OUTER HOUSE, COURT OF SESSION

[2019] CSOH 58

CA107/18

OPINION OF LADY WOLFFE

In the cause

ARDMAIR BAY HOLDINGS LTD

Pursuer

against

JAMES DOUGLAS CRAIG

Defender

Pursuer: Lord Davidson of Glen Cova, QC; CMS
Defender: Howie, QC, MacGregor; Brodies LLP

31 July 2019

Introduction

The cause of the dispute between the parties: non-disclosure of the ITT

[1] The pursuer entered into a share sale and purchase agreement ("the Agreement") with the defender and others to buy the whole share capital of the Craig Group Limited ("the Company") on 14 October 2017 ("the Signing Date") for the price of £82,570,677. The defender was a substantial shareholder in the Company. On the eve of the signing of the Agreement, one of the subsidiary companies of the Company ("North Star", as after-defined) received an email with an invitation to treat (" the ITT") appended to it. The email and the ITT related to North Star's two most lucrative contracts. The defender did not

disclose either the receipt of the email or the terms of the attached ITT to the pursuer at that time.

[2] After the loss, a few months later, of the contracts to which that ITT related (ie the options were not exercised, as expected), and after the pursuer subsequently become aware of the email (and its timing) and the ITT (and its contents), the pursuer raised the present proceedings. The pursuer alleges that the defender breached a number of warranties in the Agreement and/or engaged in wilful concealment of a material matter, or failed to correct a representation prior to conclusion of the Agreement when that representation became untrue (as the pursuer contends) upon North Star's receipt of the ITT. As a consequence, the pursuer sustained a loss in the form of paying substantially more than it otherwise would have for the shares in the Company. It estimates its loss at about £16,800,000.

[3] The defender denies all of the grounds of liability advanced by the pursuer and advanced alternative interpretations of the warranties. In respect of the claims based on the Agreement, the defender also relies an entire agreement clause. I heard a preliminary proof confined to these liability issues. Issues of quantum were reserved.

Structure of this Opinion

[4] This opinion is structured as follows:

The Share Purchase Agreement ("the Agreement")

Defined terms

[5] Four of the pursuer's five grounds of liability are founded on in terms of the Agreement. Before setting out those terms, it is first necessary to note a number of the definitions in the Agreement.

1) "Company" means Craig Group Limited;

2) "Subsidiaries" includes North Star (there is no need to repeat the more detailed definition);

3) "Business" means the business of the Company and its subsidiaries and which included "(i) offshore support operations (including platforms supply) and … (iii) emergency response and rescue services to the offshore industry in [the North Sea]".

2) The "Completion Date" was defined 6 November 2017. (The Completion Date in fact occurred on 2 November 2017.)

3) A "Material Contract" was defined as meaning "(i) all charter agreements to which the Company or any of the Subsidiaries is party; and / or (ii) all other agreements to which the Company or any of the Subsidiaries is party which are of material or fundamental importance to the operation of the Business".

One of the warranties at issue covered the short period between the Signing Date (as I have defined it) and the Completion Date, which period I shall refer to as "the pre-Completion Window".

[6] There is no definition for a "material event".

The clauses in the Agreement

[7] The parties referred to the clauses 8.1.3, 10.2, 11.9 and 18.3 of the Agreement, which provided as follows:

> "8 **PERIOD BEFORE COMPLETION**
>
> 8.1 The Warrantor shall ensure that during the period beginning on the signing of this Agreement and ending at Completion:
>
> […]
>
> 8.1.3 the Warrantor shall, as soon as reasonably practicable, notify the Buyer in writing of any matter which becomes known to him after the date of this Agreement and before Completion which constitutes, or might be reasonably be expected to constitute, a material event in respect of the Business.
>
> 10 **WARRANTIES**
>
> […]
>
> 10.2 The Warrantor warrants to the Buyer that each Warranty (other than the Title Warranties and the Warranties set out in paragraph 27 of Section B of Part 4 of the Schedule) is true and accurate as at the date of this Agreement. […]
>
> 11 **LIMITATION ON CLAIMS**
>
> […]
>
> 11.9 Nothing in this clause or Part 8 of the Schedule (Sellers' limitation of liability and conduct of claims) applies to a Claim that arises or is delayed as a result of dishonesty, fraud, wilful misconduct or wilful concealment by the Sellers or any of them.
>
> 18 **WHOLE AGREEMENT**
>
> […]
>
> 18.3 Each party acknowledges that, in entering into this Agreement, it does not rely on any statement, representation, warranty, undertaking or other assurance given or made by any person (whether a party to this Agreement or not) other than as expressly set out or referred to in this Agreement. Each party waives all rights and remedies howsoever arising which, but for this clause, might otherwise be available to it in respect of any such representation, warranty, undertaking or other assurance. The only remedy available to any party in respect of any warranty,

undertaking or other assurance expressly set out or referred to in this Agreement is for breach of contract."

I shall refer to clause 18 as "the entire agreement" clause.

The Warranties

[8] The warranties are contained in Part 4 of the Schedule to the Agreement. The pursuer maintains that the defender breached the terms of warranties 11 and 26, the relevant terms of which are as follows:

"11 **CONTRACTS**

[…]

11.2 Complete and accurate copies of all Material Contracts have been Disclosed.

11.3 There are no outstanding or ongoing negotiations of material importance to the business, profits or assets of the Company or any of the Subsidiaries, or any outstanding quotations or tenders for a contract that, if accepted, would give rise to a material Contract.

26 **VESSELS**

[…]

26.6 Documents 6.1.1 of the Disclosure Bundle ("Current Contracts Summary") sets out complete and accurate details of all of the charter arrangements that are in place as at the date of this Agreement in relation to all of the Vessels."

I shall refer to the claims in respect of warranties 11 and 26 collectively as "the warranty claims".

Outline of the pursuer's claims

[9] The pursuer alleges the following breaches of the SPA:

(1) breach of warranty 26.6 (completeness and accuracy of the CSS);

(2) breach of warranty 11..3 (failure to disclose "…ongoing negotiation";

(3) breach of clause 8.1.3 (failure during the pre-Completion Window to disclose any matter that might become a material event);

(4) wilful concealment (clause 11.9).

The pursuer also has a common law case (ie not predicated on the Agreement), namely

(5) that the receipt of the ITT rendered a representation made in an email of 5 November 2017 untrue ("the misrepresentation case").

FACTUAL BACKGROUND

[10] I had the benefit of very full witness statements from the parties' witnesses. Having heard the proof, it is clear that to a very large degree the background was undisputed, though parties might differ as to the significance and relevance of some of that evidence. Elements of the background were frequently spoken to by more than one witness. For the sake of brevity, I record these chapters of background evidence without the need to attribute passages to specific witnesses. Before doing so, it will assist to identify the individuals and entities who were involved.

Dramatis personae

[11] In presenting their cases, parties did not feel it necessary to differentiate strictly between the actings of the Company and of North Star. They referred by way of short hand to the "sell side" and the "buy side". I shall also adopt that usage. For similar ease of reference, I shall simply refer to "the business" as encompassing the activities of North Star and the Company.

The sell side

[12] James Douglas Craig: The defender, a chartered accountant, is the third generation of his family to be involved in the family business, originally George Craig and Sons Limited. When the defender joined the family business in about 1977, it was then principally involved in deep sea trawler fishing in the North Sea and was based in Aberdeen. The defender's father and uncles ran the family business at that time. The defender joined initially to assist on the accountancy side and became financial controller. Upon his uncle's retirement the defender and his father ran the Craig Group for about 25 years. The defender was Managing Director of the group but, upon his father's death in 2010, the defender became chairman. During the period of the defender's involvement, the business was developed significantly by the creation of a number of new companies, with a marine or offshore focus, and in the development of international bases in Singapore, Houston and Abu Dhabi as well as other bases in the UK.

[13] At the time of the Agreement the defender was the largest single shareholder in the Company, holding 46.73% of its shares. In terms of the Agreement, he received around £33.5 million of the consideration paid for the Company's shares. He was one of the directors of North Star. The defender was not actively involved in the operation of North Star or the Company; nor was he actively involved in the exchange of information between the pursuers and the 'sell side' in the period prior to the Signing Date. The defender lives aboard, in Barbados. He was on a cruise at the time the ITT was received and the Agreement signed.

[14] Callum Bruce: He had worked in the oil and gas industry since the 1970s. He joined North Star in 1986 initially as a ship runner, subsequently becoming an operations manager, operations director, and deputy managing director before becoming Managing Director. He

was the Managing Director of the Company at the time the Agreement was entered into and was retained after the Completion Date as Chief Executive. He was also a director of North Star.

[15] Insofar as there was a chain of communication, Callum Bruce explained that it was Graham Payton who reported back to the defender as and when required. Callum Bruce explained that Gordon Payton was also the "prime conduit" of information from the management team to Simmons, who were consultants instructed to assist by the sell side. Gordon Wallace's responsibility was to look at contractual status whereas Graham Payton had responsibility about the warranties.

[16] Callum Bruce spoke to the defender "infrequently". There was little day-to-day contact between the defender and any members of the management team. Callum Bruce readily agreed that he was not "the numbers man" and that this was Alan Holden's role (Alan Holden did not give evidence). In relation to the sale of the Company, he described his role, and that of Graham Payton, as providing information to Simmons on request. It was not their role to make decisions. So far as he was concerned, Simmons were the ones advising the defender. Their role, ie Callum Bruce and Graham Payton, was to channel information to Simmons, when this was sought, about North Star or the shipping industry. This was because Simmons were not market analysists and they did not know the shipping industry. Calum Bruce and Gordon Wallace provided information on the vessels.

[17] He had not seen earlier versions of the Agreement and did not regard it as his role to scrutinise it. He was not sure if Gordon Wallace or Alan Holden ever saw it. Callum Bruce was aware of the warranties and disclosures in it, as Brodies and Simmons consulted him and Graham Payton in relation to these. However, he did not read these- that was a matter for the lawyers. He was not asked to go through the Agreement or the warranties. In his

view the defender and Brodies "took ownership of the warranties", although he accepted that it was he and Gordon Wallace primarily who provided the information on which they were based. He was there when disclosure under the warranties was discussed.

[18] Graham Payton: He was the Finance Director of the Company's group. He joined the Company and its businesses in about 2006 and was appointed a director in about 2007. He assisted the defender in running the whole group of companies. He described the defender as being over the past few years at "arm's length overseas" and only "periodically coming to meetings", whereas Graham Payton was in the UK. Graham Payton took the lead on banking, audit, legal, human resources and IT matters for all companies within the group. He did not get involved in the day-to-day operation of businesses. He signed the Agreement on behalf of the defender under a power of attorney. He described Callum Bruce and Gordon Wallace as the "local directors" who handled the day-to-day running of the business in Aberdeen.

[19] In relation to the sale of the business to the pursuer, Graham Payton was part of the sellers' team. He described the detailed work as being led by the local directors who were more involved in the running of the business and who would meet with the sellers' advisers (ie Brodies and Simmons). These local directors liaised with the sellers' advisers regarding the description of the business, its financial aspects, the warranties and the disclosure process.

[20] Gordon Wallace: David Gordon Wallace (referred to in the evidence as "Gordon Wallace") began his working life in the Merchant Navy. He held other positions in other companies before being taken on as a commercial director of North Star about 10 years or so before the Agreement was entered into. After the sale of the Company to the pursuer, he was retained as Chief Operating Officer.

[21] Gordon Wallace was aware of a first approach made by Basalt in 2016. In October 2016 Graham Payton met with Simmons together with Callum Bruce, Alan Holden and Graham Payton to provide them with information on the current fleet of the business, together with the five-year history on clients and rates. He provided a spreadsheet containing this information, which was discussed at a meeting attended by Basalt (the principal funders of the purchase of the company), Simmons and North Star. Shortly after that meeting, he was provided with a copy vessel summary data table, prepared by the buy side, and was told to go through this in order to provide any missing information. He described that document as containing each vessel, line by line and North Star management were asked to confirm the accuracy. This vessel summary data table was the precursor of what became the Current Contracts Summary ("CCS").

[22] In relation to his role during the sale of the Company, Gordon Wallace's remit was to provide information to Simmons. He spoke to a number of documents in the Joint Bundle as illustrating the kind of information he would provide. This included a list of current tenders and any updates as they came through (this was to enable Simmons to track a live list). He also provided updated contract status and summaries of outstanding ERRV tenders. He also provided the latest version of the "workload" document, which was a document internal to North Star containing details of every contract it held). He was not involved in the negotiation of the Agreement and, indeed, was unaware that he was designated as a "Manager" in it.

[23] Douglas Crawford: Douglas Crawford was the solicitor from Brodies advising the defender in respect of the Agreement. He also provided advice at a meeting called on the evening of 13 October 2017 after the ITT received.

[24] Simmons and Co: After it was resolved to sell the Company, the services of Simmons and Co ("Simmons") were enlisted as the vendor's agents. Two individuals from Simmons gave evidence at the proof, namely Ross Andrew Atkinson and Fraser Robert Dobbie. Simmons created the financial models for the sale.

[25] Callum Bruce, Graham Payton, Alan Holden and Gordon Wallace were defined collectively as "the management team" in the Agreement. I shall also refer to any two or more of them as "the management team" of the sell side.

The Buy Side

[26] The entity funding the acquisition of the shares in the Company was Basalt, Infrastructure Partners ("Basalt"). The pursuer led evidence of two individuals from Basalt, namely:

[27] Steven Lowry: Steven Lowry was one of the founders of Basalt, a midmarket infrastructure fund focusing on equity investment in Europe and in North America. He is on one of the Investment Committees for Basalt. He was involved in Basalt's first approach in May 2016 and the renewed contact in mid-2017 which lead to the Agreement. He also spoke to the information exchange between the buy and sell side and the buyer's approach to valuation.

