr. Anderson the estimate of U.S.$2 m. for him to rely on in evaluating *Ardent*, be characterized, for the purposes of cl. 7.10 as gross, rather than mere, negligence? I recognize the force of the plaintiffs' submission that to acquire a vessel for a third party fund, knowing that she had — both historically and presently — significant permanent ballast tank corrosion, without undertaking any inspection of any permanent ballast tank in empty condition, calls for the description gross negligence. But in the final analysis and in the light of the particular factors identified above in PSMSL's favour, I consider that what occurred was no more than negligence by PSMSL in the course of inadequate attempts to fulfil its contractual role, and that the shortcomings in PSMSL's performance of its

duties were not so serious that they should be categorized as "gross negligence" or should deprive PSMSL of the general contractual protection afforded by cl. 7.10. The question is, as the end of the day, a jury question, but it arises in the context of a clause which makes it clear that it is only in certain exceptional cases that immunity from suit is lost. The present case, although it reveals significant misjudgments and shortcomings in approach and in the observance of proper standards in relation to *Ardent*, does not in my view involve negligence of so grave a nature as to fall outside the intended sphere of immunity.

VI.5 *Was PL negligent through Mr. Anderson?*

I turn to consider the position of PL, starting with Mr. Anderson's involvement. So far as class records are concerned, Mr. Anderson's evidence was that he would only have skimmed the Abstech report. They had in June, 1989 just contracted to buy the 1972-built *Armour*, and were primarily interested in buying a younger vessel. He would not have expected to see the report again. Mr. Anderson accepted that is was important to see class records, while adding that "the greatest importance is seeing the ship and assessing it". He also effectively accepted, as I have mentioned, that full records should have been inspected. He said however that it was a matter for PSMSL with which he would not normally have become involved.

Mr. Anderson was aware that corrosion was often a concern in older tankers. I believe that he was aware, although not accepting this directly in his evidence, that storage vessels could involve elements of uncertainty, particularly as regards maintenance attention, which would not be present in the case of vessels in ordinary trading. He knew that the Papachristidis organization had no or very limited experience of buying a tanker of or approaching *Ardent's* age, but said that he did not attach significance to the difference between *Ardent* and a tanker three or so years younger. His response on all such matters as age, frequency of change of name or ownership and use as a storage vessel was, again, that what really mattered was inspecting and assessing the ship. Of all factors, inspection was "of the greatest importance" or "overriding", the other matters were "incidental information":

> Until you inspect you do not know what you are getting and that is the purpose and that is where you evaluate . . . .

He identified the aim of inspection in the following answers:

> [Q.] Therefore, one of the essential purposes of carrying out a thorough pre-purchase inspection would be as far as possible to identify what would have to be spent which would then form . . . [A.] Yes.
>
> [Q.] Which would then form part of a budget over a period of time? [A.] Would be part of the budgeted expenditure, yes.
>
> [Q.] Part of the forecasting process? [A.] Sure, yes.
>
> [Q.] If that expenditure were to be, say, more rather than less, that would be an important factor, again depending how much? [A.] Yes, depending how much because if it has, you know, they are all going to have some expenditure, yes.

The obvious corollary of the emphasis placed by Mr. Anderson on inspection is that the inspection should be as full as practicable, and that PL should, so far as lay within its role, be satisfied that it was. Mr. Anderson's response was in effect that it was not his or PL's role to question whether any inspection undertaken by PSMSL was satisfactory for his or its purposes.

Mr. Anderson is, as he stressed in evidence, not a technical man. Although Mr. Anderson's qualifications and expertise lie on the commercial, rather than the technical, side, his role was to evaluate vessels for purchase on the basis of technical advice received from PSMSL. Despite his disclaimer of purely technical expertise, he volunteered a number of comments on pre-purchase inspection procedure and what was usual in his witness statements and showed general knowledge about matters such as corrosion and use of tankers for storage. His first statement said that he would have given each Red Sea director to whom he spoke about any particular vessel "a general description of the vessel concerned including . . . its general condition as revealed by the inspection". I do not accept that matters in fact proceeded in this way in relation to *Ardent*, but it does suggest that Mr. Anderson did interest himself in the general findings on inspection. The view I formed was that Mr. Anderson tended to downplay the knowledge of a general nature about technical matters which I believe that his experience would have given him and which would have enabled him to discuss them on a broad basis with Mr. Dunn if he wished.

With regard to proper inspection procedure, Mr. Anderson's evidence was unpersuasive. His witness statement started by emphasizing that it may not be possible to inspect "all" ballast or cargo tanks or other parts of the vessel. But it went on to suggest that "in some cases" sellers refused anything other than a " 'walk-through inspection' without allowing access to any tanks or machinery". He cited a restricted inspection of vessels belonging to Marathon. But he notably failed to refer to the fact that the Papachristidis organization's actual offer was subject, not just to board approval, but also and very significantly to "an inspection of the vessel's

cargo and ballast tanks at a mutually acceptable place and time prior to delivery". That the Papachristidis offer was not accepted on grounds of price and it was never tested whether Marathon would accept the term is neither here nor there. The vessels were in fact sold to another fund on unknown terms.

In his oral evidence Mr. Anderson said that usually one saw some, but not other, ballast tanks. He later accepted that it was "unusual, probably, not to see any". He could not recall and was not aware of any case where none had been seen, while maintaining that there "could be. I do not know." In the case of *Ardent*, Mr. Anderson was aware that none had been inspected in an empty condition, and that, where Mr. Reilly had been able to look briefly into them at all, he had seen severe corrosion. I find that he also knew that this was the principal reason why Mr. Reilly and Mr. Dunn were reluctant and, until Mr. Dunn was pressed into giving a figure, not able to give any figure to cover steelwork. Indeed, Mr. Anderson (in par. 156 of his witness statement, set out below) accepted that it was because of the ballast tanks that Mr. Reilly had refused to give any estimate for steel renewals, although in oral evidence he said that he could not recall the reason and suggested that it was likely to have been connected with other equipment as well as steel. I find that at the time Mr. Anderson would have been in no doubt that the real uncertainty and problem related to the steel.

Mr. Anderson's conversation with Mr. Dunn, with Mr. Reilly apparently standing by, was described by Mr. Anderson in his first statement as follows:

> 152. . . . I would have received and read a copy of SR's report and Captain Kazazis's telex report . . . either prior to or at the beginning of any meeting with JD and SR. I cannot recall whether I would also have received a copy of the Abstech Class Inspection report at the same time, but if I did, I would have done no more than skim through it . . . .
>
> 155. During my meeting with JD and SR, we read through SR's inspection report and Captain Kazazis' telex and discussed JD and SR's overall impression of the vessel. I believe that the main subject of our discussion was the cost of the necessary repairs. I needed an assessment of the vessel's condition and an estimate of the cost of any necessary repairs from JD and SR in order to form a view as to whether the "ARDENT" 's likely offer price (when such repairs were taken into account) was in line with the prevailing market price for a comparable vessel in reasonable condition. Before I joined them, JD and SR had already discussed and agreed that approximately US$ 1 million was needed in respect of several particular repair items which are noted in SR's inspection report and I do not remember there being much discussion about these specific repair items. I would have relied upon JD's and SR's experience and expertise in assessing these estimates.
>
> 156. We then considered the allowance that had to be made for steel renewals in the vessel's segregated ballast tanks. I recall that SR was unwilling to give any figure for the steel renewals because he had not been granted full access to the ballast tanks during his inspection. As I have explained, however, I needed to get some idea of the likely total repair bill in order to assess the reasonableness of the "ARDENT" 's likely selling price. I therefore pressed JD to give me a figure for the steel renewal that would be needed. After some further discussion, JD suggested that an allowance of US$ 1 million should be made for the steel renewals.
>
> 157. I was aware, of course, that JD's figure for the steel renewals was not based upon a full physical inspection of the ballast tanks. However, I was confident that JD's figure for steel renewals and his overall repair estimate would be adequate. In fact, my impression at the time was that the overall estimate of US$ 2 million if anything erred on the generous side. I believe my confidence in JD's figures was based upon the following matters, although these may not have been spelled out during the meeting: firstly, PSMSL had never had any experience of a vessel under its management requiring steel replacement in the order of US$1 million; secondly, the "ARDENT" was currently in class and had passed her Special Survey in August 1986 when the ballast tanks would have been inspected and passed by a Classification Society Surveyor; thirdly, the figure of US$ 2 million when taken as a whole, was considerably in excess of any amounts which PSMSL had ever spent on dry-docking any vessel including the ULCCs which were approximately four times the size of the "ARDENT". There is of course some uncertainty in any estimate, and although I was confident that US$ 2 million would be sufficient for the repairs to the "ARDENT", I considered that even an adverse variation of 25% in the repair costs would not significantly affect the cash position of Red Sea or the overall return to the Red Sea investors. This belief was based upon the cashflows that had been produced by NODK, most recently at the end of July 1989 following the acquisition of the "ARCHER". In particular, I considered that in the rapidly rising market that existed, such an increase in the total cost of the vessel would be off-set by the expected increases

in the value of the vessels Red Sea had acquired.

158. As I explained I already had an indication from C&P on 15th August 1989 that the seller's asking price would be in the region of US$ 12 million. Taking into account the US$2 million repair figure this meant that the overall cost of the vessel for Red Sea would be approximately US$ 14 million. From my assessment of the tanker market and discussions with MR, I considered that this accorded with the market price of a vessel of a similar age and size to the "ARDENT" in reasonable condition. There were few sales of comparable vessels at this time so it is difficult to make a precise assessment of the "ARDENT" 's market value by comparing her to other vessels. However, the price paid for the "ARDENT" compares favourably with the price recently paid for the "ARROW" (87,459 dwt; built 1975) of US$ 15.5 million. Allowing for the difference of 10,000 dwt in size (a difference of 11%) and the two year difference in age (discounted at 7% per year) the price paid for the "ARROW" indicated that a vessel of the "ARDENT" 's size and age in reasonable condition would be worth in the region of US$ 14.7 million.

In his oral evidence, Mr. Anderson suggested, without specific recollection at least in the case of the telex, that he would have received and read both Captain Kazazis' telex and Mr. Reilly's report before the meeting. This seems open to doubt in view of the passages from his witness statement just quoted, Mr. Anderson's apparent lunch engagement and the timing of receipt of the telex and preparation of the report. On any view Mr. Anderson can have had relatively little time to digest them. In his evidence, he said that he guessed that the whole meeting with Mr. Dunn took in the order of 20 minutes to half an hour. When his attention was drawn in cross-examination to a number of matters in the telex or report (such as the main deck, IGS, port blowers, COW machines, engineroom, suspect maintenance and "unexpected items") which would on their face appear likely to involve further cost, over and above those identified by Mr. Reilly, his response was that he assumed that Mr. Dunn and Mr. Reilly had discussed such matters and that they were allowed for in Mr. Dunn's figure.

> I was not there to question Mr. Dunn and his staff. I was there to get an estimate from them in order to make an evaluation. I did not go there with the specific purpose of questioning the ability of Mr. Dunn and his staff.

I find that Mr. Anderson did not make any attempt to review or understand either Mr. Reilly's specific figures or any other costs or implications which might appear to arise from the telex and report. I find that he gave little attention to the fact that there had been no inspection of any permanent ballast tanks in an empty condition. He also gave none to the fact that the inspectors had not been permitted to continue their inspection. He suggested that this was not unusual at that time, but he had, as I find, no solid basis for any such belief and, as he accepted, no idea whether it had ever happened before. He did not ask Mr. Dunn about it. Nor did he ask Mr. Dunn how he arrived, or could arrive, at any figure attributable to the steelwork, in circumstances where Mr. Reilly declined to give any estimate, and where Mr. Dunn, until pressed again, had also felt unable. Mr. Anderson did not direct his mind to whether it might be appropriate to take any further steps, in particular by way of seeking inspection of ballast tanks in an empty condition or even (at a later stage) by including a special term in any offer made, to clarify the position regarding the steelwork. His governing concern was to secure a figure from Mr. Dunn, which he could then compare with the asking price and his perception of the market value. When he had it, that was evidently the end of the matter:

> [Q.] Having pressed Mr Dunn twice, you say you are reluctant. How are you able to tell me what the figure is? [A.] I did not ask him.
>
> [Q.] Did you ask him, could it go up further than that? [A.] No, I think I left the room when I had the figure, and I had the amount, and, in my own mind, I was satisfied with it.
>
> [Q.] How could you be satisfied if Mr Reilly has told you that he is unable to do it, and he is the one who is there. Mr Dunn has told you twice that he is reluctant to do it, and somehow, out of a hat, a figure of $1 million comes? [A.] The reasons that I was satisfied with it were that Mr Dunn did make the suggestion of $1 million, and I trusted his judgment and his staff. Secondly, it was a considerable amount of steelwork that at least we had not experienced, up to that point in time, with the vessels operated by Papachristidis Limited. In its entirety, $2 million was a big estimate. . . .

Mr. Anderson then went on to refer to other factors, mentioned in his first statement, relating to the passing of special survey in 1986 and the relative insignificance, in his perception, of even an adverse variation of 25 per cent. on the U.S.$2 m. All the factors in his first statement, gave him confidence "although they may not have been spelled out during the meeting". There is, I think, no real likelihood that they were spelled out in the meeting. The lack of comparable experience should have been a matter of concern and the vessel's classifica-

tion in 1986 could not provide assurance about the condition of the ballast tanks in 1989. But the point about an adverse 25 per cent. variation may well give a clue to Mr. Anderson's thinking.

Mr. Anderson's involvement on Aug. 16 was thus brief and uninquisitive. The probable explanation is to be found, in my judgment, in a combination of factors. The principal one relates to the rise in the market. It had been resolved at the June board meeting of Red Sea to go for four, rather than just two vessels, and that PL and PSMSL should arrange for their purchase "as quickly as possible". Earlier in June some investor concern had been expressed, by Chase, about ship prices going up to "exceed the amount per vessel [U.S.$13 m.] specified in the projections". Mr. Anderson remained keen to get on with purchasing vessels, because of the still rising market in August. His first statement puts it as a factor potentially second only to physical inspection:

> The decision whether or not to purchase is primarily a commercial one based upon a number of commercial considerations in addition to the physical condition of the vessel, the most important of which is often one's expectations for the market.

He denied that was an "overriding factor". The defendants' own amended points of defence for the preliminary issues in fact assert in support of a plea on causation that each of the defendants was aware that:

> ... the future prospects for the tanker market was the overriding factor in relation to the decision to recommend and/or purchase the ARDENT.

In my judgment, Mr. Anderson was very substantially influenced by the rise in the market. He rightly acknowledged near the outset of his oral evidence that —

> ... if the market is rising, ... that is no justification for cutting corners with regard to the proper inspection of class records or the proper physical inspection of the vessel.

Secondly, by August two months had passed since the June board meeting. PL and PSMSL had looked at a number of vessels and bought two more for the fund in addition to *Armour*. But, although vessels of possible interest existed, the number of vessels on the market at the time was evidently not large. Thirdly, Mr. Anderson was himself about to go on holiday on Aug. 18. He pressed Mr. Dunn for a figure because he wanted "to try to get this sorted out" before he went away:

> I was busy trying to get the Ardent ... in a position to be offered, yes, before I left. I was trying to get that organized before I left, yes.

Fourthly, Mr. Anderson says that he took the view, or would have taken the view if he had thought about it, that there would be no significant problem even if the U.S.$2 m. was itself exceeded by 25 per cent. or U.S.$500,000. If and in so far as that was his thinking, then, firstly, it tends to suggest that he appreciated that there was some uncertainty attaching to Mr. Dunn's U.S.$2 m.; and, secondly, he had objectively no indication, information or, in reality, relevant past experience which could attach even that extra degree of certainty to Mr. Dunn's figure. The extra 25 per cent. cannot have been more than a feeling on Mr. Anderson's part, possibly supported by something said by Mr. Dunn (although Mr. Anderson himself did not recall this) to the effect that Mr. Dunn's figure was generous. In fact, an additional 25 per cent. would have taken the total paid for *Ardent* by way of price plus repairs above any market value which she could properly have been thought, even by Mr. Anderson, to have in August, 1989, and also over the total of U.S.$14 m. for a fourth ship on which all concerned were, it appears, working after the meeting of Aug. 23. Mr. Anderson's reference in his statement to "one's expectations for the market" could not justify paying over the current market for the vessel, at least without explicitly warning and obtaining the agreement of the Red Sea board. Mr. Anderson himself appears to recognize this in the later paragraph of his statement dealing with market value, where, however, he sought, without justification, to suggest a market value in excess of U.S.$14 m. for *Ardent* in August, 1989.

In my judgment, such factors explain how Mr. Anderson came to act as he did, but do not justify it. Mr. Anderson was confronted by an unusual and problematic situation. It was his duty on behalf of PL to consider and evaluate it in the interests of the fund. Even viewing the matter at a purely financial and commercial level, he had no sufficient assurance as to the significance which could properly be attached to Mr. Dunn's U.S.$2 m. On the contrary, he had, in Mr. Reilly's refusal to give any figure and in Mr. Dunn's reluctance and provision of a figure only under pressure, reason to doubt whether it was reliable and reason to enquire into its basis. Further, he was in my judgment quite sufficiently familiar with usual ship purchase procedures and reports and sale contract negotiations for it to be incumbent on him to raise the possibility of insisting on a further inspection. His attitude, throughout his evidence, that all such matters were for Mr. Dunn alone and that he had no role in them, was, I consider, unrealistic generally and especially so in the specific and unusual circumstances of this case. I consider that PL through Mr. Anderson failed to exercise proper skill and care in the steps which

they took on Aug. 16, 1989 to consider and evaluate *Ardent*.

As to the obtaining of full class records, I accept that this was a matter primarily for PSMSL. Further, although the limitations of the Abstech report are obvious on even a cursory reading, it is not shown that Mr. Anderson saw it at any time, in June, when the vessel was a serious candidate or when he might have been expected to follow up that aspect. It is also not shown that the Abstech report was actually put before Mr. Anderson on Aug. 16, and the plaintiffs have not suggested that, if it was not, he should have required it to see it then in conjunction with the telex and report. I do not therefore consider that Mr. Anderson or PL are liable to criticism because full class records were not sighted. The most that might be suggested is that, if Mr. Anderson had gone into the basis of Mr. Dunn's estimate, this might have led to discussion about any previous history of corrosion, which might have revealed the lack of full class records.

VI.6 *Was PL's negligence through Mr. Anderson (a) gross and, if so, (b) causative?*

Was the conduct of PL, through Mr. Anderson, not merely negligent, but also grossly negligent? In my judgment, Mr. Anderson allowed his perfectly proper desire to complete the acquisition of vessels for the fund to overcome normal or proper caution in respect of this particular vessel. Throughout his evidence he rightly acknowledged the primary importance to be attached to pre-purchase inspection of any vessel. He knew of the risk of corrosion in, and consequent importance of inspection of, permanent ballast tanks of a tanker. He knew that not one of *Ardent's* permanent ballast tanks had been inspected empty. He knew that this was why neither Mr. Reilly nor Mr. Dunn, until pressed, was able or willing to give an idea of the costs of steelwork required on *Ardent*. He nonetheless pressed Mr. Dunn into giving him a figure. He viewed it, rightly, not as covering all eventualities, but as an "estimate". He did not know or question its basis, in circumstances where Mr. Reilly, and Mr. Dunn himself until pressed, had not felt able to give any estimate at all. He appears not to have considered the obvious possibility of insisting on inspection of at least some permanent ballast tanks to obtain a better idea of the extent and level of corrosion and the vessel's suitability. He was content to proceed on the basis that U.S.$2 m. would cover any problem, although the vessel was on that basis being acquired at a price which was at the limit of what the market would justify. If he directed his mind to the possibility that the actual cost of upgrading could be as much as U.S.$2.5 m., then he could only have been relying on future market rises to cover any shortfall adequacy. This was not an appropriate attitude, although for reasons set out in Part VI.4(iii) above I accept that the consequences of the risk which was thereby run would not at the time have appeared fundamental to the fund's success.

All this occurred against the background of a rising market and his own imminent departure on holiday, and betrays an over-optimism about the market and a feeling that it was important to get into the market as soon as possible, which can be seen in retrospect to have been only too obviously misplaced, but which appear to have been generally shared in the market at the time. Mr. Anderson's negligence occurred in or involved the misguided and over-hasty pursuit of his duties. Again, I recognize the force in the plaintiffs' case that Mr. Anderson's failure to pursue with Mr. Dunn (a) the significance of his U.S.$2 m. estimate and (b) the possibility of inspecting at least some of *Ardent's* permanent ballast tanks, constitute clear and serious aspects of negligence. In the final analysis, however, I consider that Mr. Anderson's failures to protect the interests of the Red Sea fund in these or other respects also lack that exceptional character which would call for their characterization as "gross" and which would justify the conclusion that PL is deprived of its prima facie contractual immunity.

VI.7 *Was PL negligent or grossly negligent through Mr. Papachristidis?*

As stated in Part III.11, it is not easy to evaluate Mr. Papachristidis' evidence and position; his involvement remains shadowy in nature and extent. As indicated in Part V.8(2), Mr. Papachristidis' evidence failed in my view to face up to the fact that inspection of the full class records was an elementary pre-purchase procedure which his organization should obviously have taken in the interests of the Red Sea fund, and that no explanation or excuse has ever been suggested for failure to take it. I believe Mr. Papachristidis to have been well aware of this, although he avoided admitting it in evidence.

I accept, however, that he was not involved in the obtaining of class records. This was a matter left to PSMSL and Mr. Dunn. Mr. Papachristidis was also entitled to rely on Mr. Dunn to bring to his attention any problems or shortcomings in the records sighted. It was not for him to question Mr. Dunn or anyone else to confirm that proper procedures had been followed. There is no reason to think that Mr. Dunn summarized the Abstech report or referred to the records in any way which drew Mr. Papachristidis' attention to the absence of the Lloyd's Register records. Again, the most that might be said is that, if Mr. Papachristidis had probed the position in the light of the corrosion seen by Mr. Reilly in *Ardent's*

permanent ballast tanks, he might have enquired whether the vessel had any and if so what history of corrosion, and might have discovered that nothing was in reality known about her history.

Mr. Papachristidis rightly regarded physical inspection as an important ingredient in the decision-making process in relation to the acquisition of any vessel. He knew of the vulnerability of permanent ballast tanks to corrosion. He explained once again that he would expect Mr. Dunn to give instructions for pre-purchase inspections and would leave it to him what those instructions would be. But he should have been and was aware of the importance of inspecting permanent ballast tanks. In the case of *Ardent*, he knew that there had been no inspection of any permanent ballast tank in empty condition. Despite his attempt at points to suggest that there was no reason to believe that anything was particularly amiss in those tanks, he was also aware that they represented a problem, for which it was intended to cater within the overall figure of U.S.$2 m. which it was contemplated might need to be spent on the vessel if acquired. His response to Mr. Houghton's view that the permanent ballast tanks were areas "which a buyer must insist on seeing and on which there can be no compromise" was:

> Our experience with vessels of a similar size and age as the Ardent told us we could put this vessel into acceptable shape with the budgeted expenditure, we had had considerable experience maintaining ballast tanks of tankers of this age and size — tanks which were in many cases devoid of anodes for periods of time which were not subject to very different ballasting cycles than those of the Ardent as suggested by Mr. Houghton; we could have sought to insist on seeing all the vessel's ballast tanks, but would have lost the ship; with the benefit of hindsight that would have been good; but at the time it was not evident.