[28] Wood MacKenzie: Wood MacKenzie ("WoodMac") is a business that conducts due diligence. Basalt engaged them to provide background to the North Sea oil and gas market and to assist in the analysis of the commercial data provided in relation to the Company. They were not concerned with legal diligence.

[29] Wil Jones: He was the project manager in WoodMac and reported to Malcolm Forbes-Cable. He spoke in detail to the financial analysis conducted by WoodMac into the

business of the Company and to the several offers that were made prior to the one that was accepted and leading to the conclusion of the Agreement. He explained that the S-Class Vessels were a material part of the valuation and all parties understood that these were material contracts, given that they were North Star's most lucrative contracts.

[30] Malcolm Forbes-Cable: He is a vice-president within WoodMac, having joined them in 2007. He had an overview of WoodMac's involvement and he oversaw WoodMac's due diligence and check on the sell side's management forecasts... Other colleagues within WoodMac, such as Wei Lui and Wil Jones, had more hands-on roles. Wei Lui was involved in the financial modelling. This entailed delving into a significant degree of detail including, for example, the day rates for each vessel and what this meant for the EBITDA (ie earnings before interest, tax, depreciation and amortization) and the value of the Company. This enabled WoodMac to build up a revenue model and a financial model.

The parties' witnesses

[31] At proof ten individuals gave evidence. The pursuer led evidence from Steven Lowry and Wil Jones of Basalt, from Callum Bruce and Gordon Wallace, two members of the management team of the sell side, and from Malcolm Forbes-Cable of WoodMac. The defender led Graham Payton, Fraser Dobbie, Ross Atkinson, Douglas Crawford and the defender.

The Company and its businesses

[32] The Company and its subsidiaries owned and operated one of the largest and youngest wholly-owned British shipping fleets engaged in the UK offshore industry. It provided emergency and rescue services, assisting tankers, supplying platforms and

operating rescue boats to about 50 offshore installations. In particular, North Star provided support vessels, known as "emergency response and rescue vessels" ("ERRVs"), and services to offshore installations *inter alia* in the North Sea. The ERRV business in the UK is a highly regulated sector in UK industry, requiring 24/7, 365 days support service to oil and gas companies operating manned offshore installations.

The S-Class Vessels

[33] The pursuer engaged in a significant amount of due diligence into the Company and which included a consideration of all of the material contracts it held. On the pursuer's approach to the valuation of the Company, it regarded the Company's material contracts as fundamental to the Company and its value. One of the Company's subsidiaries, North Star Shipping (Aberdeen) Limited ("North Star"), operated two specialist "S-Class" vessels, the *Sceptre* and the *Sovereign* ("the S-Class Vessels"). The S-Class Vessels had been purpose-built to satisfy certain health and safety and operational requirements for an operator of certain North Sea offshore platforms, namely, Talisman Energy (UK) Limited ("Talisman") (now known as Repsol Sinopec Resources UK Limited ("Repsol")).

[34] One of the particular design features of the S-Class Vessels was that each vessel had a maximum displacement of 5000 tonnes with an assigned draft of 5.0 metres ("the displacement requirement"). As it was explained in evidence, Repsol's North Sea installations were "ageing assets". In order to protect their integrity and to prevent the risk of significant damage to them, Repsol commissioned the S-Class Vessels with the restriction of their displacement to this relatively low value. The S-Class Vessels became operational in 2013 and North Star provided these and associated support services under two charter parties to Repsol.

[35] The Company's management team (including Callum Bruce and Gordon Wallace) were confident that, by reason of the bespoke nature of the S-Class Vessels, Repsol would require to continue to use them.

The S-Class Charter parties: five-year term plus the options

[36] The original term of each charter party was for five years, with five one-year options to extend the charter party on the same terms ("the options"). The five-year fixed-term charter parties in respect of the two S-Class Vessels were due to expire, respectively, in May and in October 2018. The options were exercisable on 90 days' notice, if exercised in accordance with their terms, in about March and August 2018.

The sell side's expectations that the options for the S-Class Vessels would be exercised

[37] By reason of their ability to comply with Repsol's displacement requirement, which the management team on the sell side understood to be unique among service vessels operating in the North Sea, North Star could charge a premium day rate for the S-Class Vessels. In broad terms, the day rate in 2013 was about £13,500 for each of the S-Class Vessels; it increased to about £13,700 in 2015 and dipped slightly in 2016 to £13,400. This was, broadly, double the day rate for other vessels.

The buy side's expectation of the options for the S-Class Vessels

[38] Malcolm Forbes-Cable confirmed that the S-Class Vessels were treated separately in the WoodMac analysis. They were aware that an option was coming up but in their final analysis assumed that it would be exercised at the current rate. He explained there was an

assumption that "life will continue as normal"; the vessels were still doing their stuff and Repsol needed them.

[39] Malcolm Forbes-Cable confirmed the significance of the vessel day rates. The revenues were driven by the day rates each vessel could achieve and so it was necessary to assess whether or not these were likely to change in the future. Putting it simply, he explained that if the day rates decline, so does the value of the company. It was for that reason that, in the weeks before the Agreement was signed, WoodMac were seeking information from the sell side management team regarding the likelihood of the options being exercised any potential day rates on any re—negotiations.

[40] Malcolm Forbes-Cable confirmed the centrality of the S-Class Vessels to the valuation of the business. As she described it, North Star "were making hay" from these contracts because these vessels were bespoke. It was understood that Repsol's position was problematic in that they had a challenging portfolio of North Sea assets. In short, these were ageing sub- economic assets, with a very high decommissioning bill. Repsol was under "massive pressure" and, looking at its portfolio globally, much of its activity was to drive down costs. Nonetheless, in their forecasts of the day rates for the S-Class Vessels, the sell side management team were confident that these rates could be maintained and should not be discounted. The buy side viewed the options in the charter parties for the S-Class Vessels in this context and on the basis that Repsol would in fact exercise these options. There is no doubt that the sell side was aware of the buy side's approach to valuation generally and the level of detail interrogated by them.

Earlier inconclusive approaches to the Company

[41] Stephen Lowry became aware in around summer 2016 of an Aberdeen-based business, (ie the Company) looking to sell and which had the desired infrastructure characteristics. The particular features he identified as according with Basalt's investment model included regulatory oversight in the business, high barriers to entry, health and safety regulation driving the business need, tangible assets and fixed term contracts. Simmons sent an information pack about the Company and Steven Lowry delegated the day-to-day management of this potential deal to Wil Jones. WoodMac was engaged to assist the buy side.

The Indicative Offer in 2016

[42] Basalt made an indicative offer for the Company of £152 million on 28 September 2016 ("the Indicative Offer 2016"), subject to due diligence. However, as a consequence of due diligence undertaken by WoodMac this valuation could not be supported and the offer was withdrawn on 3 November 2016. In their withdrawal letter, the buy side indicated their concern about uncertainty in the market and, in particular, whether the contract or day rates had "bottomed out".

A second approach in 2017

[43] In May 2017 Simmons produced an updated business plan and forecast relating to the Company and which was provided to the buy side. As a consequence, Basalt submitted a new offer in the sum of £110.5 million on 16 June 2017 £10 million of the purchase was deferred against future performance. This reflected the buy side's view that the decline in day rates had abated or reached an acceptable level. After the exchange of some further

information the buy side refreshed its offer on 13 June 2017 to £105 million but without any deferral. The North Star management team provided a market update on 21 August 2017, via Simmons, the day before Steven Lowry was due to meet North Star's Managing Director. The updated information, including a reduction in the day rate for several vessels, resulted in the buy side revising its offer to £101.5 million on 29 August 2017. This was the final offer, which the buy side accepted. Steven Lowry explained that prior to each of these offers, the buy side had spent time with the management going through "contract by contract, vessel by vessel" to understand the status of each. The current and future contracts were integral to the buy side's valuation of the Company. These included the S-Class Vessels and relative contracts for their supply to Repsol. The Company's management team described the S-Class Vessels as "specialist" and "purpose-built" for Repsol; they were on long-term contracts. As these were specially designed for the Repsol installations, the sell side's forecast of day rates remained unchanged, ie without diminution over time, because nothing else could replace the S-Class Vessels.

The Current Contracts Summary ("CCS)

[44] As it was explained in Gordon Wallace's evidence, the CCS had first emerged during the inconclusive talks between Basalt and the Company in mid-2016. The CCS was very detailed. It included utilisation figures for the vessels, average day rates, estimated cessation of production ("CoP") for the platforms serviced, assumed scrap weights and a comments section in respect of each vessel..

[45] One of the pursuer's grounds of action is that the ITT should have been disclosed via the CCS prior to the Signing Date. The pursuer notes that the CCS disclosed on the Signing Date for the purpose of the Agreement was last updated the day before, on 13 October 2017.

[46] The CCS comprised a two page document with each vessel comprising a separate entry. In addition to the "comments" column opposite each of the 31 vessels, the other information recorded against each named vessel included its capabilities and customer. A separate column recorded each "contract as at 13 October 2017" (and included a contract reference), an addendum/update reference, the contract rate, the contract period, the contract and date, the option and date and the contract page. So, for example, in relation to the "Devotion", this was described as a vessel having a "Single DC" capability and whose customer was BP. In addition to the contract reference and contract page, the CCS recorded the contract rate (at c £6,900), the contract period (1 July 2015 to 13 August 2017), the contract and date (given as August 2018) and the option and date (given as August 2023). In the comments section it was recorded that the "Contract Length is 5 years from August 2013-per Master Contract… Rate valid the same rate as 2017". Gordon Wallace provided a large amount of the information contained in the CCS.

[47] On the evidence, Gordon Wallace was principally responsible for updating this (a role Callum Bruce took pains in evidence to distance himself from). Callum Bruce maintained that it was Gordon Wallace's role to reflect any changes in relation to rates in the CCS. Steven Lowry confirmed that the CCS was regularly updated by the sell side. Callum Bruce confirmed in evidence that he understood that the CCS had to be up-to-date as at the date of signing the Agreement. He also confirmed that the "comments" column was there, not because the sell side needed it, but to convey information necessary to the buy side. By contrast, Gordon Wallace believed the CCS "comments" column was a matter for Simmons, and to whom Gordon Wallace regularly provided information, including, for example, the three outstanding tenders disclosed in the Disclosure Letter (described at para [71]ff, below).

[48] The entries for the S-Class Vessels, namely the *Sceptre* and the *Sovereign*, described their capabilities as "S-Class" and Repsol as the customer. In addition to the contract references, contract page, and addendum/update references, the CCS recorded each vessel's contract rate (ie the day rate of £13,362 and £13,391, respectively) and which was broadly double the contract rates for the other vessels. The only matter recorded in the "comment" section was a note to the effect that the details for the two S-Class Vessels had been reversed ie information for the for *Sceptre* had been incorrectly recorded as those for *Sovereign* and *vice versa*.

The buy side's valuation of the Company

[49] Steven Lowry explained that as an infrastructure fund, Basalt always used a "discounted cash flow" ("DCF") valuation. This was made known to the sell side from the outset, as it was stated in the Indicative Offer made in 2016. Fraser Dobbie confirmed that the buy side had sought a significant amount of information about the business, including vessel by vessel and month by month. He had reason to believe that Basalt would use a DCF method of valuation of the Company. He accepted, albeit not with a degree of willingness, that this form of analysis was sensitive to risk.

[50] Steven Lowry emphasised that the buy side undertook a detailed review of the business. He explained that prior to each offer the buy side spent time with the Company's management going through contract by contract and vessel by vessel to understand the status of each. The CCS was the critical tool for the communication and analysis of information about the Company and the business. This had developed from a vessel summary data table prepared in October 2016. It included a column specifically for "comments" and which contained information which do not fall under any of the other

headings but which was important for the buy side to know and track. The CCS was put into the "data room", the secure room in which information was disclosed by the sell side and available for inspection and interrogation by the buy side. The CCS was separate from details of the charter arrangements which were also disclosed in the data room.

[51] Steven Lowry also explained that he spent a significant amount of time with the North Star management team and with Simmons going through the business ("line by line. … on various occasions during the process") in order to understand the status of its contracts. This was because the current and future contracts were integral to the buy side's valuation of the business. The contracts the Company held, and would hold in future, were crucial to understanding the value of the business.

[52] Prior to acceptance of offer in late August 2017, the buy side met with the sell side management team on 2 November, 12 and 19 October 2016, 6 June 2017 and 22 August 2017. From 26 September 2017 there were weekly calls by the buy side with Simmons. Steven Lowry explained that throughout this process the buy side interrogated the business plan and the business case the sell side put forward. The particular purpose of these was to substantiate and build up the body of evidence to support the future growth rates projected for the Company. By way of illustration, the level of detail included the likelihood of success of the vessels securing utilisation and the expected day rates.

The 5 October 2017 emails

[53] The pursuer relies on a passage in an email of 5 October 2017 as constituting a representation of fact – the defender disputes this, contending it was no more than an expression of belief – and which it said became untrue upon receipt of the ITT.

The buy side's query

[54] The buy and sell side exchanged several emails on 5 October 2017. One of the Basalt team emailed Simmons (at 9:37 am) with two queries, the first of which related to the S-Class Vessels:

> "For the two S-Class (PSV) vessels we are not clear on the circumstances of the previous rate reductions for these vessels. If management could provide their expectation and rationale for the dayrate for these assets in the option period that would be helpful"

The sell side's internal exchanges regarding how to respond to the buy side's query

[55] The sell side did not supply a response to the buy side until Fraser Dobbie's email to the buy side much later on 5 October 2017 (timed at 16:11). This response was preceded by a number of emails exchanged internally among the sell side. In particular:

1) At 9:40am Fraser Dobbie forwarded the email to Callum Bruce and Gordon Wallace asking for a brief response.