In his evidence Mr. Papachristidis also referred to

> ... the fact that we were satisfied with the information that was to hand at the time. There was no suggestion in our minds that another inspection was required.

That to my mind is probably an accurate representation of Mr. Papachristidis' thinking at the time. For whatever reason, the question of a further inspection did not receive consideration. But I consider that it ought to have been considered, on the information available to Mr. Papachristidis, even though he had not been party to, and probably did not know about, the oral discussions between Mr. Reilly, Mr. Dunn and Mr. Anderson when Mr. Reilly had refused to give any estimate for steel and Mr. Dunn had only done so under pressure. Nothing in Mr. Papachristidis's or his organization's experience should have led to a conclusion that it was safe to forego inspection of any permanent ballast tanks, or that the cost of repairing and upgrading *Ardent* could necessarily be contained within the U.S.$2 m. estimate which Mr. Dunn gave without the benefit of any such inspection. No likelihood has been shown for considering that the vessel would be "lost" due to competition, if inspection had been insisted upon. A risk that her owners might refuse to allow inspection would be no reason for not requesting inspection; the refusal would itself have suggested that the vessel was not worth pursuing.

In these circumstances, assuming that Mr. Papachristidis had knowledge and was involved in the decision-making process as set out above, his conduct is in my judgment open to the criticism that he did not suggest or insist on any inspection of permanent ballast tanks in empty condition. This could have been easily requested, and easily achieved if the owners had agreed. If they had not, that would itself have been important. Mr. Papachristidis' answer, that all such matters were for Mr. Dunn, does not in my judgment do his own experience and knowledge credit. The reason why Mr. Papachristidis made no such suggestion and took no such initiative is probably that his involvement in the whole process of consideration of *Ardent* was peripheral and cursory. Mr. Dunn and Mr. Anderson were primarily responsible. Mr. Papachristidis was, as he said, relying on them. His full attention was not engaged. He did not probe the basis on which they felt that U.S.$2 m. was a safe estimate upon which to base an offer. He did not pick up or pursue matters which, had he been primarily responsible, he would or might have done. It is also true that both Mr. Dunn and Mr. Anderson were highly qualified and experienced to fulfil their particular roles.

In these circumstances, although Mr. Papachristidis' lack of attention may attract adverse comment, it clearly did not amount to gross negligence. Any responsibility on his part is secondary and subsidiary to that of Mr. Dunn and Mr. Anderson. The most that could be said in relation to Mr. Papachristidis was that he failed to apply his mind sufficiently to this particular vessel, and assumed that Mr. Anderson and Mr. Dunn between them had done so. If he had applied his mind and questioned the basis of Mr. Anderson's recommendation and Mr. Dunn's estimate, then he would have realized that there was no reliable basis for either. As the leading member of the team running the Papachristidis organization, I think that he ought to have applied his mind in this way, even though *Ardent* was only one (and the last) vessel of four being recommended to and acquired for the Red Sea fund. But failure to do so, when others who he was

entitled to regard as very competent and experienced members of the team were handling the matter, does not amount to gross negligence depriving PL of contractual immunity.

VI.8 *Overall effect of conclusions*

It follows from my findings that, although I consider that there was causatively relevant negligence on the part of PL and PSMSL, I do not consider that it amounted to gross negligence or forfeited under cll. 7.9 and 7.10 the contractual immunity otherwise available to protect these defendants. In the circumstances, this action fails in relation to the acquisition of *Ardent*.

In summary, answering the preliminary issues which I have identified in Part I.1:

1(i) None of the first, fourth and fifth defendants owed any duty of care in contract, tort or otherwise to the first or fifth plaintiff when acting on behalf of PL and/or PSMSL in relation to the acquisition of *Ardent*.

(ii) The fourth defendant was acting on behalf of and in possession of knowledge on behalf of PL and/or PSMSL rather than on behalf of the first and/or fifth plaintiff in all respects material to such plaintiffs' claims in relation to the acquisition of *Ardent*.

(iii) The second and third defendants owed duties to the first plaintiffs in contract and the first and fifth plaintiffs in tort subject, in all respects material to such plaintiffs' claims in relation to the acquisition of *Ardent*, to the terms of cll. 7.9 and 7.10 respectively of the commercial and technical advisory agreements entered into in June, 1989 with the first plaintiffs; and each was liable accordingly in such respects for any (if any) "Damages [as defined in such agreements] resulting from acts or omissions on his part which (a) were the result of gross negligence, (b) constituted wilful misconduct, (c) constituted fraud or (d) constituted bad faith".

2. None of the first to fifth defendants was in breach of duty to the first or fifth plaintiffs in relation to the acquisition of *Ardent*.

3. The third preliminary issue does not in these circumstances arise. Had it arisen, my answer, as appears from Part VII below, would be that none of the first to third parties acted in breach of duty to the first or fifth plaintiffs or was liable to make any contribution pursuant to the Civil Liability (Contribution) Act, 1978.

VII. CONTRIBUTORY NEGLIGENCE AND THIRD PARTY PROCEEDINGS

The defendants' allegations of contributory negligence against the plaintiffs and the claims as defendants of Mr. Papachristidis and Mr. Dunn against Messrs. Bouckley, Baarma and Henderson as third parties are closely related. The third party claims by defendants other than Mr. Papachristidis and Mr. Dunn have been stayed. The defendants relied as contributory negligence on the conduct of each of the Red Sea directors, including therefore Messrs. Bouckley, Baarma and Henderson, but also Mr. Anderson and, strictly, Mr. Vouzounerakis. The defendants (if liable at all) contended that there should be a 50 per cent. reduction in the plaintiffs' recovery because of negligence of the plaintiffs' directors. They recognized that, if this contention succeeds, the third party proceedings could not lead to any further recovery.

It is common ground that each of the Red Sea directors owed to Red Sea and (in the case of Mr. Anderson) the fifth plaintiff a contractual and parallel tortious duty when acting as a director of Red Sea to exercise reasonable care and the skill to be expected of a reasonably competent person with his expertise and knowledge.

The defendants relied on certain internal memoranda indicating an understanding on the part of Mr. Bouckley and Mr. Baarma that "work, real work" would be involved in fulfilling their roles as well as to their assertions that they played as far as they could "a probing and questioning role". The defendants sought also to deploy against Mr. Bouckley and Mr. Baarma the evidence which these gentlemen gave about the importance they attached to "full and thorough" inspections and against Mr. Henderson his general acknowledgement in evidence of awareness of the risks of acquiring second-hand tankers without adequate inspections and his trenchantly expressed views about the folly of not inspecting any permanent ballast tanks in empty condition.

Much of the basis for reliance on such points is removed by previous findings of fact in this judgment. In particular, neither PL nor PSMSL nor anyone else identified any particular risk in respect of the acquisition of vessels or the condition of vessels to be acquired prior to the acquisition of *Ardent*. The bankers, including Mr. Bouckley and Mr. Baarma (an accountant and investment banker by background) did not identify or raise any questions about the need for "full" or "thorough" inspections. They simply relied on PL's and PSMSL's abilities in relation to the acquisition and operation of tankers. Mr. Henderson at the relevant times in 1989 had had no tanker experience, and was not aware of corrosion in elderly tankers as a particular problem area. His relevant field of expertise lay in the operation, crewing and maintenance of general cargo vessels. After the acquisition of the HTL and Red Sea vessels, when the Papachristidis organization was experiencing severe difficulties in managing the very heavy demands placed on its resources, which were due only in part to the poor

condition of the Red Sea vessels, Mr. Henderson was asked by Mr. Papachristidis to assume an advisory role in respect of the Papachristidis organization. With the consent of Red Sea, he did this for some time. His experience and knowledge of tankers generally has without doubt greatly increased by reason of that role and the Red Sea debacle generally.

The defendants say nevertheless that each of the Red Sea directors should have identified the acquisition of tankers in suitable condition as an important element in the Red Sea fund's success; and that each should have ensured by questioning and checking that full and thorough surveys were or had been undertaken on any vessel proposed to be acquired, before any recommendation to acquire her was accepted. The defendants also say that, had any of the third parties asked whether a full survey had been carried out, they would have been informed that it had not been, and the acquisition of *Ardent* would never have taken place.

These allegations in my view lack substance. PL and PSMSL were engaged because Red Sea could not itself command the necessary commercial and technical expertise. Their role together was to identify and recommend suitable tankers for the fund's purposes, and to take all steps appropriate to that end. As Mr. Anderson acknowledged in evidence, the other Red Sea directors had "absolutely no reason" to think that PL and PSMSL might go ahead with a vessel such as *Ardent* without the benefit of a thorough inspection. No-one expected or would have expected Messrs. Bouckley, Baarma and Henderson to involve themselves in this process or to seek to formalize themselves with its execution or with individual vessels identified by PL and PSMSL in any way which could have led to their discovering the failings in the process of inspection and recommendation which occurred in respect of *Ardent*. Moreover, if any of Messrs. Bouckley, Baarma and Henderson had asked for confirmation that a full or thorough survey had been undertaken, the probability is that the response would have been in terms which would quite reasonably have satisfied him. Once it had been decided to recommend *Ardent*, the likelihood is that the recommendation would have been supported with assurances of confidence in her suitability and in Mr. Dunn's estimate.

As to the cost of repairs, overhauling and upgrading in respect of which the sum of U.S.$2 m. was mentioned to, at all events, Mr. Bouckley, again the Red Sea directors were in my judgment entitled and bound to rely on the apparently very experienced and capable commercial and technical managers who they had engaged. It was, as I have found, probably explained at the meeting of Aug. 23, 1989 that *Ardent* could be acquired at a "discount" to her market value corresponding to this amount. This must, as I have also found, have corresponded with the view taken by, in particular, Mr. Anderson within the Papachristidis organization. They must have believed that the market value after all the works would reach U.S.$14 m. If any of the directors had pressed for further information, the likelihood is that he would have received comfort and assurances on which he would have been entitled to rely.

Mr. Henderson was at the time of the recommendation and authorization to go ahead with *Ardent* on holiday in the Cayman Islands. It is said that he should have insisted on being kept informed and on investigating and participating in any decision relating to the fourth vessel. I do not accept this. The fact that he does not appear even to have been informed before the memorandum of agreement that a fourth vessel had been recommended and was being pursued does indicate a lapse in proper procedure. But it also reflects the reality that, in the area of identification, recommendation and acquisition of tankers, the Red Sea directors were in the hands of PL and PSMSL. It would, in my view, have been most unlikely to have altered the course of events or to have prevented the acquisition of *Ardent*, if Mr. Henderson had been in London, had attended the meeting of Aug. 23, 1989 or had discussed the proposed acquisition with Mr. Papachristidis or Mr. Anderson by telephone in any way which could realistically have been expected of him, bearing in mind the limitations of his knowledge and experience at the time.

Both the allegations of contributory negligence and the third party claims would thus have failed, even if I had held the defendants or any of them liable to the plaintiffs.