2) At 12:36pm Gordon Wallace emailed Fraser Dobbie (of Simmons) asking him to confirm what rate levels he had projected for both of the S-Class Vessels forward in the projection, wondering whether this was £10k or £12k. This email was copied to, among others, Graham Payton and Callum Bruce.

3) At 12:56pm Ross Dobbie (of Simmons) emailed Gordon Wallace and (copied to Callum Bruce and Graham Payton (of North Star) and Fraser Dobbie, among others), stating:

> "The Sceptre and Sovereign are currently in the financial model on rates of £13.4k on contracts, we have assumed the option period to go out to 2023 at these rates and the rate then basically stays the same at £13.4k under our market assumptions.
>
> Not sure where the £10k/£12K comes from?"

4) At 13:31pm Fraser Dobbie (Simmons) applied to (among others) Gordon Wallace, Callum Bruce and Graham Payton that "these are essentially carried through at the contract rate throughout the forecast. If [*sic*; *it?*] has been decided the best thing was to keep the external view that the vessels are unique and Repsol have nowhere else to go, as such why would the rate move".

5) At 15:23pm Gordon Wallace replied to Fraser Dobbie's earlier email (timed at 9:40) and copied in Callum Bruce and Graham Payton, with the proposed reply:

> "The Grampian S class vessels were purpose-built to satisfy HSE requirements whilst working alongside certain ageing North Sea assets. As far as we are aware these are currently the only vessels in the North Sea that can satisfy these requirements. As such the rate expectations would be in line with projected expectations. The current time we have no information on Repsols [*sic*] Marine strategy going forward, as such we have based assumptions on current operating practice by the charterer.

The rates were reduced by a token amount in 2016 as a strategic move to resecure multiple ERRV Contracts."

And after providing information on another matter, he signed off:

> "Pleased to discuss further as may be required."

6) At 15:26pm Fraser Dobbie (Simmons) replied, with a proposed deletion from Gordon Wallace's text:

> "Thanks Gordon.
>
> Slightly amended below:
>
> The rates were reduced by a token amount in 2016 as a strategic move to re-secure multiple ERRV Contracts.
>
> The Grampian S class vessels were purpose-built to satisfy HSE requirements whilst working alongside certain ageing North Sea

> assets. As far as we are aware these are currently the only vessels in the North Sea that can satisfy these requirements. As such the rate expectations would be in line with projected expectations. ~~At the current time we have no information on Repsols [*sic*] Marine strategy going forward, as such we have based assumptions on current operating practice by the charterer."~~

After providing details of several short term contracts, he ended:

> "Please let me know if you are alright with this…"

7) At 16:00pm Gordon Wallace emailed a further amendment altering the second sentence (for ease of comparison, I have shown the altered text in italics):

> "The rates were reduced by a token amount in 2016 as a strategic move to re-secure multiple ERRV Contracts.
>
> The Grampian S class vessels were purpose built to satisfy HSE requirements whilst working alongside certain age-ing North Sea assets. This followed a Global Tender exercise to identify the specific tonnage capable of meeting the charterers requirements, consequently, we believe that the Grampian S class vessels are the only vessels capable of meeting this specific requirement. As such the rate expectations would be in line with projected expectations." (italics added).

The Simmons email: The sell side's reply

[56] After these internal revisions, the text of the email that Simmons of the sell side sent to the buy side (timed at 16:11pm) ("the Simmons email") was as follows:

> "1) The rates were reduced by a token amount in 2016 as a strategic move to re-secure multiple ERRV Contracts.
>
> The Grampian S class vessels were purpose built to satisfy HSE requirements whilst working alongside certain age-ing North Sea assets. This followed a Global Tender exercise to identify the specific tonnage capable of meeting the charterers requirements, consequently, we believe that the Grampian S class vessels are the only vessels capable of meeting this specific requirement. As such the rate expectations would be in line with projected expectations."

[57] Basalt circulated the sell side response internally, with the comment:

> "See responses from Management below. Can you let me know your initial thoughts - if we can take comfort on the rate option period and possibly beyond, depending on the COP [ie the cessation of production] of the underlying field/activity"

[58] WoodMac responded about an hour later, in the following terms:

> "For the S-Class vessels the minimum dayrate reduction in the 2016 as part of a larger contract deal highlights to us the specific nature of the Sceptre and Sovereign vessels. In light of this it is fair to assume that the options will be exercised at the current rate. Post the option period we will take into consideration the reduced operational base of platforms of Repsol Sinopec at that time and assume a utilisation of 90% for the vessels at management dayrate."

Comment on the internal drafts preceding the 5 October 2017 email

[59] As just noted, it was Fraser Dobbie who deleted a sentence from Gordon Wallace's draft reply. He acknowledged that he had amended the draft of the Simmons email but emphasised that it was based on information from management. Their assumptions included the uniqueness of the S-Class vessels. His evidence was a little equivocal as to why he deleted the sentence Gordon Wallace had included, first saying he deleted this because Gordon Wallace could not have a valid opinion on the subject matter and, after it was noted (in cross-examination) it was a statement of fact, his response was that it was best to keep diligence responses "concise".

Effect of the 5 October 2017 email on the buy side

[60] Malcolm Forbes-Cable explained the impact the assurance in this email had. Prior to receipt of this email, in its analysis WoodMac had assumed that the options starting in May and October 2018 would be exercised but that the rates would drop by approximately 35%. This was in line with the drop in North Sea day rates from their peak in 2013. However, after receipt of this email, that assumption was changed. The North Star management team

were understood to be confirming that, because of the bespoke nature of the S-Class Vessels, these were the only vessels capable of meeting the specific requirements of Repsol. For that reason, the rate expectations were in line with those projected by Simmons (ie the rates would continue unchanged). In other words, the expectation was that the options would be exercised at the full contracted day rate, contrary to WoodMac's initial assumptions. He also explained that the exchange of emails highlighted that this was a "quite sensitive issue". Malcolm Forbes-Cable also explained that he would have found it helpful to see the sentence which had been deleted before the final draft of the email was sent out. If WoodMac had not received confirmation from North Star's management that the day rates would be maintained at current levels doing the option period, WoodMac would not have revised its original analysis and which assumed a significant reduction in the rates after the initial five-year contract period had come to an end. There was no challenge to the pursuer's evidence that WoodMac had relied on this information to change its assumptions about day rate projections during the option periods.

[61] He stressed the significance of the S-Class Vessels to the overall valuation of the Company. The S-Class day rates were the highest of all the vessels and so had a disproportionate impact on the valuation of the Company.

The events giving rise to the pursuer's claims under the Agreement

The receipt of the Repsol email, the attached ITT and the cover letter

[62] It is not disputed that the Company received an email on 13 October 2017 (it is timed at 16.23pm) sent on behalf of Repsol ("the Repsol email") with an attached ITT. While the Repsol email did not refer specifically to the S-Class Vessels, the commencement dates (of May and October 2018) matched the expiry of the charter parties for the *Sceptre* and the

Sovereign. There is no doubt that the sell side management team knew at the time that the Repsol email related to the S-Class Vessels. (No witnesses suggested otherwise at the proof.)

[63] It is necessary to note the following parts of the Repsol email, and the attached cover letter and ITT:

The Repsol email

1) The Repsol email (subject line "[Repsol] Long Term Requirement") noted a requirement for 2 PSVs commencing late May and late October 2018 for 1, 2, 3 years plus options.

2) It also stated that the earlier commencement will require a methanol capacity.

3) Tenders were required by close of business ("COB") 31 October 2017.

The Repsol cover letter

4) The Repsol cover letter requested "competitive "tenders" for PSV Services commencing in late May for the first vessel and late October for the second. Bids were invited for contracts of 1 and 3 years, each with two one-year options, and for 2 years with three one-year options.

5) A methanol capacity was required for the vessel sought from May 2018. The Repsol letter provided that alternative tenders (as per Annex B) would be considered "in so far as they are technically compliant and provide a robust and cost effective solution".

The ITT

6) Section C of the Form of Tender required to be submitted by 27 October and copy tenders submitted by close of business on 31 Oct 2017.

7) The technical specifications for the PSVs (in Annex A) did not stipulate any displacement or deadweight tonnage. In other words, there was no maximum displacement requirement.

8) Under the heading "Methanol" at the end of Annex A, the defenders noted that the passage began "If the vessel is tendered with a methanol capability.."

The absence of the displacement requirement was the most significant feature of the ITT, as it meant that the S-Class Vessels lost their advantage of being the only vessels capable of meeting Repsol's requirements. (It should be noted, that for a person conversant with ITTs, it would take a matter of mere moments to ascertain the absence of the displacement requirement.) To a lesser extent, but still significant, was the new stipulation (in the Repsol email) for methanol capacity for vessels serving the Repsol platforms. Finally, as mentioned in the cover letter, the fact that the date of commencement for any successful tenderer was the same as the date of the commencement of the first option was itself significant; it was inconsistent with the exercise of the options in respect of the S-Class Vessels.

The sell side's actions consequent upon receipt of the email and ITT

[64] Callum Bruce said normally by 5:00pm on a Friday, everyone was finished at work. He was in the North Star office. He received Repsol's email and attached ITT at 17:23. It was also copied to Gordon Wallace. He didn't review the attachment (he accessed this only through his phone, because he was not on his desktop), but "it was clear from the cover email" that it related to the S-Class Vessels. Gordon Wallace responded a few minutes later (at 17.42) with the comment, "Shit timing!". Callum Bruce "wasn't focused on his emails", so he is not clear of the order in which he read them, and may have read them at the same time. He did read the Repsol email before arriving at Brodies' offices for the meeting later

that evening. In evidence, Callum Bruce agreed it was "bad timing", because it was a tender they were expecting to see much later. Callum Bruce confirmed that it was out of the ordinary, because it was earlier than expected. In any event, it was Gordon Wallace's "responsibility to go through the detail". Callum Bruce forwarded the Repsol email to Simmons, but they didn't ask to see the ITT or the emails.

[65] None of the individuals on the sell side opened up the attached ITT on the day it was received. The earliest point at which anyone on the sell side management team opened the ITT was four days later, on the following Tuesday, 17 October 2017.

[66] The receipt of the Repsol email was discussed at a meeting at Brodies later in the evening of 13 October 2019.

The meeting at Brodies on the evening of 13 October 2017

[67] I heard a considerable amount of evidence about the meeting at Brodies' offices, the advice tendered and the defender's participation for part of this, via a call from onboard the cruise ship *The World*, where he was on holiday. There were differing recollections of how long the meeting at Brodies lasted, the duration of the call made to the defender and the scope and basis of advice tendered. (I discuss this, under the heading "Contentious Matters", below.)

[68] The significant uncontested matters that emerged from the evidence was that none of the North Star management team had opened up the ITT attached to the Repsol email. Nor did they apprise Douglas Crawford of the reference to a methanol capacity or the anticipated cost (of c £500,000 per vessel) of retrofitting the S-Class Vessels to provide this capability. In relation to the timing or significance of the Repsol email, this was represented as a normal business event. This is significant. On the basis of the sell side management

team's characterisation of the Repsol email, Douglas Crawford considered the warranties and advised the defender he did not require to disclose the ITT. No reference was made by any one at the meeting to the representation in the Simmons email of 5 October 2017 or any need to correct that.

The sell side's subsequent communication of the Repsol email and ITT to the buy side

[69] As noted above, Douglas Crawford recommended that the ITT be disclosed by the sell side, albeit not against the warranties. In an email sent 9 days later, on 22 October 2017 ("the email of 22 October 2017"), Callum Bruce set out in 10 paragraphs details of seven matters, the fifth matter referred to was Repsol. That paragraph stated:

> "Repsol have issued an RFQ looking for a tender to be submitted mid-November, awarded likely in Q 1 next year, for the two "S" Class vessels commencing on expiry of the current contracts in May and October next year. As per our normal approach as the incumbent but particularly as these are specialist vessels we will wait until near the submission date to come to a firm decision on the rate to be offered."

Steven Low circulated this to others with Basalt, with the short comment: "S class gets a mention but things look relatively solid". In evidence, Callum Bruce readily accepted that the ITT wasn't an RFQ. He sought to minimise the difference between an RFQ and an ITT. Callum Bruce cavilled when he was asked why the sell side were not told at this time the date on which the ITT had in fact been received. In his view, it was "not important".

[70] A further exchange of emails on 30 November 2017 was spoken to in evidence. The first was a short email from Stephen Lowry (of Basalt) with the subject line "tender" and asking "… Can you send me the actual date that the tender for the S class was released please?" Callum Bruce responded about 40 minutes later stating:

> "no problem didn't expect to be dealing with this right now. Thought it would be after the new year with a better outlook on the market for the PSV's.
> The tender was released on the evening of 13 October 2017."

I deal with the email of 22 October 2017 in more detail, below, when I consider the contentious evidence.

The Disclosure Letter and the "3 outstanding tenders"

[71] Lord Davidson elicited evidence about other disclosures. The disclosure letter of 14 October 2017 ("the Disclosure Letter") did not make reference to the ITT. However, pursuant to his obligations relative to warranty 11.3, the defender disclosed the existence of "3 outstanding tenders". Those "tenders" were said to be with Siemens ABB Germany, Zennor Petroleum and BP Trinidad. These disclosures consisted of two RFIs and one ITT. BP Trinidad issued an RFI on 26 July 2017, to which the Company responded on 14 August 2017. BP Trinidad did not then issue an ITT. The Siemens communication was also an RFI, issued on 19 December 2017, to which the Company responded on 25 January 2018. Siemens did not then issue an ITT. The Zennor work was a tender, which was issued on 28 August 2017, and to which the Company responded on 13 September 2017.

[72] Gordon Wallace explained (in his witness statement, at para 8.3) that an RFI is "usually a prequel to an ITT" and that "If you do not respond to an RFI, you will not be considered for the ITT". Wil Jones, in his witness statement (at para 6.4), explained that RFIs "precede an Initiation to Tender". To Wil Jones, it made sense that the RFIs were disclosed as Mr Craig knew that Basalt "were interested to know about the opportunities and challenges facing the business." In chief, Gordon Wallace supposed it was him who decided to pass on the Siemens, Zennor and BP Trinidad information for disclosure. He agreed that two of these pieces (Siemens and BP Trinidad) were RFIs. In chief, Callum Bruce agreed that the Siemens and BP Trinidad arrangements were not ITTs, but RFIs. They were

disclosed as tenders as "potentially significant work". He explained that, if one responded well to an RFI then one may subsequently receive an ITT. Callum Bruce also commented that an RFI is something that "was likely to turn into future work". It was not his decision to disclose the RFIs, but he acknowledged these were disclosable. On the basis that the BP Trinidad and Siemens work were not outstanding tenders, Callum Bruce considered that the disclosures the defender chose to give pursuant to clause 11.3 were wider than "outstanding tenders": they were "potential outstanding work".

Outcome of the ITT

[73] North Star's tender for the S-Class Vessels by half was unsuccessful, notwithstanding cutting its day rates by half in that tender.

Contentious matters of fact

The roles of those attending the meeting at Brodies and the purpose of the meeting

[74] Gordon Wallace, the author of the "Shit timing!" email, could not attend the Brodies meeting because he was at his child's 21st birthday party. However, he had expected Callum Bruce to provide information about the ITT to Simmons. (As noted below, in his view the ITT was "an important tender" and that this should have been provided to the sell side lawyers for their advice.)

[75] Callum Bruce was the member of the sell side management team who had had the greatest experience of the business and the industry in which it operated. However, as he explained in his parole evidence, his chief purpose in attending at the Brodies meeting was to sign his personal service contract (ie retaining him as part of the management team under the new ownership). "That was", he said, "the only thing I was coming to do that night". In

this mind-set he was unlikely to consider what, if anything, he required to do in Gordon Wallace's absence. His recollection about what transpired at the meeting at Brodies 'offices was uneven, at best. (I accept Lord Davidson's submission that Callum Bruce was not an especially reliable witness in this respect.) His poor recollection was consistent with his detached view of the matters to be addressed at the Brodies' meeting and his focus on his own personal service contract. For example, he regarded the issues of disclosure and the warranties as something "left to the lawyers". That comment betrayed a significant failure of appreciation of his role, as part of the senior management team, to communicate any matters of any materiality on behalf of the sell side to Douglas Crawford.

[76] In his evidence, Graham Payton portrayed himself as distant from the issues. While he agreed with Callum Bruce's characterisation of him as the "numbers man", he cast Alan Holden of North Star in the role of the person more familiar with the numbers. Graham Payton was not responsible for providing information to Simmons: that was for others. In relation to commercial matters, Graham Payton left this to Callum Bruce and Gordon Wallace. He was not involved in everything; he would be included in emails but he did not necessarily read them. He was not involved in revisals to the Simons email. When asked questions about this in cross, he professed "not to be conversant" with it.

[77] In terms of what Graham Payton's actual role was as part of the North Star management team, in his words, he was "floating around with the best intentions". As for his attendance at the Brodies' meeting on 13 October 2017, Mr Payton presented himself as having a minimal role. He did not 'lead' on any matter; Callum Bruce did. He felt that the matter of the ITT was for others, surmising that this was a shared responsibility between Gordon Wallace and Callum Bruce. He left the issue of what was to be done in response to the ITT to Douglas Crawford.

[78] The Simmons team comprised Fraser Dobbie, and the more junior man, Ross Atkinson. The impression Fraser Dobbie gave was that by that point Simmons' role had been discharged. Fraser Dobbie confirmed that the payment of the full fee to Simmons was contingent on a deal being done. (The defender confirmed that the Simmons fee was "certainly" a million pounds.) Ross Atkinson understood his role at the meeting was just to review the financial information and detailed arrangements in the Agreement to ensure that these reflected what had been agreed between the buyer and the defender. Neither gave the impression that they understood they had an active role to play other than to check the numbers (and which Fraser Dobbie delegated to Ross Atkinson). The Simmons' witnesses' description of their role is consistent with the evidence of other witnesses about them. Graham Payton described them as sitting there listening to the lawyers words. Otherwise, he did not recall that they made any contribution as regards the ITT.

Evidence as to the purpose of the Brodies meeting

[79] There was a surprising paucity of evidence as to the purpose of the meeting at Brodies. Most of those who attended were not asked specifically about this in evidence. It was relatively late in the proof when Douglas Crawford volunteered that he did not know at the outset what the purpose of the meeting was. There is a ring of truth in this observation. It is consistent with the impression in the evidence that the meeting was hastily arranged outwith business hours on the eve of the Signing Date. The fact that Douglas Crawford thereafter used the occasion (and, in particular, the call to the far-distant defender), to go through other matters prior to the Signing Date was not inconsistent with this passage of his evidence. The unplanned nature of the meeting was also consistent with the evidence that none of the other witness appeared primed or ready to discuss the warranties and that none

had copies of the warranties or the Agreement in front of them. This is consistent with the limited role that each envisaged for himself at that meeting.

Receipt of the ITT: the sell side response

What was the sell side's understanding of the use of ITT's generally and the significance of ITT?

[80] Having regard to the respective roles of the members of North Star's management team, Gordon Wallace was best placed to explain the use of ITTs in the industry. Graham Payton was relatively new to the industry and was not, as Finance Director, as close to the commercial operations as Gordon Wallace. Callum Bruce, while notionally part of the commercial operations, clearly regarded himself as operating a form of oversight at some remove from the detail of numbers or day-to-day operations.

[81] In his witness statement Gordon Wallace explained that, generally, ITTs were considered "outstanding tenders" at the point of their receipt. In cross-examination on behalf of the defender, he accepted that this was a mistake. However, on the totality of his evidence it was clear that the North Star management team view was that receipt of an ITT "indicated" a lowering of the rate was required. He elaborated on the purpose of an ITT, which was to make an incumbent "as worried as possible" about the chances of retaining the contract to which it related. It was a way for a counterparty to "generate a competition".

[82] In relation to the ITT, both Callum Bruce and Gordon Wallace confirmed in evidence that its timing "surprised" them. Gordon Wallace was surprised it had come out so early. All of the sell side witnesses (apart from the defender) who were asked about the ITT confirmed that the timing of the ITT was out of sync with the expectation that any communication about exercise of the options would be much closer to the date at which they fell to be exercised. It is clear that the fact of the receipt of an ITT, especially an early ITT,

was not a neutral factor. This is borne out by Gordon Wallace's description of the timing of receipt of the ITT as "ironic". It was "ironic" because "it was [Friday] the 13th and because we were close to the deal"; "it [ie the ITT] could potentially affect the deal". As he explained: the ITT had the potential to "make Basalt think again". The defender's evidence to the contrary, that the ITT was not a surprise to him or to any of the management team, is not credible and is not consistent with the evidence of these witnesses just described.

[83] Gordon Wallace accepted that the market for PSVs in October 2017 was "soft" and that there was "downward pressure" on rates at that time. He also understood that Repsol were looking for ways to save money on the S-Class Vessels. By reason of the low oil price many ,"if not all", of the business' clients were struggling and if they could find a way to reduce operating expenses they would try to achieve this.

[84] At that time, Repsol were looking "to drive rates for anything as low as they could go". He fully understood that the ITT had to be shared with Simmons, because Repsol had options for chartering ships that did not comply with the displacement requirement. He regarded it as "important" and so he "thought it should be provided to our lawyers". When asked why, he said "I think all contracts are significant; that one [ie the S-Class Vessel charter parties] in particular is a very important one". This was because "in terms of the rates within that contract, they were high performance, high value contracts". He accepted that the ITT "might upset the deal- he didn't know, but it certainly had the potential…you were looking at a five-year contract with a duration to May 2018 and suddenly the headlights [were on] and [it] had the potential to make you think again". His concern was about the effect on the day rates.

[85] Callum Bruce also accepted that rates for PSVs had "softened" by October 2017. In common with Gordon Wallace, Callum Bruce accepted "in hindsight" that receipt of the ITT

signalled that there would be no rollover of the S-Class Vessels. He explained the sell side's thinking at the time was that Repsol were "trying to get a price chip", meaning a reduction in the day rate for the S-Class Vessels. It must be noted that this answer disclosed knowledge and understanding on the part of the buy side that Repsol were attempting to achieve a reduction in S-Class Vessel day rates. It also supports an inference that this would have been important information for the buy side.

[86] In relation to the warranties, in his parole evidence Gordon Wallace disavowed the sentence in his witness statement that Graham Payton "had ownership of the warranties"; he did not know what this phrase meant. He himself was not involved in the negotiations of the terms of the Agreement. His, ie Gordon Wallace's, remit was to provide information as best as he could.

[87] Graham Payton's parole evidence about the significance of the ITT was somewhat guarded, although he acknowledged that he agreed that it signified Repsol were "reassessing their options." He described the degree of risk "as an interesting question; they [Repsol] were reconsidering marketplace to see if [there were] any other vessels". Repsol were using the ITT "to reconsider their options". Not having seen the ITT on the day it was received, he was unaware that the displacement requirement had been dropped.

[88] The evidence of the Simmons team on this issue is in large measure dependent on what they were told by the North Star management team. Fraser Dobbie had relatively little recall about events. He became aware of the ITT in a call from Callum Bruce. Callum Bruce told him he wasn't sure whether there was something that needed to be done in relation to the ITT, but gave him the impression there was a need to disclose it. Fraser Dobbie did not see either the ITT or the email, nor did he ask to see them. He confirmed that neither the ITT nor the email was produced at the Brodies meeting. He did not recall that their contents

were communicated. He had no specific recall of what information was provided to Douglas Crawford by the North Star management team about the ITT or what it might signify. He volunteered he had "no valid opinion" on what should be done. No one discussed disclosing the ITT; if it was a question of law, it was a question of deferring to the lawyers. He did not ask any questions; he did not look at the warranties during the meeting; he did not really listen to the lawyers. The only warranty he could recall being discussed had wording about "material events". While he had no knowledge of what was normal business in the North Sea industry, he did recall that the North Star management team regarding the ITT as an ordinary business event.

[89] In response to a question in cross examination, as to what his reaction would have been to the receipt of the ITT had he been acting for the buyer, he confirmed he would have had "asked further questions " of the management team of North Star. He didn't disagree with the proposition that that the ITT "kicked off" on the expiry of the S-Class Vessel charter parties (ie when the options fell to be exercised). Fraser Dobbie did ultimately accept that the buy side would have known that disclosure of the ITT would have given rise to further questions.

[90] Ross Atkinson was the other Simmons representative present at the Brodies meeting. In relation to the ITT, he accepted that it could mean the contract would be "re-awarded" or "renegotiated", but he did not feel he had a great deal of knowledge or experience. His role at the meeting was to review the financial information. Nonetheless, it never occurred to Ross Atkinson that the CCS should be updated to reflect the ITT. This sits uncomfortably with his acceptance, in cross-examination, that the buy side might have had "an interest" in knowing that the ITT came in on 13 October 2017. He also accepted that, given the materiality of the S-Class Vessels, the buy side would have such an interest because of

impact on risk. He candidly accepted as "fair" that the buy side had an interest in learning "anything that affected" the risk in respect of the S-Class Vessels. This included losing the contract or lowering the day rates.

Comment on the sell side view of the ITT

[91] All of the sell side management team witnesses (ie excluding the defender) who spoke to the receipt of the ITT confirmed that the timing of its receipt was itself surprising. The sell side management team were well aware of the significance of the S-Class Vessels' contribution to the value of the business, the softening of the North Sea market at this time and the buy side's particular focus on factors such as day rates to forecast future profitability. The latter was demonstrated by Basalt's withdrawal of the offer in 2016 and the subsequent intense interest the buy side exhibited in this level of detail during the pre-Signing Date negotiations. It is difficult to reconcile the sell side's collective quiescence on receipt of the ITT with their knowledge of these matters. All of the witnesses on the sell side accepted in one form or another that the buy side would have wanted to know about the receipt of the ITT, and that it introduced a risk of the S-Class Vessels charters not being rolled over.

[92] It is necessary to distinguish between the retrospectivity or justification provided by the sell side witnesses in their evidence and what the evidence disclosed of their understanding and actions in response to the ITT at the time.

[93] One striking feature of the evidence from those attending the Brodies meeting on behalf of the sell side was that not a single one of these witnesses regarded discussion of the ITT as within his managerial responsibility or professional remit. Rather, there would only be significant downsides if the sale did not complete. Simmons' fees would not be paid in

full, and the service contracts to retain members of the North Star senior management team would not be signed, if the sale of the Company to the pursuers did not complete. The risk that the sale would not proceed was very real, given that Basalt had backed away in 2016 because of concern about declining day rates.