APPENDIX A
(referred to In Part VI.1 of Judgment)

OVERHAULING

Ardent was intended to trade as a member of the Seatramp pool, servicing major oil tanker charterers to whom the defendant provided a quality service. She would need to be in appropriate operating condition. The PPM made this point clearly, when explaining the initial drydocking costs of U.S.$500,000 which its figures assumed. The PPM and other cash flow and profit figures on the basis of which the Red Sea fund was established also assumed very limited time off-hire each year (10 days), and so inferentially assumed a generally sound initial operating condition which could be maintained by regular maintenance thereafter. It followed from these points that, before *Ardent* was acquired and in order to form a view whether it was

appropriate to acquire her, the defendants would need to make some assessment of the level and cost of any repairs which might be involved.

The list of items requiring attention set out in Mr. Reilly's report consisted of items which Mr. Reilly felt that he could "justify" on a basis of established need. Mr. Reilly's evidence, which I accept on this point, was that he was expressly instructed not to allow for contingencies, unexpected problems or crew work. It was no part of the exercise which he undertook on Aug. 16, 1989 to cater for general overhauling. The specific items which he identified were intended as such. It is not likely that this was misunderstood or overlooked when Mr. Dunn and Mr. Reilly discussed the vessel on Aug. 16.

I did not regard Mr. Dunn's evidence about overhauling and contingencies as satisfactory or entirely consistent. He said, inter alia, that (leaving aside the state of her ballast tanks) he gained a satisfactory impression of the vessel's condition, that he would not have known what provision to make for any unexpected problems that might emerge, that, if he had wanted a more precise estimate he would have asked a surveyor since that was not his job, that he did not feel that there would be any significant repairs or work that could not be taken care of by the vessel's crew or a repair team at Perama, that he felt that the U.S.$1,005,000 total of the specific items in Mr. Reilly's report was adequate to cover any overhauling, that in particular the U.S.$500,000 for drydocking included in it was more than adequate to cover drydocking and that he assumed that the vessel would in this respect be no different from other vessels of which he had had experience.

While I accept that Mr. Dunn approached the question of any overhauls on a broad basis, I have already indicated that I do not accept that his thought process regarding the costs of any overhauling were as he now recalls or reconstructs it. In my view, so far as he made any allowance for overhauling, it was as part of the further U.S.$1 m. which he added to the specific total of U.S.$1,005,000 at which Mr. Reilly arrived. This gave a total figure of U.S.$2 m. which he took to cover all the work on the vessel. This does not however answer the question either how significant overhauling actually was for Mr. Dunn or how significant it should have been.

Although it is clear that no-one did this exercise in August, 1989, considerable evidence was directed at trial to the actual allowances which it would have been appropriate to make for particular overhauls and contingencies, had such an exercise been undertaken on Aug. 16, 1989. Mr. Houghton produced alternative figures based on work being done in a shipyard or by the crew or a riding crew at Perama, with contractors being engaged where necessary. Mr. Spence produced figures in response on the latter basis. Mr. Reilly was cross-examined as to the former basis. Mr. Dunn was cross-examined, but on any view in less detail and in a way which the defendants submit was neither comprehensive nor adequate for the purposes of the plaintiffs' case.

I append as Annex I a "summary of overhaul costings" which appeared in the plaintiffs' final submissions. This identifies in columns 3 to 6 the two sets of figures given by Mr. Houghton and the figures given by Mr. Spence and Mr. Reilly. These figures all incorporate allowances for the specific items identified by Mr. Reilly in his report, which I have added in column 7. It is apparent that, on Mr. Spence's figures, any allowance for overhauls and contingencies that could have been made on Aug. 16, 1989 would have added only about U.S.$135,000 to the total of the specific items identified in Mr. Reilly's report. By contrast, on any of the other sets of figures, there would have been a substantial additional allowance for overhauls and contingencies, ranging from about U.S.$778,000 to over U.S.$1 m.

It is notable that the figures, for which on the plaintiffs' case allowances should have been made, have been varied and supplemented over time. Schedule 9 to the points of claim in the main action contains four "minimum estimates" different from those appearing in the unamended schedule 3 to the preliminary issues (one lower), while amendments to schedule 3 made shortly before trial varied many of the original figures, making in all but two cases substantial reductions, and added six new items with suggested "minimum estimates". The recent amendments were apparently the result of Mr. Houghton's engagement as expert to assist the plaintiffs. The overall picture, of changing and expanding allegations years after the relevant events, is not however encouraging to a party seeking to establish a negligent failure to make appropriate allowances.

The defendants submit that the exercise undertaken by Mr. Houghton is in any event irrelevant and unhelpful. Their case is that there was no reason to expect Mr. Dunn ever to make any assessment of this nature or in this detail, and that it can and should be disregarded as a pure ex post facto exercise undertaken for the first time by Mr. Houghton after he was instructed. In the detail in which it was gone into before me, there is some force in this submission. Indeed, even the plaintiffs in their final submissions submitted that:

> The court does not need to come to hard views on specific figures, and the true position may be

> that the cost of overhauling might vary depending on such factors as whether it turned out that the crew could do the work, or whether specialist contractors were required. But in these circumstances the Defendants were taking an obvious risk if they gave figures to the Plaintiffs, and proceeded to work out how much they could pay for the ship, on the assumption that everything would turn out favourably . . .

It is certainly tempting not to look in any detail at the differing provisions suggested by the experts. Mr. Dunn himself clearly did not approach the matter on any detailed basis. A suggestion that he could not have carried the matter further does not however appear to be correct. He himself acknowledged the possibility of asking a superintendent to provide a costing of individual items, saying simply that this would not be his job. Mr. Reilly had been instructed not to undertake any such exercise, but could, if asked, have given his views on provisions, as he did when asked in the witness box. As a matter of fact, Mr. Dunn does not appear to have asked Mr. Reilly even orally on Aug. 16, 1989 to comment on such matters. The lack of any detailed or documented consideration of the nature and scope of any overhauls required in relation to *Ardent*, whether by Mr. Reilly or by anyone on the instructions of Mr. Dunn, contrasts unfavourably with the detailed attention to such matters given by Mr. Tsevas when he inspected a previous vessel, *Ourenia*. Mr. Dunn said that Mr. Tsevas was "about the only one that ever does this". If no such exercise is undertaken and no specific attention is directed to items which would or could require overhaul, there must be a risk that an insufficient general allowance will be made. An experienced expert like Mr. Dunn may be able to make a satisfactory overall allowance, based on general information available and if he has comparable experience of other vessels. The exercise undertaken may thus have value, first, as indicating the sort of figures that could have resulted had Mr. Dunn asked a superintendent to look at the matter in any detail and, secondly, as giving some indication as to the general level of allowance at which Mr. Dunn himself or a surveyor like Mr. Reilly might have been expected to arrive, even viewing the matter on a broad brush basis, despite Mr. Dunn's own professed inability in the witness box to know what provisions to make for overhauling. The defendants complained that Mr. Dunn was not given the opportunity in cross-examination of commenting on each item raised by Mr. Dunn. But, in view of Mr. Dunn's evidence that he did not undertake and would not have undertaken any such detailed exercise himself, but would have left it to a superintendent, this complaint seems to me to lack force.

The differences between columns 3 to 6 derive from important differences in approach. Firstly, columns 1 and 4 depend on the assumption that all the work will be done in a shipyard, whereas columns 2 and 3 assume that as much as possible will be done in a place like Perama and/or by a crew, with contractors only being engaged where necessary. Secondly, there are major differences of opinion between Mr. Houghton and Mr. Spence as to the work required to be done. In the main these derive from different assessments of the condition of the vessel, as it was or should have been apparent to Mr. Dunn, and the proper approach to the work which would have been required.

As to the first difference, Mr. Dunn said that he would have approached overhauls on the basis that as much work as possible would be done by crew, including where necessary a special riding crew. The use of such crew did not necessarily depend on repairs being in Perama, which was, I accept, only resolved in mid-October. Crew work was already well in hand in September and early October, 1989. Further, it appears that crew repairs could have continued if the vessel had been in a yard for other work, and that even a small riding crew might then still have been able to remain on board. Mr. Dunn's and Mr. Reilly's evidence that they envisaged overhauls being attended to by crew and outside contractors only being engaged where required by the nature of the work was effectively unchallenged, and I accept it.

As to the second difference, the plaintiffs submitted that the picture which was or should have presented itself of the vessel to Mr. Dunn was one of generally suspect maintenance and uncertain condition. They referred to the comments noted in the telephone conversation of Aug. 14, 1989 to the effect "looks nice but all superficial" and "no work for two years". In Captain Kazazis' telex comments they drew attention to the comment that the master, chief and second engineers:

> . . . seemed not very knowledgeable and I doubt if they have maintained the vessel very well

and to the further comment that, although "engine room looked OK" —

> Vsl was alongside for two years and I am not sure if [chief engineer] was doing the normal maintenance of engine room. I believe a lot of money should be spent in the engine room especially for boilers.
>
> Vsl was not trading normally and once it seemed to me that vsl was not maintained properly, we may face unexpected problems.
>
> . . .
>
> We could had found more if we had more time for inspection.

In Mr. Reilly's report they relied on the conclusion that:

> . . . Present crew/management have provided the minimum of attention to the upkeep of the vessel, there is an obvious disinterest in ancillary equipment as a result of the vessel being a storage tanker. . . .

They drew attention to the comment in relation to engine room auxiliary equipment:

> General appearance is good but planned maintenance is suspect.

There was also an apparent absence of records (such as main engine calibrations, crankshaft deflections and luboil reports for the main or auxiliary engines or for boiler feed water or fresh water consumption), and adverse comments on specific items (such as control and automation, main and exhaust gas boilers, inert gas system and anodes).

The defendants rightly caution against attaching any great significance to a brief note of certain points covered in a 10 to 15 minute telephone conversation. The notes, telex and report are however in my view to similar effect. The defendants submit the plaintiffs have considerably overstated the adverse nature of that effect and have ignored counter-balancing considerations. Thus the telex contains favourable comments on the vessel's general condition, apparently mainly directed to her hull and extending also to her cargo tanks, to the fact that on-deck machinery "looked good", to the renewal of "almost all pipes on deck", to the "reasonable" condition of her pump room, to the fact that her engineroom "looked good" (a comment heavily qualified by later observations set out above) and to her being "in good condition for her age".

Similarly, in relation to Mr. Reilly's report, the defendants point out "disinterest in ancillary [deck] equipment" and "suspect" planned maintenance of engineroom auxiliary equipment is not the same as complete neglect; work had also been done at Piraeus in late 1987 before the vessel's stay in Aqaba. The suspected absence of deck maintenance since then was also a minor matter. The report also contained positive comments. For example, all nine units of the main engine had been overhauled at Aqaba, the outboard diesel was "seen running in good order" and the turbo alternator was "reported in very good order". Deck railings and fittings were "good all round", deck lines were "good" with many new replacements. The deck equipment for inert gas and crude oil washing were "in good order" with "no immediate attention required". By contrast, the engineroom equipment for the inert gas system was noted not to have been used for two years, and Mr. Dunn said in evidence that it was clear that it needed a complete overhaul. The cargo handling and stores cranes and derricks were also "seen in good condition".

These communications do show that the vessel had positive aspects. Mr. Dunn in his evidence reinforced these by reference to the works done in late 1987 shown in the Abstech report and the fact that the vessel would have been required to undertake cargo operations as a storage vessel in Aqaba. On any view, however, giving the positive aspects the maximum weight, the vessel presented an uneven picture. This was most obvious in relation to the hull. Cargo tanks in good condition contrast with ballast tanks in highly suspect condition. Similarly, even if one disregards parts of the vessel or its fittings or equipment in relation to which comments of a positive nature may be found in the documents, the position is still uneven. Each part has its own importance and would have to be inspected and dealt with if appropriate after the vessel was taken over. Mr. Papachristidis allocated different priorities to different parts at the pre-purchase stage. He said that he would be interested in hull and main engine above all, and then in cargo and auxiliary equipment. But each of these areas and other areas could give rise to potential overhauling costs, of which one would expect account to be taken at the pre-purchase stage.

In my view, all three of the surveyors' communications were sounding to Mr. Dunn an important general note of caution in respect of maintenance. The absence of records meant that there was nothing to dissipate this; it was unusual and it meant that neither Mr. Reilly nor Mr. Dunn had any real basis for confidence about the behaviour or standard of care exercised in relation to the boilers. Mr. Dunn in the circumstances had nothing to rely on other than what Mr. Reilly said. But that meant simply that he had very little to rely on, and no real basis for assuming that all would be alright. It was suggested that the fact that Mr. Reilly had the chief engineer's word for the operation of the boilers meant that Mr. Dunn could in turn proceed on the same basis. Having regard to the expressions of doubt in the telephone conversation, Captain Kazazis' telex and Mr. Reilly's report about the knowledgeability and diligence of the captain and all engineroom officers on the vessel, I do not accept that Mr. Dunn can or should have deduced from anything said by Mr. Reilly any real assurance in this regard. The absence of records should have been viewed as an unusual and unsatisfactory matter.

The vessel's age and the lack of any definite information about her history, before or after her period as a storage tanker, were matters which should have underlined the cause for concern. So too her period of recent use as a storage tanker, with which the doubts about her recent maintenance

were linked. It is true, as the defendants stressed and as Mr. Houghton accepted, that there was nothing to suggest that the suspect maintenance involved or would lead to any major or serious problems, which could not be resolved given time or money, in many cases by the defendants' crew (including in that phrase a special repair team). But the present exercise is not intended by the plaintiffs to suggest that the vessel should have been rejected outright as a candidate for purchase, because of the actual or possible condition of non-steel items. It is aimed at reaching a figure which surveyors would have been likely to arrive at for work other than steelwork, if any assessment had been made at the time, at shedding some light on the level of figure which Mr. Dunn might as a matter of general reaction and experience had had in mind for non-steelwork overhauls, if he had ever focused his mind on that question, and at shedding light on the adequacy of the actual overall provision of U.S. $2 m. for all repairs which Mr. Dunn had in mind.

Someone in Mr. Dunn's position, considering whether the vessel was a possible candidate for purchase and if so at what price, should have paid considerable note to the factors identified above. For reasons indicated in Part VI.3 of the judgment, if Mr. Dunn had had sight of class records for a longer period, this would or should have accentuated his concern in the same area. If there was, in the circumstances, no way of being certain what areas or equipment would require what attention at what cost, that should not have been a reason for making no provision at all. It should have been viewed as a reason either for not pursuing any interest in the vessel or, alternatively if interest was pursued, for insisting, so far as practicable, on further inspection and for building in a cautious provision for overhauling costs. Mr. Dunn was questioned about comments in a report by a Mr. Ramoundos, a consulting naval architect and marine engineer, on a vessel called *Elite* in April, 1988, suggesting caution in respect of auxiliaries in the light of "the class records history of extended damages of the engines, our observations aboard and the lack of records". Mr. Dunn was generally dismissive, as he was in respect of some of the concerns of other experienced surveyors employed or engaged by PSMSL. I was not impressed by Mr. Dunn's attitude or evidence in the witness box in this respect, but, whatever the position in respect of *Elite*, caution was called for in respect of *Ardent*.

I do not accept that Mr. Reilly gave orally to Mr. Dunn any significantly different picture to that painted by the written material, although at points Mr. Reilly's evidence seemed to suggest that he had gained a different or better impression of the chief engineer's diligence and did not share all of Captain Kazazis' telexed views.

The plaintiffs sought to support their case on the scope of overhauls by reference to the specification of work which Mr. Reilly prepared after *Ardent* had been taken over, which was submitted to at least two shipyards (Hellenic and Eleusis) to obtain their quotations, which in the event were largely not taken up, since the vessel went to Perama to repair. The specification provides for a comprehensive overhaul of the vessel. Mr. Reilly was not clear about his thinking in compiling it. At one point he accepted that it represented work which he actually envisaged would have to be done in terms of general overhaul, at other points he gave a contrary picture, suggesting that much of it (perhaps 30 per cent. or 25 per cent.) would be cancelled but also explaining that this would allow for the cost of "emergent" or unforeseen work. He gave, as the allowance for overhauling (over and above the specific figures in his report) which he would have suggested if asked, U.S.$80,000 to U.S.$100,000, or in oral evidence U.S.$100,000 to U.S.$150,000. The defendants criticize the plaintiffs for cross-examining Mr. Reilly in a "confusing and rushed manner". To my mind, Mr. Reilly's evidence was itself simply confusing and at points inconsistent. However, I accept as likely his statement that the specification which he drew up was intended to be comprehensive in the sense that it would cover, and serve to ensure that the defendants had a shipyard quotation for, all aspects of overhauling which might reasonably be envisaged. Not only did the defendants and Mr. Reilly envisage doing as much work as possible outside a shipyard, I accept that they also envisaged that it would be unlikely to do all the work on the specification. However, there would, as Mr. Reilly pointed out, be "emergent" work. I was left after Mr. Reilly's evidence with the impression that he was, particularly towards the end of his evidence, tending to underestimate and undervalue the extent and cost of the general overhauling works, not catered for by his specific figures, which he would, if specifically asked, have had in mind on Aug. 16, 1989.

I turn to the summary of overhaul costings (Annex I). Head A relates to the main engine. U.S.$50,000 of the total is covered by part of the automation allowed for in Mr. Reilly's report. On top of that Mr. Reilly was prepared to contemplate some work on the turbo chargers and some other cleaning work, costing maybe U.S.$10,000 a boiler in a shipyard. Mr. Dunn said that he had not thought that any money would need to be spent, beyond, it would appear, U.S.$10,000 to U.S.$15,000 for a survey and maybe some tube repairs. Mr. Houghton and Mr. Spence were agreed that it would be necessary to spend an estimated U.S.$7290 on

opening three cylinder units (item A1) and various other items (A9–A22) for inspection and overhaul. They also agreed that a number of turbo chargers would need to be opened and overhauled by a contractor. Mr. Houghton thought all three, Mr. Spence only one. I prefer Mr. Houghton's view on this, based on the significance of these units, especially in case of breakdown, their need for servicing every 16 hours and the uncertainty regarding their servicing position in the absence of records. Overhaul of all three units was also specified and done after delivery of *Ardent*, although the defendants rightly referred to the dangers of making general deductions with hindsight from subsequent events, when the vessel on closer inspection proved almost immediately to be in worse condition than previously envisaged. An extra cost of U.S.$14,000 would thus arise.

Items A3 to 8 in the breakdown to the summary were items in respect of which Mr. Houghton would have wished to provide some U.S.$50,000 to cover the cost of doing them in a shipyard, while Mr. Spence would have allowed no more than U.S.$2280, in some cases on the basis that no work at all would be required and in all on the basis that any work would be done by a riding crew. As to scope of work, I again prefer Mr. Houghton's approach. As to mode of execution, although Mr. Houghton thought that it would not be reasonable to use a repair team, these are items for which no allowance was sought at all, until May, 1996, and do not for the most part appear to represent specialist work. They were in fact done ashore by a firm of general engineers, Standard. Mr. Spence was emphatic that such items could be done by crew on board. As individual items, it seems also to be agreed that the crew could attend to them on board. Mr. Houghton made a strong case for saying that, in view of the number of items involved and their significance to the vessel's future trading, any reasonable shipowner would all along have contemplated overhauling ashore. Despite this, I think that the balance of the evidence probably entitles the defendants to the benefit of the doubt on most of these items. The difference in cost between having them done ashore and by crew is so large that it would be understandable that someone looking at the matter beforehand should approach them on the basis that they would, if at all possible, be taken care of on board by a repair team. The fuel pumps (item A5) were however important items, with an overhaul life of 6–8000 hours. It seems unrealistic to assume that they would not incur any costs at all. Further some of the costs would have related to timing work ashore by contractors. I think that an allowance should have been made for this work, although not for the whole of Mr. Houghton's figure of U.S.$6750 which relates to the cost of having the whole work done ashore. In the absence of other information, I shall simply take U.S.$2500.

The remainder of the main engine costs consists of spares, to a total of U.S.$30,000. The total allowance sought for spares increased in May, 1996 from U.S.$100,000 to U.S.$160,000. It is difficult to relate the increase to any particular head. Mr. Spence's total figure for all spares is only U.S.$20,000. The actual cost of spares during the vessel's repair was in excess of U.S.$300,000, but this gives no assistance as to what should have been foreseen on Aug. 16, 1989. The defendants point to the statement in Mr. Reilly's report that "a good stock of spares exists . . . ". The plaintiffs point out that it would be necessary to replace spares used in the process of overhauling. All the same it seems to me that the current suggestion that a total of U.S.$160,000 should have been allowed for spares puts the matter too high. Mr. Spence's U.S.$20,000 appears on the other hand very low, in the light of the work identified as necessary and the general caution in respect of maintenance. Bearing in mind the picture presented of the vessel on Aug. 16, 1989 and the likely nature of the overhauling as I find that it should then have been perceived, I think a total of U.S.$50,000 would have been the appropriate allowance for spares at that date. Of that, some U.S.$15,000 may be attributed to the main engine.

On this basis, under head A, there would be a provision of U.S.$91,070, or some U.S.$41,000 more than covered by Mr. Reilly's report.

Head B relates to the generating plant. It includes a further U.S.$25,000 of the provision suggested by Mr. Reilly for automation. The balance consists of spares (U.S.$15,000), and general overhaul in a shipyard of the auxiliary diesel generators (U.S.$30,241) and the turbo alternator/generator (U.S.$31,757). The general overhauls represent new provisions, first suggested in May, 1996. If done by a repair team, the cost of overhaul was agreed at U.S.$2890 a unit for the diesel generators (though Mr. Spence would provide for the overhaul of only one) and U.S.$2080 for the turbo alternator. Again, I prefer Mr. Houghton's approach regarding the numbers of diesel generator units requiring attention, especially against a background of absence of records and past and current breakages.

The turbo alternator is important to the vessel's economical running, but is, Mr. Spence told me, very robust. Mr. Reilly noted that it had been "reported in very good order". The full class records would have shown that it had not suffered recent damage. The Abstech report showed its overhaul in October, 1987. There is some force in

Mr. Houghton's view that allowance should have been made for another overhaul of so important a part, on a vessel which appeared not to have been properly maintained at Aqaba, and it appears that any cost of doing this would have been relatively minor. In the end however I have come to the conclusion that this was not an item for which any allowance was required on the information available at the time.

The position regarding spares in respect of the generating plant was uncertain, particularly when at least some spares would be being used on the generator repair in circumstances where there was no certainty that replacement spares had been ordered. Some provision would appear to me called for under this head, although not as extensive as the full set of two liners, bearings and spindles for which Mr. Houghton allowed. Taking, therefore, U.S.$5000 as an appropriate provision for spares, the total provision under head B becomes U.S.$35,780 — i.e. U.S.$10,780 more than is covered by Mr. Reilly's report.