[94] Callum Bruce accepted at the proof that he was aware that the CCS required to be up-to-date, that this was generally the responsibility of Gordon Wallace, and that Gordon Wallace was not available to attend the meeting at Brodies offices on the evening of 13 October 2017. Accordingly, Callum Bruce was the senior member of the North Star management team in attendance at that meeting. Notwithstanding all of these factors, it is abundantly clear on the evidence that at the Brodies meeting Callum Bruce adopted what can only be described as a position of complete complacency. He did not, in Gordon Wallace's absence, assume any responsibility in relation to the ITT or its possible implications. On the evidence, he appeared to give no thought to whether the ITT might be relevant to the buy side or might fall within the warranties. While he had a copy of the warranties as Douglas Crawford went through these at the Brodies' meeting, he was completely disengaged from that process, focused as he was on his single purpose (to sign his own service contract). Graham Payton, as Finance Director and with less experience in the industry, was in no position usefully to comment on the significance of the ITT. The Simmons' witnesses, Fraser Dobbie and Ross Atkinson, were dependent on what they were told by the North Star management team.

[95] The sell side knowledge of all of these factors provides a particular context in which to place their subsequent actions and how they chose to convey the significance (or otherwise) of the receipt of the ITT to Douglas Crawford. There was, in fact, very little evidence on this point. This may reflect the fact that there appeared to be so little

consideration of it by the sell side management team at the time. What is clear is that all of the sell side witnesses understood that the ITT undoubtedly related to the S-Class Vessels and they all knew the importance of those to the valuation of the business. It is hard to say whether each member of the sell side management team present at the Brodies meeting was influenced by the personally adverse financial consequences if the sale did not complete, but on the whole evidence not a single one of these witnesses appeared to interrogate the timing or receipt of the ITT from the position of the buy side (and in whose service some of them were about to be maintained in senior positions). The impression was of a meeting, hastily convened, whose principal purpose was to get the deal over the imminent finishing line and then to wait and see what the fallout might be. If Repsol exercised the options then, potentially, there was no fallout, though the sell side's general understanding of the use of an ITT by an incumbent and their knowledge of the difficult market for the North Sea industry cast serious doubt on that wished-for prospect.

The Brodies meeting: what the sell side management team told Douglas Crawford

[96] It is important to note what information was not provided to Douglas Crawford before or at the Brodies meeting. As noted above, apart from Gordon Wallace (who did not attend the Brodies meeting), the first time anyone else from the sell side opened up the ITT was four days after its receipt and after the Signing Date. It was necessarily the case, therefore, that Douglas Crawford was unaware of the terms of the ITT at the Brodies meeting (a position of ignorance shared by all of the sell side management team in attendance). He was not told of the removal of the displacement requirement or the significance of its omission from the ITT. He was not provided with a copy of the cover email. He was not told about the new requirement for a methanol capacity or the likely cost

of that per vessel. He was not provided with a copy of the Simmons email; nor was he apprised of its terms.

[97] By the time of the Brodies meeting Callum Bruce and Graham Payton had agreed to tell Douglas Crawford about the ITT. (On the evidence of both Gordon Wallace and Callum Bruce, Graham Payton never saw the ITT or email that evening.) Callum Bruce resisted the proposition that the purpose of the Brodies meeting was to obtain legal advice, so much as "just to tell" Douglas Crawford that this had come and to take his advice. In general, it was "we have an ITT, what do you think?" and "Did we need to disclose?". When pressed on this, Callum Bruce explained that he had never been in this position before.

[98] Callum Bruce simply told Douglas Crawford that the ITT had come in. Douglas Crawford asked if this was "ongoing" or material. Callum Bruce said he and Graham Payton affirmed that it was not an issue because they would retain the Repsol charter parties: "it was an ITT and we [ie North Star] will get the work going ahead [ie forward]". He indicated to Douglas Crawford that he had" no doubt" that the Repsol charter parties of the S-Class vessels would be retained.

[99] Douglas Crawford accepted that he had seen neither the ITT nor the covering email at the meeting at Brodies' offices. So far as he could recall, the cover email was not discussed at all. He recalled that there was no discussion of the details of the ITT. Douglas Crawford's evidence was unclear as to what precisely he was told by the sell side management team about the ITT. (No file note of the meeting was spoken to in evidence.) On the one hand, he recalled that everyone was "surprised" because there was no "pre-warning". At other points in his evidence, he did not think that Callum Bruce had told him he was surprised to see the ITT early. Douglas Crawford explained he had no personal knowledge of how the industry operated in relation to ITTs or their receipt.

[100] He emphasised that the conversation about the ITT was led by Callum Bruce and Graham Payton (though this is not borne out by their evidence). As Douglas Crawford presented it, the view of the meeting on this matter was a discussion "led by others" (specifically Callum Bruce and Graham Payton) rather than by him, because this was a commercial rather than a legal issue. As he understood the view expressed by Messrs Bruce and Peyton it was that the ITT was a "normal" event for the business; that all charters were renewed by ITT and that the S-Class Vessels were coming up for renewal at some point. He was not told that the ITT suggested a risk that the options for the S-Class Vessels might not being exercised.

[101] The foregoing is the context in which to place the evidence about the call made to the defender during the meeting.

The call with the defender during the Brodies meeting

The duration and subject matter of the call to the defender

[102] Callum Bruce's evidence about the discussion of the ITT during the call with the defender was that it was brief. The purpose of the call was not confined to receipt of the ITT; it was "a general call". So far as Callum Bruce could remember of Douglas Crawford's call to the defender, during the call with the defender Douglas Crawford did not go through the warranties; he referred to the ITT "as 'ongoing business' and not 'negotiations';' we hadn't commenced any negotiations' and that was about it. It was not a long conversation".

[103] As for the length of the discussion of the ITT at the Brodies meeting, Graham Payton's recollection was that this lasted between 15 and 30 minutes. The ITT was "a relatively small part" ("no more than 10 minutes") of the discussions. Douglas Crawford asked questions mainly of Malcom Bruce. All he could recall about the discussion was

really just whether there were "negotiations" or "active negotiations" or not. The only warranty Fraser Dobbie could recall being discussed was that in clause 11.3. He did not regard himself as under a duty to update the CCS as a consequence of, or to reflect, receipt of the ITT. In Ross Atkinson's estimate, the call with the defender lasted about one hour and most of the call was devoted to the subject matter of the ITT. He could recall the defender saying something about the "ordinary course of business" and being comfortable with Douglas Crawford's advice, which he himself could not remember. I discount Ross Atkinson's evidence as to the length of the call with the defender, as this was unsupported by the evidence of the others present. His impression of the length of the meeting may be explained by the fact that this was a meeting imposed on him at short notice, held into a Friday evening and where, seemingly, nothing was expected of the Simmons team other than to "sit and listen" to the lawyers. The defender said the purpose of the call was to cover 10 to 20 issues, "normal SPA things", and that the subject matter of the ITT consumed only about 5 or 10 minutes of the 30-minute call.

[104] In relation to the defender's participation in the meeting by telephone call, Douglas Crawford's recollection was that the purpose of the call was to talk about the ITT. (No other witness supports this evidence.) He said the call lasted 10 to 15 minutes and was, after the opening pleasantries, devoted to the issue of the ITT. He explained that his advice centred solely on the warranties and his advice was not to disclose. The context was that everything was moving quickly towards signing. Douglas Crawford's description that everyone was concerned with the ITT at the meeting is inconsistent with the evidence of all the other witnesses present at the Brodies meeting. While Douglas Crawford suggested there was active input from Ross Atkinson and Fraser Dobbie, this is not consistent with their evidence, or with Ross Atkinson's description of their passivity. Douglas Crawford's

recollection of a meeting convened specifically to discuss the ITT was not reflected in the evidence of the others.

[105] In relation to the scope of the discussion at the Brodies meeting, Douglas Crawford stated, in response to a question in cross-examination, that consideration had been given to the impact of the ITT on the buyers. (However, this is unsupported by the evidence of any of the other witnesses in attendance.) He also confirmed that he was solely concerned with the warranties and gave no consideration to any other duty to inform the buy side of the ITT in the circumstances. He emphasised that his practice was not to disclose beyond the warranties. The defender's evidence contradicts Douglas Crawford's evidence on the subject matter of the call. The defender's evidence was that it lasted 30 minutes and that it was to "drill down" on the main issues before the Agreement was signed. In my view, Douglas Crawford's evidence on what he said was focus of the call may reflect the unconscious desire of a lawyer to protect his client and to present his own actions in the most favourable light. However, this chapter of his evidence is contradicted by the weight of the evidence of the others present, and which on this matter I prefer.

Comment on the credibility and reliability of the defender's evidence

[106] The defender had little direct evidence of relevance to the issues. There is a certain tension in the defender's case, which requires the contention that the defender (or the sell side management team) knew enough to disclose for the purposes of the pre-Completion window warranty (eg of a material event), but that what was known was otherwise outwith the pre-signing warranties (of "ongoing negotiations … of material importance …"). Portions of the defender's written witness statement appear crafted to negotiate that tension

while providing scant detail. So, for example, in the section dealing with notification of the ITT to the sell side, the defender stated that he believed that

> "Callum Bruce gave Steve Lowry an operational report within around a week of [the Agreement] being signed. I understand that the report made Basalt aware of the Repsol ITT. I checked this with Callum at the time and received confirmation that Basalt had been notified."

Pausing there, it is not correct that the "operational report" was sent in that short a timescale; nor (more tellingly) was Basalt made aware it was an "ITT". (For the reasons provided below, I find that the terms of the email of 22 October 2017 were misleading.) If the defender had checked with Callum Bruce at the time, as stated in the third sentence, he was either potentially aware of the misleading nature of that communication or he was blasé about compliance with the pre-Completion window warranty. In turn that calls into question the genuineness of the defender's earnest assertion in the next statement in his witness statement: "These operational updates were important in terms of enabling Basalt to have input on operational issues and decisions in the gap between the signing and the closing of the transaction". The apparent interest the defender says he took, such as to lead him to check with Callum Bruce, does not sit comfortably with the evidence of others about the defender's complete detachment from the affairs of the Company.

[107] Considering the totality of his evidence and the manner in which he gave it, the defender did not give the impression of one trying to do his best to remember or to assist the court. He was often guarded in his exchanges with Senior Counsel in the course of his cross examination. At other points, the defender cavilled in his evidence. One small example was his reluctance to accept (as all of the other witness readily had done) the uncontroversial proposition that the S-Class Vessels were important to the business.

[108] His evidence that the ITT was "not a surprise" to him or to anyone on the sell side is (or his later statement that it was "not unexpected") is not credible. It is not consistent with the evidence of the witnesses from sell side management team, nor, even, with the defender's description at an earlier point in his evidence of the Brodies meeting being convened because the ITT had come in "at the 11th hour". Accordingly, it is necessary to treat the defender's evidence with a degree of circumspection, especially if unsupported by or, indeed, inconsistent with, the evidence of other witnesses.

The defender's evidence of the purpose of the meeting

[109] The impression the defender gave was that in very large measure he left things to the North Star management team. This was consistent with the evidence of others that, by this stage in his life, he had little direct involvement in the affairs of the Company. He was abroad at this time. This is also consistent with how he presented in the witness box, which was unconcerned about details and of which he had little recall.

[110] The defender confirmed that he was aware no one at the meeting had opened up the ITT by that point. So far as he could recall Douglas Crawford's advice, it was that "the ITT was not an outstanding tender, nor an ongoing negotiation which could lead to the acceptance a material contract". (On reviewing the defender's evidence, this is one of the rare instances when he provided an answer with a degree of detail. There is force in Lord Davidson's observation that this answer appeared to reflect a rote repetition of the exact words of the warranty.) Douglas Crawford's short advice was that the ITT not disclosable.

Finding on scope of advice at the Brodies meeting

[111] In relation to the advice tendered to the defender, Douglas Crawford could only provide advice on the receipt of the ITT based on how this was presented to him by the sell side management team. It is clear that, by the time of their attendance at the meeting (and in contrast to the candour of Gordon Wallace's "shit timing!" response and the concerned terms of Callum Bruce's call to Fraser Dobbie), the significance of the ITT, even its timing, was significantly downplayed. On that basis, the nature of the advice Douglas Crawford provided to the defender was unsurprising.

[112] I find on the balance of probabilities that the insofar as it concerned warranty issues, the discussion at the Brodies meeting was confined to warranty 11.3 and that Douglas Crawford's advice was predicated on the bland presentation of the ITT by Callum Bruce and Graham Payton (either because they downplayed the ITT or failed to appreciate its significance). The ITT was presented essentially as an unremarkable, normal business event.

[113] There was no discussion of the terms of the ITT or email (whose contents were unknown to all in attendance). There was no discussion of the CCS. There was no discussion of the Simmons email. It is likely, therefore, that the duration of the call was relatively brief, ie 10 to 30 minutes, which included finalising the usual details prior to a closing.

Was there was ancillary advice tendered at the meeting?

[114] Douglas Crawford appeared to have a weak recollection of looking at or advising on clause 8.1.3. However, this was unsupported by any of the other witnesses and may reflect a degree of retrospective reconstruction. No other witness spoke to Douglas Crawford giving advice on clause 8.1.3. No other witness supported his description of everyone having a

copy of the Agreement and going through each of the warranties in turn. At most, and consistently with Graham Payton's recollection, there was a suggestion that the ITT be disclosed the next time the sell side communicated with the buy side. This was not framed as advice for the purpose of complying with the Agreement (eg clause 8.1.3). In any event, even if this advice were tendered, it was not followed by anyone on the sell side.

[115] All that Graham Payton could recall of Douglas Crawford's advice was that the ITT did not fall specifically into any clauses requiring disclosure, but that it would be a "good idea" to disclose it the next time they had contact with the buy side. The reasoning process for that was that the Repsol contract was "a significant contract"; that the ITT was part of "the normal process" and that there was no harm in disclosing it. The defender's evidence was that he understood that the ITT would be disclosed "in the normal course of business". If he had been told it needed to be disclosed, he would have done so. As he explained it: "he [ie Douglas Crawford] believed we had received something we didn't need to disclose at that time, but would prior to the sale of the Company". He (ie the defender) had taken legal advice on this. On the defender's evidence there wasn't really advice about any post—Signing Date disclosure (ie under clause 8.1.3), because "this didn't come into play". He did not recall receiving advice at any point after the signing about this either. At other points in his evidence in relation to the issue of disclosure under clause 11.3, the defender appeared simply to rely on Callum Bruce and the terms of the email of 22 October 2017. While the defender conceded, when pressed, that he had was "keen" to know the buy side's reaction to Callum Bruce's email of 22 October 2017, he was distinctly unwilling otherwise to answer questions on this topic.

What the sell side did in relation to the ITT after the Signing Date

[116] There is an unexplained dissonance between the sell side's reaction to the ITT upon its receipt and their subsequent conduct in the period following the Signing Date. While a meeting with Douglas Crawford would always be necessary pre-completion, such evidence as there was indicated that the receipt of the ITT prompted the urgent calling of the Brodies' meeting at very short notice after business hours on the eve before the Signing Date. The alacrity of that response must be contrasted with the casualness thereafter of the sell side's disclosure of the ITT to the buy side. (This reinforces the impression that there really was no firm or focused advice by Douglas Crawford of what the sell side should do in relation to the ITT after the meeting, which itself is consistent with its import being presented to him as an ordinary business event.) Callum Bruce accepted that Douglas Crawford told him to tell the buy side about the ITT when he next spoke to or updated them, although this was not framed as necessary to ensure compliance with any warranty or clause in the Agreement.

[117] I have already set out the terms of the email of 22 October 2017. In relation to that email, Fraser Dobbie accepted that from its terms a reader might assume that what had been received was an RFQ received after the Signing Date.

The defender's evidence about the email of 22 October 2017 and his knowledge of the ITT

[118] The defender was cross-examined under reference to the email of 22 October 2017. In his answers the defender presented as cagey and, at times, he cavilled in his evidence. For example, the simple question was put to him that the description of the ITT as an "RFQ" was not correct. After a long pause, he queried that "it could be interpreted as such?" He was pressed: if it was an ITT, it would say "ITT". He quibbled: "it may or may not" say that. As to the omission in the email of 22 October 2017 to state when the ITT had been received,

the defender would only concede "it was not specified" on that date. When asked if a reader of the email of 22 October 2017 would assume the "RFQ" was received after the Signing Date, the defender again cavilled, answering "it could or it couldn't". (This answer may be contrasted with Fraser Dobbie's more straightforward answer, noted at para [117], above.)

[119] The defender appeared or affected not to understand the import of a further line of questions about whether he had notified the buy side about the ITT. His initial answers were to deflect responsibility for this onto others. In his view, the sell side had "responded very quickly". When asked if he had intimated the ITT as a "material event", his evidence was, at points, confusing and contradictory. He conceded that the ITT "was material" so far as the litigation was concerned. However, the thrust of his evidence was that so far as the sell side were concerned at the time, the ITT was not a "material event". At the same time as asserting that the ITT was disclosed via the email of 22 October 2017 (ie for the purposes of clause 8.1.3), the defender maintained that "we didn't think it was a material event". He accepted that as at 13 October 2017, none of the sell side had opened up the ITT. In re-examination, the surprising evidence (if accepted) was brought out that the defender had never opened the ITT and had never been told of its terms until the present dispute emerged. This last statement is not credible. In addressing the question of when the defender first became aware of the detail of the ITT, the sentence in his witness statement is as follows: "I do not recall being aware of the detail and content until this claim was made against me". This is carefully crafted. There is no straight denial; the position is left equivocal. The reference to the "detail and content" of the ITT leaves it unclear what he might of known of its critical features, such as the abandonment of the displacement requirement, or of matters also apparent from Repsol's email and cover letter – namely, the

methanol capacity or proposed commencement at the start of the first option. The lack of knowledge the defender professes as to the terms of the ITT is also not consistent with the "keen" interest he had to know from Callum Bruce of the buy side's reaction to the email of 22 October 2017. That was the single point in the evidence which disclosed an active concern on the part of the defender. That passage was true, although it does not sit comfortably with the defender's statement that he was not aware of the content or detail of the ITT. If he was ignorant of the terms of the ITT, why would he keenly exhibit interest on this single occasion during the sale process? On balance, I do not accept the defender's evidence that he was not aware of the salient features of the ITT prior to the litigation. On the whole evidence, I find it more likely than not that he knew of the principal features of the ITT and Repsol email during the pre-Completion window. Nothing else explains his following this up with Callum Bruce "at the time" (per his witness statement quoted at paragraph [106] above).

Causation: **The buy side and the impact of the ITT**

No disclosure of the date of receipt of the ITT until after completion

[120] Steven Lowry explained that upon receipt of the email of 22 October 2017 he was "disappointed", not least because he considered the buy side to be on "business risk" in relation to the S-Class vessels. From the terms of the email of 22 October 2017, he assumed that the ITT had been received after the Signing Date. This was because the sell side did not at any point volunteer the date on which the ITT had been received (or, indeed, describe it accurately as an "ITT"). Indeed, while there was subsequent contact in the form of a meeting with the North Star management team on 7 November 2017 and a call between Callum Bruce and Wil Jones on 9 November 2017, there was no mention of the receipt of the

ITT on either of those occasions. Information about the receipt of the ITT was only provided some weeks later, on 30 November 2017, in reply to a direct question by the buy side. Steven Lowry explained that the buy side was "very surprised" and believed it should have been disclosed before the Signing Date. Callum Bruce accepted, ultimately, that it would have been important to have told Steven Lowry when the ITT had been received. Ross Atkinson accepted that losing the Repsol contracts for the S-Class vessels was a significant hit. I accept this evidence. It follows that I reject the defender's suggestion in his evidence that the buy side were aware of the ITT prior to completion. The ITT was mischaracterised as a lesser "RFQ"; the date on which it was received was withheld; minimal detail was provided (omitting the abandonment of the displacement requirement and adding one for methanol capacity); and such detail as there was, was buried among many other items in a low-key email. The manner of the first mention of the ITT was, in my view, intended materially to underplay its terms and effect and, in that respect, was disingenuous and misleading.

Consequence if the buy side had known about the ITT before the Signing Date

[121] Steven Lowry explained that if he had known about the ITT, the sell side would have been "concerned" about other competitors and would have wondered why Repsol were issuing the ITT, especially if the S-Class Vessels really were bespoke. It would have led him to question what this would "mean for the revenue" of the business. If he had known of the ITT, he explained the buy side would have "paused and investigated the ITT … to query the broker and [he] would have expected [the sell side] management to engage with Repsol and find out what was happening." He expanded on this: "We would have wanted to understand the risk around these". He was clear that the buy side would not have signed

the Agreement until it "understood the risk around [the S-Class Vessels]". Steven Lowry was also clear that the fact that the ITT was "early" was "another warning sign".

[122] Collectively, these features would have pushed the transaction "outside the parameters" that had been approved by Basalt's investment committee. In other words, if the S-Class Vessels were "at risk", then there were concerns about the value of the business and which may have taken the Agreement outwith Basalt's delegated approval. Steven Lowry explained that, even in respect of the methanol capacity, the buy side would have compared the specification appended to the ITT with the existing contract specifications. They would have done so to seek "comfort" that the S-Class Vessels were still unique to meet Repsol's needs. Steven Lowry confirmed that knowledge of the ITT prior to the Signing Date would have led him to adjust the price. In particular, this would be a "substantial downward amount" given the importance of the S-Class Vessels, and which comprised between 20 to 25% of the EBITDA.

[123] Malcolm Forbes-Cable explained that WoodMac had initially intended to discount the day rates for the S-Class Vessels by about 35% but changed that approach upon receipt of the Simmons email from the sell side. This conveyed to WoodMac the sell side's confidence that the charter parties for the S-Class Vessels would be rolled over, ie the options exercised.

[124] He explained his understanding of the implications of receipt of the ITT as meaning that Repsol

> "were looking to revise the ongoing agreement. So when you see a tender document, it just means there is a potential change in the terms of that agreement. So for us that's significant because the existing contract had some options which would mean a rollover of the current terms but to us they were looking to break that is were looking to seek another vessel or another rate".

In Malcolm Forbes-Cable's view, the ITT affected risk. He explained that this was market-dependent, because, at that time, there was a strong impetus to reduce costs in the market. The expectation from anyone in the industry at that time was that an ITT meant the counterparty was looking to reduce rates. As Malcolm Forbes-Cable understood it, the ITT meant that Repsol were "looking to renegotiate" and, having regard to market conditions, were looking for a lower rate. In broad terms, assuming a negative impact of about 3 million per vessel per year for a 10-year period, he estimated that the effect of the non-exercise of the options in respect of the S-Class Vessels resulted in a price impact of about £25 million.

[125] In relation to the Simmons email, Malcolm Forbes-Cable rejected the suggestion, put him in cross examination, which this was only about reduction of the rates as a "token" gesture; he understood this email to convey the sell side's certainty about the future exercise of the options for the S-Class Vessels. In other words, that the rates for those vessels should be held flat and not reduced as WoodMac had, up to that point, intended to do.

[126] Wil Jones was a more junior member of the buy side team. His evidence was wholly consistent with that of the other members of the buy side team which I have already described. He confirmed the importance of the S-Class Vessels, the buy side's focus on data to predict the future for the business' vessels and the use of a DCF valuation method.

[127] In relation to the ITT, had this been disclosed at the time, he described its effect would have been "confusing". It would have caused him to ask: "why would the counterparty issue the ITT if these were the only vessels?. So it meant potentially other vessels out there, which meant pressure on the rate and assumptions". While he accepted in cross that an ITT might mean no contract followed, an ITT could nonetheless mean that more people would be tendering for the contract in question and it put the exercise of the options for the S-Class Vessels charter parties at risk.

[128] If he had known of the ITT this would have been "a major red flag". He would have queried the timing of the ITT as well as its significance, because it indicated that Repsol were not "locked in" to North Star's S-Class Vessels. It highlighted a risk previously unknown to the buy side which was that North Start might lose these contracts. The issuing of the ITT in his view increased the risk of the options not being exercised on the S-Class Vessels at the same value which had been assumed in the valuation of the business. He went on to explain that he had authority to sign the deal on behalf of the buy side within certain risk/return parameters. The receipt of the Repsol ITT "dramatically increased the risk", and did so beyond the level at which he was authorised to enter the Agreement. In other words, he could not have signed the Agreement without considering the ITT further. At the very least, the buy side would have delayed signing the Agreement to consider the impact of the ITT on its valuation. The impact of the Simmons email was the same on him as it had been for Malcolm Forbes-Cable, namely an assurance to persuade the buy side not to discount the rates for the S-Class Vessels in the valuation of the Company.

Conclusion on causation

[129] I have no hesitation in accepting the evidence of the buy side witnesses, which in any event was not challenged in cross, that the buy side was intensely interested in the vessel contracts, day rates, and other factors relied on to forecast the future profitability of the business and that this kind of data was central to the DCF valuation method it employed. It will be recalled that Basalt's 2016 offer was withdrawn because of concern about the day rates. Steven Lowry explained that he had gone through the vessels and day rates "line by line" in order to test the sell side's assumptions.

[130] Furthermore, on the whole evidence there can have been no doubt that the sell side management team was fully aware of the buy side's methodology and approach to the valuation of the business, the centrality to that of factors such as day rates and vessel usage in general, and the value generated by the S-Class Vessels in particular. Steven Lowry's evidence of what prompted him to send his email of 5 October 2017, wondering about the reduction in the S-Class Vessel day rates, and the careful orchestration of the sell side's reply (in the form of the Simmons email) are eloquent of this knowledge.

[131] The evidence of the buy side witnesses was also consistent as to what they would have done had they known about the ITT prior to the Signing Date.

Other matters arising in the evidence

[132] While some of the buy side witnesses were cross-examined under reference to certain "no liability" clauses in the Simmons documentation, this did not cover the defender. In any event, this evidence was (in my view, rightly) not referred to or relied on in submissions. There were also lines of questions of some of the sell side witnesses about updating the CCS. However, the CCS was not mentioned at the Brodies meeting and the evidence of what, in hindsight, the witness might have done – and which generally prompted *ex post facto* justifications or a reasoning process that clearly had not been gone through at the material time- contributed little to the issues and I do not record it.

Legal principles

Construction of the contract

[133] The following principles concerning the interpretation of contracts applied:

1. The court must ascertain the intention of the parties by determining what a reasonable person, having the background knowledge of the parties, would have understood from the language selected by them (*Arnold* v *Britton* [2015] AC 1619, per Lord Neuberger at para 15; *Midlothian Council* v *Bracewell Stirling Architects* [2018] PNLR 25 (per LP (Carloway) at para 19; *Scanmudring AS* v *James Fisher MFE Ltd* [2019] CSIH 10). In other words, account can be taken of background knowledge and matrix of fact where that is relevant.
2. The meaning of the words used must be assessed having regard to other relevant parts of the contract, understood against the factual background.
3. In the event that there are two possible constructions, the court is entitled to prefer one which is consistent with business common sense (*Arnold* v *Britton* (supra), *per* Lord Hodge at para 76).
4. In relation to business common sense, courts require to be careful before attributing too legalistic a meaning to the words of a commercial contract. The words used will often have been intended to apply principally to a situation in which the contract is operating satisfactorily rather than one involving the occurrence of an unanticipated and catastrophic (in contractual terms) event.
5. Commercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say (*Muirhead & Turnbull* v *Dickson* (1905) 7 F 686 (*per* Lord Dunedin at p694)).