Head C is auxiliary machinery. Mr. Reilly's comment that planned maintenance was suspect related specifically to this head. Mr. Spence appeared originally to be prepared to allow some U.S.$50,000 on this account (although this figure may have included work within other heads such as B or E), but his detailed provisions totalled U.S.$14,888. Taking repair crew costings where appropriate, there were differences between Mr. Houghton and Mr. Spence as to the numbers of units for overhaul of which provision should have been made, and how far it would have been realistic to provide for all the work to be done by a riding crew. On numbers, I prefer Mr. Houghton's approach, bearing in mind the serious question mark over maintenance and the absence of records. I accept therefore Mr. Houghton's figures for principal pumps (item C1 — U.S.$5100), air compressors (item C3 — U.S.$2040), air conditioning (item C4 — U.S.$7148, in relation to which Mr. Spence accepted that in practice a contractor would be engaged), generator plant (item C5 — an agreed U.S.$510), heat exchangers (item C7 — an agreed U.S.$3910), waste gas boiler (item C8 — an agreed U.S.$1700 for an item on which Mr. Reilly's report specifically commented), and bilge and underfloor areas (item C10 — U.S.$4760). This gives a total so far of U.S.$25,168.

Item C2 concerned purifiers, which Mr. Houghton accepted would normally be a crew matter, but which he suggested would have to be dealt with by a specialist at a cost of U.S.$23,670 in this case, because of the absence of planned maintenance. Mr. Spence said that some must have been working for the vessel to get to Piraeus and that these simple, although important, items could be dealt with by a riding crew at a cost of U.S.$425. Mr. Reilly's report noted simply that the purifier room was "clean and tidy". They were in fact found after delivery to be non-operative and were dealt with then by Standard.

The next item is C6, overhauls, renewals and repairs of piping, valves and fittings in service lines from machinery services, in the engineroom area. Mr. Spence accepted that the absence of specific adverse comment by Mr. Reilly did not mean that no such work would be necessary. Mr. Reilly could not be expected to see everything, and some repairs and some provision, which he put at U.S.$5000 would be required. Mr. Houghton's provision of U.S.$53,000 (calculated on the basis that a contractor would have to be engaged) was however for "massive repairs" and Mr. Spence did not accept it.

The remaining item under head C is item C9, spares, totalling U.S.$20,000. Again, I would only allow a part of this. In view of the particular question mark over maintenance, I take U.S.$10,000.

I would not criticize a surveyor with Mr. Dunn's information on Aug. 16, 1989 for not making the very full provisions allowed by Mr. Houghton in respect of items C2, C6 and C9. But the uncertainty about maintenance and the absence of records make this an area which called for at least some general provision for unexpected problems. I take on this basis a round sum of U.S.$30,000. The result is an overall provision of U.S.$55,000 under head C.

Head D concerns electrical equipment. Taking the cost of overhaul using the crew, the difference is between Mr. Houghton's U.S.$11,400 and Mr. Spence's U.S.$3050. This is explained (a) partly by reference to the scope of overhauling to be contemplated and (b) partly by reference to Mr. Houghton's specific provision of U.S.$5000 for spares, covered only by Mr. Spence as part of his general allowance of U.S.$20,000. As to (a), I accept Mr. Houghton's approach to the scope of overhauling, but would reduce his provision for spares. Looking at the matter in round terms, I take an overall figure of U.S.$7900 (to include U.S.$1500 spares) under head D.

Head E concerns the cargo and ballast system. Taking a repair crew cost where thought appropriate, the difference is between Mr. Houghton's U.S.$263,254 and Mr. Spence's U.S.$178,040. Both figures include a further U.S.$75,000 in respect of the automation plus U.S.$90,000 for the testing and repair of heating coils covered by Mr. Reilly's report.

The first main difference relates to the overhauling of cargo, stripping and ballast pumps, items C1–4, for which Mr. Houghton allowed a total of

U.S.$35,780 and Mr. Spence nothing. Mr. Dunn pointed to the use of pumps which would have been made by the vessel as a storage vessel. Mr. Spence pointed to the references in Mr. Reilly's report to the pumps being seen in good condition (which Mr. Reilly confirmed meant running) and in the Abstech report to pumps being attended to in late 1987, and made the assumption (open itself to question in view of other indications) that the owners would have continued to look after the pumps at Aqaba. Mr. Houghton accepted that pumps would normally only be due for opening up every 4 or 5 years, but said that their high risk nature and importance and the question marks arising from suspect maintenance and lack of records called for their overhauling after delivery, which was in fact specified then by Mr. Reilly and done. Mr. Reilly considered that the crew could handle any repair work, if any was necessary, at a cost, at very worst, of U.S.$10,000. While I think that some provision should have been made, I am not satisfied that wholesale overhaul by a contractor was to be envisaged. I would allow at most U.S.$10,000.

Items E5–7 were either agreed or estimated in differing sums which led Mr. Houghton to a total of U.S.$6100 and Mr. Spence to a total of U.S.$6680. Items E8 and 9 were the remaining substantial items. As item E8 Mr. Houghton provided for disconnection, redressing and re-assembly of a total of 20 ballast lines in cargo holds, at a cost of U.S.$24,800, Mr. Spence for testing at a cost of U.S.$680 and repairs costing U.S.$3000. As item E9 Mr. Houghton allowed for like work on cargo lines on deck and bottom lines costing U.S.$30,534, while Mr. Spence allowed only U.S.$2680. Bearing in mind what was said in Mr. Reilly's report about the good condition of deck lines with "many new replacements" and the "very good condition" of cargo tank pipelines, valves, fittings and dresser couplings, Mr. Houghton's provisions appear to me more cautious than could necessarily be expected.

To the U.S.$165,000 covered by specific items in Mr. Reilly's report, I would therefore add U.S.$22,360, making a total of U.S.$187,360 for head E.

Head F concerns deck machinery, equipment and fittings. Captain Kazazis' telex and Mr. Reilly's report and photographs reported that these looked in good repair. The port windlass and aft mooring winch had been overhauled in 1987, and such items would have been in use thereafter at Aqaba and en route back to Piraeus. Mr. Spence would originally have been prepared to allow U.S.$75,000 under this head, to include the replacement of a dry by a wet type seal on the inert gas system. Mr. Dunn said in his witness statement that he would have envisaged this at a cost of U.S.$35,000 to U.S.$40,000. Apparently inconsistently, he gave oral evidence (19/133) that no decision had been taken, that it was being investigated, and that he did not make any allowance for it. These answers were not then challenged. Whether they would justify the absence of any allowance itself appears open to doubt, but neither Mr. Dunn nor the experts were in fact questioned further upon this. Mr. Spence indicated that he would have been content with either type of seal. The seal was simply excluded from Mr. Houghton's figures. In the circumstances, I shall exclude it from the present exercise.

On a detailed basis Mr. Houghton would have provided for overhaul and testing by contractors of both windlasses and all five mooring winches, as well as the two derrick winches and the stores cranes, at a cost which it is agreed would have totalled U.S.$14,430. These were important items for the vessel's trading, and good external condition told one nothing about their operational abilities. Mr. Spence questioned the need for any work by contractors at all, in view of the favourable indications about deck machinery mentioned above. He said that these were all items which would be tested and if necessary overhauled by the crew. In cross-examination Mr. Houghton accepted that some crew work could have been done during other repairs, but suggested that a full provision should nonetheless have been made for use of contractors, with work being cancelled if it was done by crew. It seems to me that the reality probably lies between Mr. Houghton's and Mr. Spence's views on these items. A surveyor considering what provision to make on Aug. 16, 1989 would I think have made some relatively minor allowance for overhauling and testing, say U.S.$5000.

Mr. Spence's total for head F is U.S.$40,910. Almost all of this (U.S.$40,000) is for item F6, the inert gas system, for which Mr. Houghton now only suggests U.S.$19,250. Mr. Dunn's evidence was, as I have said, that it was clear that it required a complete overhaul. He said however that he made no provision for its overhaul, on the basis that it could simply be done by the crew or a repair crew. Mr. Reilly said that he too was told that this would be so, that he would not have known how to cost it, without being able to "justify" any particular figure, but that "without looking at unforeseens" he would have allowed U.S.$10,000. Mr. Reilly's attitude, not merely in relation to steelwork, was that it was not for him to put any figure on costs about which he could not be reasonably certain. He did not include any figure to cover eventualities, even though they were, as in this case in my view, likelihoods, when the actual figure could not be stated with any certainty. Neither Mr. Houghton nor Mr. Spence suggests that it could be realistic to suppose that the inert gas system would be overhauled by crew or to make no provision for its cost

or to take as the cost the figure of U.S.$10,000 which Mr. Reilly ventured in evidence. Overhaul of the inert gas system is thus a substantial matter, likely to involve considerable time and work, which Mr. Dunn did not himself cost at all. In so far as he addressed his mind to it, it appears to me probable that he did so on a very broad basis, treating it as covered, along with all other work, by the overall provision of U.S.$2 m. which he had in mind.

Mr. Houghton would allow U.S.$24,480 for crew work on item F7 (the crude oil washing (COW) machines) compared with U.S.$910 allowed by Mr. Spence, U.S.$1190 for item C8 (cargo tank hatch seals and fastenings) compared with nothing by Mr. Spence and U.S.$15,000 for item 9 (miscellaneous fittings, air pipe heads, guards, rails, ladders and walkways) again compared with nothing.

Captain Kazazis referred to the condition of the COW machines as "unknown", and Mr. Reilly's report threw no light on it, save that it did include a photograph of one well-greased and apparently sound COW machine head. Mr. Dunn said in his witness statement that the COW machines were a crew item and of minimal concern, and that he bore in mind that the vessel would not have required to crude oil wash while on storage "when estimating the cost of overhaul of the COW machines . . . ". He did not say and does not appear to have been asked what he meant or envisaged here when he spoke of estimating the cost of overhauling them. In point of fact, very little if any work proved to be required on them. Mr. Houghton allowed for inspecting them all, but said that there was not a lot to do by way of overhauling and accepted that it was work that could be done by crew. I think it unlikely in these circumstances that anyone at the time would have envisaged an inspection of each at anything like the cost identified by Mr. Houghton.

As to miscellaneous items, Mr. Reilly reported that "winch in front of windlasses precludes fitting of Smit Bracket". Mr. Tsevas' witness statement shows that this was indeed the case:

> . . . the vessel had a mooring winch on the centre line where the chainstopper would normally be fitted. It was therefore necessary to offset the chainstopper starboard of the centre line. This cost about $10,000.

Mr. Dunn said:

> Since most of the major oil companies require a Smit bracket to be located on the forecastle, I took note of Simon Reilly's comment regarding the problem of fitting such a bracket in front of the windlass, but was confident that we could find a way around this particular problem.

It appears that a way round was indeed found, but that there would be a cost could, presumably, have been foreseen. Looking at the matter generally, I would have expected a further provision for the COW machines, cover seals and fastenings and miscellaneous items in the regions of U.S.$20,000. Added to the allowance for the inert gas system, this gives U.S.$44,250 on Mr. Houghton's figures and U.S.$65,000 on Mr. Spence's for head F. For subsequent purposes, I shall take the mean of U.S.$55,000.