Neither part suggested that there was any speciality in relation to the construction of warranties, such as those at issue in this case.

Non – reliance statements

[134] The following principles in relation to non-reliance statements apply:

6. The point and effect of a non-reliance statement is to require the parties to accept a particular state of affairs as true, even if the actual reality was different. One cannot, merely by referring to what is asserted to be the underlying reality, avoid the effect of those provisions (*Standard Chartered Bank* v *Ceylon Petroleum Corporation* [2011] EWHC 1785 *per* Hamblen J at para 544).

7. The contractual delineation of responsibility and allocation of risk may preclude a party from founding on the actual reality which eventuates if he has contracted to accept a particular state of affairs as true. Thus if A and B agree that B will not advise A and A will not rely on any statement by B as advice, the contract will bar A from asserting the giving of that advice and his reliance on it (*Grant Estates Ltd (In Liquidation)* v *The Royal Bank of Scotland* [2012] CSOH 133, para 44)

8. English law treats the matter as a species of estoppel in which issues of unconscionability do not arise, namely contractual estoppel. In Scots law, the correct analysis is that there is a contractual bar. Issues of inconsistency and fairness, which would be relevant in personal bar do not arise.

9. The approach in the two preceding paragraphs extends to a retrospective agreement in relation to past events. A and B may agree that their relationship will be on the basis of a certain state of affairs in the past which they know not to be the case, such as that B had not made any

representations, and A will thereafter be obliged to act on the basis of that acknowledgement.

Pre-contract representations

[135] Finally, in respect of pre-contract representation the following principles apply:

10. The law may in appropriate circumstances impose a responsibility upon the maker of pre-contractual representations in respect of their continuing accuracy between the making of the representation and the conclusion of the contract.

Parties written submissions

[136] I have had the benefit of Notes of Arguments in advance of the Preliminary Proof, as well as full Written Submissions from parties. In addition, three lever arch files containing 33 cases were produced and referred to in parties' submissions. I have had regard to all of these materials and do not propose to recapitulate them in detail. I summarise parties' submissions as I deal with each of the pursuers' claims in turn.

Parties' submissions on issue 1: warranty 26.6

[137] Pursuant to clause 10.2 of the Agreement, the defender warranted as "true and accurate" the statement contained in warranty 26.6, that on the Signing Date the CCS set out:

> "**complete and accurate details** of all the **charter arrangements** that <u>are in place as at the date of this Agreement</u> in relation to all of the Vessels."

The pursuer emphasises the words on bold; the defender the words underlined.

The pursuer's submissions

[138] Lord Davidson QC, who appeared for the pursuer, observed that it was a matter of agreement that the defender, or those acting on his behalf, did not include details of the ITT in the CCS. Lord Davidson noted the definitions from the Oxford English Dictionary of "complete" (as being "entire, full" or "embracing all the requisite items, details, topics, etc) and "accurate" (as "performed with care, exact" or "exact, precise, careful … in exact conformity to a standard or to truth") appearing as the opening words of warranty 26.6. He submitted that, accordingly, on a common sense approach, and giving the language its natural and ordinary meaning, the reasonable person would have understood the Agreement to mean that the CCS was accurate and included all relevant details pertinent to the charter arrangements. He submitted that the defender's argument (that warranty 26.6 is restricted in effect to current contracts, and in particular to charters in place or then in existence) proposed too narrow an interpretation of the words "complete and accurate details of all the charter arrangements". Had that been the meaning intended, he submitted that the clause would have said "the charters in place". The Agreement distinguished between "agreements" and "arrangements" (he referred to the phrase using both, "agreements or arrangements" in warrant 11.1) and, further, that warranty 26 used the word "charter" by itself where charter was the intended meaning (eg in warranties 26.1.3, 26.3, and 26.4). The defender's approach conflated "arrangements" with "agreements".

[139] Warranty 11.1.1 warranted that the Company is not subject to any arrangement "which is not in the ordinary … course of business" - a phrase which Lord Davidson noted was used by the defender in his testimony and which other witnesses recall Mr Crawford using - which might apply to the ITT, given the surprise its early appearance generated in

Mr Wallace and Mr Bruce. He submitted that "arrangements" conveys a meaning well beyond a contract in place.

[140] He submitted that a meaning needed to be given to "details". In context, it meant the details of the charter arrangements, not merely the terms of the charters. "Arrangements" means more than "the charters". "Arrangements" are those aspects additional to the charter including matters in process of being arranged.

[141] He submitted that the phrase "charter arrangements that are in place" was sufficiently broad to encompass the scenario found in the present case, whereby the counterparty to an existing charter agreement issued an ITT to the market in respect of the services provided under that agreement. This was particularly so, he argued, when the ITT identified that the new charters would overlap with the extension periods available under the existing charter arrangements, thus indicating that (as turned out to be the case) the options were not going to be exercised.

[142] He submitted that, in context, the ITT was one such matter, in that it was part of the process to negotiate the terms charters of the S-Class Vessel then in place – in other words, it is a "detail of the charter arrangements." Given the significance of the contractual arrangements of the vessels, he suggested it could be easily understood that what was in issue went beyond the actual charters in place. He submitted that on the evidence of various witnesses the arrival of the ITT could, in certain circumstances, foreshadow at least an attempt by the counterparty to reduce rates. This happened especially when the oil price was low. The oil price was low at the time of the Agreement. The evidence showed that warranty 26.6 was introduced in October 2017 into the Agreement.

[143] Accordingly the declarator sought correctly identified the ITT as covered by the warranty at 26.6.

The defender's submissions

[144] Mr Howie , who appeared for the defender, submitted that the wording of warranty 26.6 was clear. Disclosure was required of the charters that were in place as at the date of the agreement (ie as at 14 October 2017). These details were clearly set out in the CCS. In relation to the *Sceptre* and the *Sovereign*, the CCS disclosed charters with Repsol then in existence. There was no requirement to mention the existence of any ITT.

[145] Mr Howie further submitted that warranty 26.6 sought details of "charter arrangements". This, he said, underlined the fact that the ITT did not fall within the ambit of the warranty. In this context, "arrangements" were bilateral or multi-lateral agreements or understandings. In the case of the vessels, that meant a bilateral one. In relation to the *"Sovereign"* and the *"Sceptre"*, the only bilateral agreements extant on the critical date to which the word "charter" could be applied were the charter parties with Repsol to which the CCS referred in terms. The ITT was a unilateral document which could not amount to an "arrangement" (still less an arrangement which could be referred to as a "charter arrangement" or one which could be accurately described as being "in place") and, indeed, might never lead to one. An ITT could be unanswered.

[146] Warranty 26.6 referred to the date of the Agreement and no other date. In contending for a narrow construction of the phrase "charter arrangements", Mr Howie stressed the importance of the description of the "CCS", ie that it is a '*Current Contracts* Summary, and so was restricted to the *current contracts* of the Company. Accordingly, the reference to "details" did not, so his argument ran, itself point to any wider scope, as it is only "details" of existing charter contracts or arrangements "in place" that required to be disclosed.

[147] The warranty was restricted by its drafting to "*details*" of only one class of contract, charters, and then only to those "*in place*" as at the relevant date. That last phrase, Mr Howie, submitted, meant concluded and therefore extant charters. It did not extend to future contract opportunities, or contracts that may be concluded at a future date, for any of the S-Class Vessels.

[148] Furthermore, the ITT was not a charter relative to either of the S-Class Vessels. Any future charter which *might* have arisen were the invitation to treat constituted by the ITT be accepted and any negotiation subsequent to the making of a tender to bear fruit, could not be "in place" on 14 October, 2017. Its receipt was, Mr Howie argued, but a unilateral event, not a "detail" of any charter extant on or before the critical date.

[149] In relation to warranty 26.6 the overall proposition being warranted was that all the charters concluded and extant on 14 October 2017 relative to either of those vessels was accurately and fully set out in the CCS. It followed that any document which was not a concluded and extant charter relative to one vessel or the other, was not the subject of the warranty and could not give rise to a breach of that warranty. Whether or not each of the options to extend to which those charters gave rise was actually exercised, or likely actually to be exercised, was not a "detail" of the "charter arrangements" in relation to which the contract called for warranted information to be given. It was not a "detail" of the Charter arrangements, but rather an extraneous event. He submitted that on a correct appreciation of the terms of that warranty, the receipt of the ITT was not a disclosable matter, and whether it was disclosed or not, it could not give rise to breach of the warranty.

Discussion of issue 1 Warranty 26.6

[150] It will be apparent from the parties' submissions that there was an intense focus on a few words in warranty 26.6. In addressing this issue, I remind myself of the guidance in *Arnold* v *Britton, cit, supra*, which, in short, is that the meaning of the words used is considered in the context of the contract as a whole (its legal context, as it were) and construed against the relevant factual background.

Warranty 26.6 construed in the context of the Agreement

[151] Accordingly, I begin with the "legal context" of the words used, that is in the context of warranty 26.2 itself and, further, that warranty in the context of the Agreement.

[152] It is important to understand the place and purpose of the warranties in question, in the context of the whole Agreement. This is because all but one of the pursuer's claims are based on clauses in the main body of the Agreement (eg clause 8.1.3 concerning the pre-Completion window obligations, as well as clause 18.3, the entire agreements clause invoked by the defender) or contained in the general warranties (in Section B of Part 3 of the Schedule) at the end of the Agreement.

[153] The Agreement, which exceeds 120 pages, is detailed and is intended to define comprehensively the parties' respective rights and obligations in relation to the pursuer's purchase of the shares in the Company. The use of an entire agreement clause reinforces the intention that the Agreement comprehensively defined parties' rights. While there is the usual provision (in clause 10.5) that each warranty is "separate and independent", this does not mean that these are divorced from the specific context of the contract as a whole (to paraphrase principle 2, in para [133],above). It is important to note, too, that clause 10.5 stipulates that the scope of each warranty is not to be "limited or restricted by reference to

any other Warranty or other provision in the Agreement" unless otherwise specifically provided. (Neither party identified any "specifically provided" limiting provision.)

[154] The schedule to the Agreement is divided into several parts. Part 3 deals with the mechanics of completion and what the seller is obliged to deliver to the buyer at completion. Part 4 ("Warranties") is subdivided into three sections, dealing with title warranties (section A), general warranties (section B) and tax warranties (section C). Two of the warranties the pursuer contends were breached are found in the section containing the "General warranties". The general warranties govern a wide range of matters. Broadly, many of these are concerned with the Company's assets in whatever form they take (eg contracts, intellectual property, heritable property, assets, vessels) and its liabilities (eg in employment and pension terms, as well as under third party contracts). There are, of course, other warranties, including those dealing with the Company's shares, accounts, constitutional documents, licences and consents.

Warranty 11.2

[155] Warranty 11.2 stipulates that there has been disclosure of all "Material Contracts" (which includes all charter agreements to which the Company and any subsidiary is a party and all other agreements "which are of material or fundamental importance to the operation" of the business). All the existing charter agreements, including those for the S-Class Vessels, were disclosed in the data room provided to the pursuer. Warranties 11.2 and 11.3 are located under the heading "Contracts". Warranty 26.2 is found in the section headed "Vessels". *Prima facie* the subject matter of warranties 11.3 and 26.6 should address discrete matters.

Warranty 26.6

[156] Turning to warranty 26.6, this provides that the CCS sets out complete and accurate details of all of the charter arrangements that were in place as at the Signing Date of the Agreement in relation to all of the vessels. While the focus of Senior Counsel's submissions was the phrase "charter arrangements", it respectfully seems to me that it is important first to note that this warranty relates to a document external to the Agreement itself, namely, the CCS. Mr Howie relies on the title of the CCS, emphasising that the warranty 26.6 relates to a "Current *Contracts* Summary" (his emphasis). In my view, there is little force in this point. First, it should be noted that the warranties in respect of contracts are in part 11 (headed "CONTRACTS") of the Schedule containing the warranties. By contrast, warranty 26.6 is contained in the section headed "VESSELS". Secondly, it is important to consider the *content* of the CCS and not just its description. I have described above the layout and categories of information the CCS contained. It was presented in table form and contained a large amount of information which was derived from the charter parties, such as their duration, the day rates, the contract periods, contract references (and addenda, where applicable) and the customer of each.

[157] Importantly, however, the CCS was not just a summary of the contracts or their terms; those details are ascertainable from the terms of the charter parties themselves (the subject of warranty 11.2 requiring disclosure of all Material Contracts). Significantly, information is provided under the column headed "Contract as at 13 October 2017" about the options (where these existed). The information provided the option end date, being the date on which the last exercisable option would expire. So, for example, the *Sceptre*'s contract end date is given as October 2018 and the option end date as October 2023. In terms, therefore, the information provided relative to the contracts invited consideration of

matters beyond the expiry of the particular contract term and necessarily affected by events external to the charter agreement. In the present context, the data captured in the CCS included options exercisable in terms of the contract, but only after the contract period had expired. This raised the prospect that some steps (eg an ITT) or decision (eg to exercise an option), which were external to the charter arrangements, had effect after the contract end date. With respect to Mr Howie's submission that the receipt of an ITT is an "event" and not a detail, in my view, this is too pat and it is inconsistent with the features of the CCS just described. The totality of the information captured in the CCS invited consideration of events extraneous to the contract's term and which may have an impact on the exercise of the options.