Head G consists of general requirements, put at U.S.$158,460 by Mr. Houghton and U.S.$142,000 by Mr. Spence. These figures include U.S.$120,000 allowed by Mr. Reilly's report for renewal of anodes. Mr. Spence would concede that a provision should have been made for updating fire and safety equipment, a specialist item put by him at U.S.$15,000, although by Mr. Houghton only at U.S.$10,000. Servicing of bridge and radio equipment, another specialist item, is also agreed at U.S.$5000. Mr. Houghton would allow U.S.$8360 for a third specialist item, ultrasonic testing of tanks, while Mr. Spence would allow U.S.$2000 (which seems on its face low in the light of the known steelwork problems in the ballast tanks). Mr. Houghton would also have provided for U.S.$15,000 to be spent on spares for deck machinery and equipment, while Mr. Spence's only provision would consist of part of his total allowance of U.S.$20,000 for spares. Taking a round U.S.$5000 for spares the resulting total for head G is U.S.$148,360 or U.S.$153,360, or, say, a round U.S.$150,000.

Head H relates to accommodation, for which Mr. Houghton would have provided for U.S.$30,000. The accommodation proved to be in utterly lamentable condition, but this was a matter which Mr. Reilly did not pick up on such limited inspection as he undertook of the relevant areas. His report said merely that it was "Dirty and dark by design (sic). Originally a high standard Western style".

Mr. Dunn acknowledged that it was obvious from this that "it had been neglected and needed a thorough cleaning and painting". Mr. Spence said that this would not have suggested major works. I find it difficult, bearing in mind among other matters the defendants' own standards, to accept Mr. Spence's suggestion that the defendants would have expected the crew to do all the necessary work at no cost and that no other work whatever was to be envisaged. Some provision should have been made for upgrading the accommodation, even though its truly lamentable condition only appeared after delivery. I take a round U.S.$10,000.

Head J relates the balance of the spares. I have already indicated that I would take as a total for spares U.S.$50,000, and the balance of this sum not so far specifically allocated is some U.S.$18,500.

Head K is drydocking, for which Mr. Reilly took a round U.S.$500,000 plus U.S.$40,000 for the tail shaft survey. Although I consider (contrary to the defendants' case) that Mr. Dunn regarded this as the appropriate figure at the time and did not view it as containing slack which would cover other items, both Mr. Houghton and Mr. Spence would have accepted somewhat lower figures. Mr. Houghton took U.S.$466,438 and Mr. Spence U.S.$381,000. Mr. Houghton's figure was criticized on the basis that it assumed too high a standard of attention. The defendants were however concerned to maintain a high class of vessel to attract first class charterers. Mr. Houghton was asked whether, if Mr. Dunn did think that somewhat lower figures would suffice, he (Mr. Houghton) would criticize Mr. Dunn as imprudent. Since Mr. Dunn's thinking was not in my view along these lines, Mr. Houghton's qualified acquiescence in the proposition is essentially unhelpful. I prefer Mr. Houghton's higher figure, which corresponds in my view with Mr. Reilly's and Mr. Dunn's thinking at the time.

Head L relates to three matters for which Mr. Reilly made specific provision, tank mucking, pump room steelwork and installation of Marisat equipment, totalling U.S.$105,000. It is common ground.

Head M relates to survey requirements, for which Mr. Houghton provided U.S.$39,860 and Mr. Spence U.S.$15,950. Items totalling U.S.$5750 are common ground. The only difference relates to overhauling and preparing the starboard boiler for class survey, for which Mr. Houghton allows U.S.$34,110 and Mr. Spence only U.S.$10,200. Mr. Houghton estimated off the cuff that his figure would reduce by about U.S.$8000 if the crew undertook the overhaul of the mountings. The mounting figures in the two shipyard quotations were U.S.$14,276 and U.S.$6545, the mean of which is U.S.$10,410.50. Mr. Houghton assessed the cost of the crew doing the mountings at U.S.$2000, which must be added back in the calculation. On this basis Mr. Houghton's original U.S.$34,110 cost would reduce to U.S.$25,700, which matches closely his quick estimate.

The remaining work was, he said, specialist work, which a prudent owner taking over this vessel would require to be undertaken. Mr. Spence on the other hand thought that it could be assumed that all necessary boiler work would be undertaken by a repair crew. Mr. Houghton also pointed out that, although Mr. Reilly understood the boilers to be in good condition and told Mr. Dunn this, Mr. Reilly did not actually see them operating. Above all, there were none of the usual or proper records of their operation or even to show that both had been in operation. The absence of chemical and boiler feed water treatment records, noted in Mr. Reilly's reports, was extremely bad practice as well as adding to general doubt about crew maintenance. I accept Mr. Houghton's views on these points and they appear to me to be strongly reinforced by the fuller picture which would have emerged, if Mr. Dunn had known of the contents of the earlier class records. I take therefore U.S.$25,700 on the basis of Mr. Houghton's figures, making a total of U.S.$31,450 under this head.

In the upshot, the detailed exercise undertaken by the experts would indicate provisions totalling U.S.$1,213,498, calculated on a basis which of course includes Mr. Reilly's specific items totalling U.S.$1,005,000. The total is a little over U.S.$200,000 more than the total of Mr. Reilly's specific items. It is not without interest to compare this with Mr. Reilly's statement in his witness statement that he would, if asked, have made an allowance of U.S.$80,000–U.S.$100,000, increased in his oral evidence to U.S.$100,000–U.S.$150,000, in circumstances where, as I have said, I felt that he was probably tending to understate the significance which he would, if asked, actually have attached to general overhauling.

It was Mr. Houghton's and the plaintiffs' submission (raised late in the case) that a prudent shipowner would have added a general allowance for general contingencies, particularly for unforeseen matters (which in the event proved to constitute so large a part of the overall repair costs on *Ardent*) or costs overruns. As I understood Mr. Houghton's evidence, and contrary to the defendants' interpretation, the allowances which he suggested were intended to cover work envisaged as actually required, which might in the event prove to be more or less, and not to represent some sort of worst case, which would be improved by cancellations. I can leave aside further pleaded suggestions that allowance should also have made for off-hire and service charges. These were not made good in evidence or submissions.

As to contingencies, Mr. Dunn said that it was not his practice to add any contingency allowance, since the estimates he gave were his "best estimates". So far as appears Mr. Dunn did very little in the way of forming any precise estimates on matters of overhauling not specifically covered by Mr. Reilly's figures. On the basis that he took an overall broad brush figure of U.S.$2 m., the point he makes appears a fair one. There would be no logic in adding to it a yet further broad contingency allowance.

Mr. Spence, looking at overhauling on a detailed basis, accepted the principle of a contingency allowance, but only in relation to particular items arrived at on a broad brush basis, and not in relation

to items costed by reference to actual contractors' charges. The rate he took was the same as Mr. Houghton's, 15 per cent. Mr. Spence applied this to heads K (drydocking), L (provisions) and J (spares). The figures for these items which I have taken total U.S.$589,938, 15 per cent. of which is U.S.$88,490. In so far as this contingency is applied to Mr. Houghton's dry docking figure of U.S.$466,438, it may have a firmer basis than else where, since it brings Mr. Houghton's specific figure up to Mr. Reilly's round total of U.S.$540,000 for the dry docking and tail shaft.

If one accepts Mr. Spence's qualification, a similar allowance should be applied to those elements of the other heads now arrived at on a broad brush basis. Mr. Spence accepts for example that spares should carry a contingency, and heads A, B and D include some U.S.$21,500 of spares. Automation is also a substantial figure arrived at on a broad brush basis, and included in heads A, B and E in a total of U.S.$150,000. If one added a contingency to these two figures, it would amount to U.S.$25,725. I cannot say that I am entirely happy about the logic of taking a broad brush figure like this and then adding another contingency to it. The idea of a contingency came, as I have said, late into this case, and its basis was not very fully or adequately explored in evidence. At most it would add some U.S.$114,215 to the total costs to be envisaged.

Looking at the matter overall, I consider that a prudent shipowner who did the detailed exercise undertaken by the experts would have come to a conclusion that *Ardent* would require extra overhauling costs, over and above those specifically covered by Mr. Reilly's provisions, of between U.S.$200,000 and U.S.$300,000. Standing back from the detail, I do not find this a surprising level of figure. In round terms, it appears to me the level of figure which might have been expected on a vessel of this age, size and history purchased for management as part of a good quality fleet intending to serve good quality charterers, leaving aside items which the surveyor could immediately pick up on a brief one-day superficial survey.

Wednesday May 21, 1997

ANNEX I
(See Appendix A to judgment)

Summary of Overhaul Costings

(1)	(2)	(3)	(4)	(5)	(6)
		Shipyard (NH)	**Perama (NH)**	**Perama (BB)**	**Reilly**
A.	Main Engine	197,919	151,905	64,170	164,505
B.	Generating Plant	101,998	47,860	27,890	60,000
C.	Auxiliary Machinery	197,376	121,838	14,888	125,706
D.	Electrical Plant	43,544	11,400	3050	36,914
E.	Cargo & Ballast System	308,275	263,254	178,040	269,659
F.	Deck Machinery	144,610	74,350	40,910	75,470
G.	General Requirements	158,460	158,460	142,000	158,460
H.	Accommodation	30,000	30,000	Nil	25,000
J.	Spares & Stores	80,000	80,000	20,000	Not XX
K.	Drydocking	466,438	466,438	381,000	500,000
L.	PSMSL Provision	105,000	105,000	105,000	145,000
M.	Survey Requirements	39,860	39,860	15,950	39,860
	Total	1,873,480	1,550,365	992,898	1,600,574*
	With 15% contingency	2,154,502	1,782,920	1,141,833	1,840,660

* This total does not include any amounts for items A1, A4, E4, F4 or F5.

JUDGMENT ON COSTS

Mr. Justice MANCE:

1. *Introduction*

On the trial of the preliminary issues, I held that the plaintiffs' claim in this action against the defendants in relation to the acquisition of *Ardent* failed and that the claims against the third parties by two defendants (Mr. Papachristidis and Mr. Dunn) also failed. The defendants now seek orders for costs in their favour against the plaintiffs. They also seek an order for such costs against a non-party, National Commercial Bank of Saudi Arabia ("NCB"). Since NCB has written through its solicitors asking for further time to consider my judgment on the preliminary issues, I have stood over the plaintiffs' application for an order for costs against them. It should be heard not before June 9, of which notice should be given by the defendants to NCB as soon as possible.

Mr. Papachristidis and Mr. Dunn further submit that (a) if they are ordered to pay any costs to the third parties in relation to *Ardent*, they should be entitled to add such costs to their costs recoverable from the plaintiffs, and (b) the conclusion that they owed no personal duties to the plaintiffs applies to all four vessels the subject of this action, and must lead to the dismissal of the whole action against them. The proposition in (b) is accepted by Mr. Jacobs for the plaintiffs.

A similar submission to (b) was advanced by Mr. Lyon on behalf of Mr. Anderson in respect of Mr. Jacobs' response is that Mr. Anderson's factual involvement in relation to the other three vessels did not necessarily parallel that upon which I have ruled in relation to *Ardent*. In these circumstances, I stand over any application relating to the claim against Mr. Anderson in relation to other vessels for five weeks to enable Mr. Jacobs and his clients to consider their position.

2. *General principles*

It is common ground that, as between the plaintiffs and defendants, the defendants were the winners of the preliminary issues and of the action so far as it concerns *Ardent*. They are prima facie entitled to an order for costs in their favour. O. 62, r. 3(3) provides:

> If the Court in the exercise of its discretion sees fit to make an order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.

Mr. Jacobs submits that in the circumstances of this case the right order is that the defendants recover no costs or only a part of their costs. He does not suggest that this is a case where the plaintiffs can or should seek any order to recover any part of their costs from the defendants. But he submits that, looking at "the whole battlefield" of the issues which I determined, the defendants have only succeeded on narrow grounds and that the circumstances call for some other than the general order. He refers me to principle (iii) identified by Lord Justice Nourse in *Re Elgindata Ltd.*, [1992] 1 W.L.R. 1207 at p. 1214B:

> The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs.

3. *Perama repairs*

I start by clearing out of the way an aspect of the plaintiffs' claims in respect of *Ardent* which was abandoned shortly before trial of the preliminary issues. That concerned the Perama repair claims in pars. 36–37 and sched. 4 which were, pursuant to a letter dated Mar. 26, 1996, abandoned by the re-re-amended points of claim. The plaintiffs have undertaken not to renew such claims. Mr. Jacobs submits that costs incurred in relation to these claims were also relevant to the issues which were pursued at trial, for example to Mr. Houghton's evidence. This is true but to a relatively limited degree. So far as Perama claims have generated additional costs, they should be borne by the plaintiffs. Having been withdrawn, the Perama claims as such occupied no time at trial.

The Perama allegations having been withdrawn, Mr. Lyon sought leave to withdraw the defendants' third party claims in respect of the Perama repairs on the basis that the defendants would pay their costs and give an undertaking not to renew them. He also sought an order entitling the defendants to add such costs to those recoverable from the plaintiffs. In my view the appropriate order is that, so far as the third party proceedings have generated additional costs in respect of the Perama repairs, there should be no order. It is not easy to see how the defendants could, if liable themselves, have held any of the third parties liable in respect of the Perama claims.

4. *Other costs of the claims relating to Ardent*

It was common ground that I can and should treat the plaintiffs and the third parties as if they were one and the same. Mr. Jacobs confirmed that there was no risk of the third parties being personally exposed to costs in respect of the third party

proceedings, if they did not obtain a separate order in their favour for the costs of those proceedings. All parties in these circumstances accepted that it could be appropriate to treat the costs of the main and third party proceedings together and to make a single order for them as between the plaintiffs and defendants. That is the course which I propose to take.

The defendants have emerged victorious from the proceedings as against the plaintiffs. The defendants have however lost the third party proceedings for reasons which would have applied, even if they had lost the main action. Their contention that the plaintiffs' claim should be reduced on the ground of contributory negligence has also failed for reasons which would have applied, even if they had lost the main action. Even if there had been any basis for asserting contributory negligence, there appears to have been no real need or basis for issuing third party proceedings. Mr. Lyon's response that it was necessary to issue third party proceedings in order to obtain discovery against the third parties personally is no justification.

Mr. Lyon submits that the reason why the third party proceedings and the assertion of contributory negligence failed is that I rejected the third parties' evidence of their awareness of the importance of pre-purchase inspections, and of assurances and representations allegedly received in that connection from Mr. Papachristidis, Mr. Anderson and Mr. Dunn. These alleged assurances and representations were a main subject (considered in Part II of my judgment) of the evidence of the plaintiffs' factual witnesses, which occupied in total nearly 7 days between days 5 and 12 of the trial. Part VII of my judgment did indeed comment that much of the basis for reliance on certain points stressed by the defendants in their final submissions had been removed by my findings in Part II. However, as a reading of the third party pleadings makes clear, the defendants' pleaded contentions as against the third parties go much more widely. Indeed, they include the suggestion, rejected in Part II.2 as "a forensic exercise", that the third parties were or ought to have been aware that all forecasts, projections and estimated reserves for repairs and maintenance may well prove to be "wholly inaccurate". In my judgment, the allegations of contributory negligence and in the third party proceedings were always unrealistic in view of the complete disparity in functions and expertise between the defendants and third parties. If there had been express representations such as the third parties suggested in their evidence, it is also very far from clear that they would have assisted the defendants as against the third parties. Adapting to this context what I said in Part VII, if any of the directors had pressed for further information, the likelihood is that he would have received [further] comfort and assurances on which he would have been entitled to rely. I consider that as between the defendants and third parties, the additional costs attributable to the third party proceedings should be borne by the defendants, without being passed on to the plaintiffs. Taking an overall view of all costs (including those of the third party proceedings) between the plaintiffs and defendants, there should on this basis be some corresponding reduction of the costs ordered to be payable by the plaintiffs. I bear in mind that, on this approach (viz. reducing the defendants' recovery against the plaintiffs), the reduction must cover the additional costs incurred by the third parties as well as the defendants themselves in respect of the third party proceedings.

Looking at other issues in the action, the plaintiffs were effectively successful on the issues of New York which were the subject of expert evidence over some two days and submissions before me. On the issues which were argued on Days 3 and 4 of the trial about the pleadings and the issue of wilful misconduct the plaintiffs can in the light of the outcome of the trial be regarded as unsuccessful.

The plaintiffs can however claim in my judgment to stand in a different position in respect of important areas of fact and expertise, which played a very significant role during the remainder of the time spent at trial (a total of 9 days on factual evidence and 7 days on expert evidence — the time spent being without doubt increased by the paucity of contemporaneous records of their conduct and thinking on the defendants' side). The key areas to which I have referred included, in particular, the reasoning behind and basis of the U.S.$2 m. estimate for upgrading *Ardent* which was central to her purchase. I did not accept that the U.S.$2 m. was made up of Mr. Reilly's total of U.S.$1.05 m. plus a further U.S.$1 m. for steelwork. I did not accept that Mr. Dunn thought that Mr. Reilly's total of U.S.$1.05 m. included sufficient "slack" to cover other general overhauling. I did not accept that Mr. Dunn had in mind a total of either 300 tonnes of steelwork or U.S.$1 m. for steelwork. Nor did I accept Mr. Dunn's (or for that matter Mr. Reilly's) suggestion that Mr. Dunn's reluctance to give Mr. Anderson any overall estimate for upgrading costs was because no or no precise estimate could be given without ultrasonics. The reality, as Mr. Houghton's evidence indicated, was that, if some permanent ballast tanks had been inspected in empty condition, sufficient could and would have been seen to lead to rejection of the vessel as a candidate for purchase. Despite the defendants' vigorous attacks on the admissibility, competence and impartiality of much of Mr. Houghton's evidence, and their comments on his late involvement

and the revisions in the plaintiffs' case to which it led, I found him a valuable witness whose evidence was of real assistance in identifying and resolving the technical issues.

On the key issues of evaluation of the defendants' conduct on the basis of the findings of fact which I made, the defendants further failed to persuade me that any of Mr. Papachristidis, Mr. Anderson and Mr. Dunn had acted in relation to *Ardent* in accordance with the skill and care to be expected of competent ship-managers assisting an investment fund like the plaintiffs. This applies both in relation to the class records, where I held that PSMSL acted with gross negligence, and in relation to the recommendation to purchase *Ardent*, which I held to have involved negligence, although not gross. Mr. Papachristidis, Mr. Anderson and Mr. Dunn downplayed the importance of matters such as inspection of class records and of permanent ballast tanks, as well as other matters of experience and background bearing on the question whether PL and PSMSL performed their functions with the skill and care to be expected of concerns of their experience and apparent quality. I also rejected other aspects of the defendants' evidence, including a suggestion by Mr. Anderson that *Ardent* had a market value as high as U.S.$14.7 m. in August, 1989.

Mr. Lyon relies on the fact that I held that none of Mr. Papachristidis, Mr. Anderson and Mr. Dunn personally owed any duty of care, even to avoid gross negligence, and that as regards the defendant companies, PL and PSMSL, I concluded that the gross negligence in respect of class records was not causative, while the further negligence leading up to and in making the recommendation was not gross. Mr. Lyon submits that since the plaintiffs, in order to succeed, had to show either wilful misconduct or at the least gross negligence, it was irrelevant to consider whether there was negligence. The exclusion clauses meant that negligence would not suffice. That does not answer the point that the defendants have only succeeded in respect of class records on causation. It is also in my view unrealistic in respect of gross negligence. As my judgment shows (and as Mr. Justice Megaw seems also to have found in *Shawinigan*, [1961] 3 All E.R. 396, at p. 405E), it is in my view quite natural, when considering alleged gross negligence, to consider first whether there was negligence and then to consider whether it was gross.

Mr. Lyon says that the trial would in any event have covered the same ground in factual and expert evidence, because of the serious allegations of wilful misconduct which were particularized and the subject of argument on Day 4 as well as the allegations that any negligence was gross. In my judgment, the trial would have been very considerably shorter had the facts as I have found them been accepted and had the defendants been prepared to acknowledge the shortcomings in their handling of *Ardent*, and confined their evidence and case to a denial of any knowing wrongdoing, causative gross negligence in the case of the class records and gross negligence in other respects. That applies both to the witnesses of fact called on the defendants' side and to the expert evidence.

Looking at the circumstances of this case as a whole, I consider that it is appropriate to take into account this increase in the length and complexity of trial and the shortfalls in the defendants' performance, even though they do not in the event ground legal liability, in any order for costs. The fact that there were such shortfalls and that they were in issue and had to be investigated and established not only increased the length of any trial, they also meant that the plaintiffs were faced with explanations and a defence which they were right to conclude could not be accepted as they stood and which they to a significant extent rebutted, although they failed to do so to the full extent necessary to establish causative gross negligence. Whether there was causative gross negligence could not be judged until the actual factual position, the relevant background and the proper approach in relation to a vessel such as *Ardent* had been clarified.

A successful party is not to be deprived of part of his costs simply because he makes allegations on which he fails, but he may be if this has caused or contributed to the bringing, length or costs of the proceedings. Taking all the circumstances of this case in the round, and making an order as between the plaintiffs and defendants which covers all the costs of these proceedings (that is the main action and the third party proceedings) apart from those which I have already dealt with under the heading of Perama repairs, I consider that the defendants should recover 75 per cent. of their costs of the main action and third party proceedings from the plaintiffs, with no separate order for costs in the third party proceedings.

5. *Costs of claims against Mr. Papachristidis and Mr. Dunn in respect of the other three vessels*

It is, as I have said, common ground on the basis of my findings the Mr. Papachristidis and Mr. Dunn owed no personal duties and that the rest of the action must be dismissed as against them. As a result of such dismissal, they seek orders for the whole of the costs of the action to date in respect of the other vessels. Mr. Jacobs on the other hand submits that any costs order in their favour should be limited, at least at this stage, to any additional costs incurred in respect of the pursuit of claims against them in respect of these three vessels, that is

additional to the costs which would anyway have been incurred in pursuing the action against PL and PSMSL. Mr. Lyon's riposte is what has always interested the plaintiffs is the prospect, or possibly the threat, of establishing personal liability on the part of Mr. Papachristidis and Mr. Dunn, in particular the former, whose family trusts have been, he boldly suggests, the real target of the plaintiffs' aim, rather than PL and PSMSL, who he hints may not have proved worth powder and shot. Mr. Lyon's submissions in these respects appear to be little, if indeed anything, more than unevidenced assertions. I am quite unable to proceed on the basis which he invites. In my judgment, it would be inappropriate to make an outright order in Mr. Papachristidis' and Mr. Dunn's favour in respect of what could prove to be the whole costs of the rest of the action, assuming Mr. Papachristidis and Mr. Dunn are jointly and severally liable to their solicitors for them. Equally, it would seem to me inappropriate to make an order of any additional costs incurred in respect of the pursuit of the action, and certainly so on any basis which involved immediate taxation. Such an order and taxation might later prove to have been inappropriate or unnecessary, for example if the claims on the other three vessels also fail against all defendants. I propose to reserve any order in respect of Mr. Papachristidis' and Mr. Dunn's costs of the rest of the action relating to the other three vessels until after conclusion of the rest of the action against the other defendants or further order.

6. *Time of payment of costs*

It is common ground that the costs orders which I have made in pars. 3 and 4 above in respect of Perama repairs and other costs should be for costs to be taxed and paid forthwith.