[158] Furthermore, it is clear on the evidence as well as from the terms of the CCS, that there was a significant use of options in this industry. While fourteen of the 31 vessels did not have options, this was because those vessels were described as on short term contract, on rollover contracts from year to year, subject to *ad hoc* arrangements, or they had no current contract in place ("the non-optioned vessels" a non-optional character position). However, the majority of the vessels had options exercisable after their contract end date ("optionable vessels" or "optionable charter parties", as the context requires). The use of options was common and they were highly market-sensitive. There was also evidence about the buy side's approach to options, which was to assume a reduction in day rates to reflect the then downward pressures of market conditions. The buy side's sensitivity is illustrated by the statements in the "Comment" column, that the "[r]ate valid is the same as in 2017" (see, eg *Devotion*, *Talisker*, and *Talisman*) - ie, that the rates were holding steady (and not reducing). This is also borne out by the exchange of emails on 5 October 2017 and the adjustment the buy side made to its projections in light of the Simmons email.

Warranty 26.2 construed in the context of the relevant factual background

[159] Having set out the legal context of warranty 26.2, I turn to address the evidential context. The consequence of the defender's construction, restricting the scope of warranty 26.6 to the four corners of the charter agreements, produces the result that, in effect, the same matters are warranted twice. The parties cannot have intended this. This is also, in my view, inimical to the careful drafting reflected in the Agreement. Warranties 26.6 and 11.3 are located in different parts of the schedule ("Contracts" and "Vessels", respectively) and which is a further pointer away from their having the same content or purpose. The pursuer's approach better respects the relationship between these warranties I have just described.

[160] In relation to the terms of warranty 26.6 itself, the defender's approach has the further disadvantage of essentially conflating "arrangements" with the word "agreements". However, as already noted, the CCS contained more information than the terms of specific charter party agreements. Having regard to the usage of "agreements and arrangements" elsewhere in the Agreement (eg in warranties 11.2, 11.3 and 26.6), the use of "arrangements" in warranty 26.2 is not legal superfluity. The general principles of contract construction militate against an interpretation which does not ascribe a meaning or content to all of the contractual language the parties employed. I accept as well founded Lord Davidson's submission that elsewhere in warranty 26 the word "charter" was used when intended, ie to signify a charter party agreement

[161] In my view, the parties' use of "charter arrangements" was intended to cover something broader than the subject matter addressed under warranties 11.2 and 11.3. This is also evidenced in the use of the "Comments" column in the CCS. All of these features point

to "charter arrangements" meaning something other than, or at least encompassing more than, charter agreements and that "details of the …arrangements …in place" is not confined to the terms of the charter parties.

Warranty 26.6 considered against the background knowledge available to the parties

[162] From the evidence I have recorded above, among the matters forming the background knowledge reasonably available to the parties would include the fact that this transaction and its commercial rationale depended, in large measure, upon the value to be ascribed to the Company's future activities. The Company operates in a service industry in the North Sea. Its physical assets generate income only if they are chartered. It is in this context that the options acquire particular significance.

[163] Indeed, the evidence I have heard provides a very specific context (indeed, having heard the evidence, a highly fact-sensitive context), known to both parties, and in which the Agreement falls to be construed. The following features disclosed in the evidence are relevant to this issue:

1) The S-Class Vessels were a major contributor to the value of the business;
2) In comparison with other vessels, the S-Class Vessels were materially more lucrative (enabling North Star to charge approximately double the day rate that it did for other vessels);
3) The S-Class Vessels had been specially commissioned in 2013 to serve the particular needs of the counterparty, Repsol, and were first provided to them in 2013 in the form of a five-year contract. By inference, the S-Class vessels have been contracted exclusively to Repsol since they were commissioned; and, by further inference, North Star had a *de facto* monopoly of the ERRVs

capable of servicing Repsol's assets for so long as it retained the displacement requirement.

4) The current contracts with Repsol were for five years, with five one-year options. The earlier of the two contracts was not due to expire until May 2018. Generally, an option would be exercised about 4 or 6 weeks before that date (ie March 2018).

5) At the material time, the significant drop in the price of oil had a detrimental effect on the industry. Repsol, in particular, was understood to be under pressure to reduce its costs world-wide.

6) There was a distinction, well understood in the industry, between an RFQ and an ITT. The latter was indicative of a serious intent to contract and was more than an exploratory stage (for which an RFQ was more appropriate).

7) There is no doubt that the sell side understood the ITT received to relate to the S-Class Vessels.

[164] All of these factors underline the use of options in the industry and which, in light of the evidence, acquired a particular significance in respect of the company's most lucrative vessels. In the light of this evidence, it is in my view artificial to detach the ITT from this context and to consider it in isolation. It was not an invitation out of the blue, in the sense of one issuing from a third party with whom there was no existing contract. Rather, the ITT came from an existing client, and it affected two vessels that were subject to current charter parties or arrangements. Having regard to these features, I find that the options for the S-Class Vessels were "details" of current charter arrangements in place. Information raising a serious doubt about the exercise of those options was also within the scope of this phrase in the warranty. Stepping back, any indication that the most lucrative contracts might not be

renewed was extremely significant to the S-Class Vessel charter parties and their options. The terms and timing of the ITT could not but have given rise to the inference that there was an appreciable risk that Repsol were disinclined to exercise the options in those charter parties and that they intended to drive down the day rate. The receipt and the terms of the ITT clearly signalled that the options on the S-Class Vessels were not to be renewed or, at least, about which a serious doubt was created at the material time.

[165] Two additional features of the tender specification attached to the Repsol email signalled how significant the risks were that the options would not be exercised in relation to the S-Class Vessels, namely the abandonment of any displacement requirement (ie the very quality relied on as constituting the S-Class vessels' uniqueness) and the positive stipulation for methanol capacity. The latter requirement entailed a spend of about £500,000 per vessel. These additional features would have materially increased the doubt. At the very least, if considered by the local management team or the defender at the material time, it would have caused them to doubt the degree of certainty they attributed to the exercise of these options.

[166] Having set out the relevant legal and factual background, I return to parties' submissions. In my opinion, the pursuer's submissions in respect of warranty 26.6 are to be preferred. The narrow interpretation of warranty 26.6 Mr Howie advances conflates to a large extent that warranty with warranty 11.2; and it further conflates the words "arrangements" with "agreements" found in warranty 26.2. Given the context of this transaction, the defender's interpretation also sits uncomfortably with commercial common sense. Having regard to the terms of the other warranties, and how they inter-relate, the defender's approach creates a gap in the warranties.

[167] I return to the significance of option end dates being recorded within the CCS. While there may be dubiety as to whether an option which necessarily operates only after the expiry of the term of the charter party is within the phrase "charter agreement", in light of the foregoing evidence it is readily encompassed within the phrase "charter arrangements". In testing the scope of the phrase "complete and accurate details of charter arrangements in place", it is helpful to consider several scenarios which might arise on receipt of an ITT. These include:

1) Receipt of an ITT from a third party who is not party to any current charter party with the Company,
2) Receipt of an ITT from an entity with whom there is a current charter party in place, but that charter party is a non-optioned one,
3) Receipt of an ITT from an entity with whom there is a current charter party in place, and which is an optionable charter party. Further, the ITT is either
    (i) not inconsistent with the options (eg it relates to a different period), or
    (ii) it is potentially inconsistent with the exercise of the option;
4) Receipt of an ITT from an entity with whom there is a current optionable charter party; the ITT undoubtedly relates to the vessel(s) subject to that charter party and the ITT is inconsistent with the exercise of the option.
5) Receipt of a communication from a counter party of an optionable charter party that it will not be exercising the option.

[168] Not all of foregoing scenarios require disclosure under warranty 26.6. Certainly the receipt of an ITT in scenario 1 would not be disclosable; there is no current "charter party or arrangement …in place" in respect of any vessel to which an ITT could relate. In relation to

scenarios 2 and 3 (i), the receipt of an ITT has the potential to affect an optionable charter party in a positive way. In the normal course, the sell side would have a keen interest to communicate an ITT received in those scenarios, not least because it would wish to communicate any boost of the potential future earning capacity (and hence value) of the Company. However, the receipt of an ITT in scenarios 2 and 3(i) does not readily fall within the language of warranty 26.6, because as it does not relate to a current charter party or arrangement *in place*.

[169] The receipt of an ITT falling within scenario 3(ii) is, perhaps, a borderline case. In relation to scenario 5, it is undoubtedly the case that had a counterparty intimated its intention to exercise an option, in an optionable charter party in respect of one of the vessels recorded in the CCS, this would be disclosable under warranty 26.6. It is a "detail" of a "charter in place" arrangement, even if it is to signify that the optionable charter party in place will expire without exercise of the options. Certainly, the sell side would be anxious to convey information that enhanced the value of the company. (The evidence disclosed that by virtue of the terms of the Simmons email they had successfully dissuaded the buy side from reducing the assumed day rate for the S-Class Vessels.) There is no commercial rationale for distinguishing between details which positively affect an optionable charter party and on which adversely affects it.

[170] What then of scenario 4? That reflects the very particular circumstances in which the ITT was received in this case. In my view, the ITT was disclosable under warranty 26.6 as a "detail of a charter arrangement … in place." It was a communication from an existing client and related two vessels which were subject to current charter parties. Furthermore, the timing and terms were inconsistent with, or at least disruptive of the sell side's expectations in respect of, the exercise of the options (and which I have held is within the

phrase "details … of … charter arrangements"). This may be contrasted with a charter party of vessel in the CCS in respect of which there were no exercisable options, (eg because it was on a rollover arrangement or on a call-off contract, such as Freedom or Cavalier). An ITT in relation to the vessels subject to those kinds of arrangements is likely not to be disclosable under the warranty, regardless of whether it came from the counterparty or a third party to those contracts. This is because the receipt of an ITT could not disrupt or alter any expectation in respect of the duration of those arrangements in place; they were time-limited and governed by non-optionable charter parties. Any ITT in respect of the non-optionable vessels could not, therefore, affect the current arrangements, much less non-existent options, for those vessels. An ITT received in respect of vessels subject to non-optionable charter parties would not be disclosable under this warranty.

[171] As the foregoing discloses, the interpretation and application of warranty 26.6 cannot be determined solely on the wording or simply by considering, as a generality, whether the receipt of an ITT was disclosable under this warranty. The position is highly fact-sensitive. In the instant case, the ITT was from a counterparty to extant optionable arrangements (ie with Repsol) and was understood by all parties to relate to the S-Class Vessels, the business' two most profitable vessels. The commencement dates in the ITT were necessarily inconsistent with the exercise of the option end dates recorded in the CCS. In my view, the receipt of the ITT clearly had the potential to affect the charter arrangements, in the form of the optionable charter parties to which the S-Class Vessels were subject. The ITT signalled two things: that those arrangements were potentially coming to an end at the contract end and that there was at least a prospect that exercise of the option was in doubt. Consistent with the wording of warranty 26.6, and construed in the context of the

Agreement as a whole and in light of the evidence, I find that the ITT was a detail of the charter arrangements "in place".

[172] For these reasons, I find that the defender's failure to include confirmation that the ITT had been received in the CCS (and in particular, by placing relevant wording in the "Comments" column) meant that the CCS did not set out "complete and accurate details" of the "charter arrangements…in place". He breached warranty 26.6.

[173] For completeness, I record that on the evidence there was no discussion by the sell side at the Brodies meeting of whether the CCS should be updated to reflect receipt of the ITT. Of itself, this is of little relevance: the question is not whether they tried or intended to comply (which some discussion at that meeting might have betokened); it is whether the defender did comply. I have held that, construing the warranty in its relevant factual and legal context, he breached this warranty.

Issue 2: Warranty 11.3

The pursuer's submissions

[174] The pursuer's second warranty claim was based on clause 10.2 of the Agreement and on warranty 11.3. The defender had warranted to the pursuer in accordance with clause 10.2 that, *inter alia,* the following statement (in paragraph 11.3 of Section B, Part 4 of the Schedule to the Agreement) was true and accurate at the Signing Date:

> "11.3 There are no outstanding or ongoing negotiations of material importance to the business, profits or assets of the Company or any of the Subsidiaries, or any outstanding quotations or tenders for a contract that, if accepted, would give rise to a material Contract."

[175] Lord Davidson noted that all of the witnesses agreed that the pursuer was not informed about the ITT prior to signing the Agreement. It was undisputed that the defender

did not disclose the ITT to the pursuer on or before the Signing Date. The pursuer was accordingly unaware of the ITT at the time of signing and in the immediate days that followed. Accordingly, he submitted that in essence the issue is one of interpretation (save in respect of some matters around disclosure under the Disclosure Letter: see para [71], above). In particular, the issue was whether the ITT fell within the language of warranty 11.3. Had the ITT been taken forward to an actual tender it is assumed the defender would have accepted the "material importance to the business" and that it would "give rise to a material Contract". The defender read the clause as referring only to offers or negotiations where two or more persons were engaged in the process of negotiation. The difference between the parties was whether the ITT would qualify as "outstanding or ongoing negotiations". In Lord Davidson's submissions, the ITT did so qualify.

[176] The meaning ascribed to warranty 11.3 had to be placed in context. The ITT was the opening by Repsol of negotiations. It invited North Star, the "incumbent" provider of the S-Class Vessels (ie a party with whom it is in an existing contractual relationship and where there was an exercisable option), in effect to step away from that contractual relationship and create a new one pursuant to the ITT terms. That was, he submitted, the opening of a "negotiation".

[177] He turned to consider the words "outstanding or ongoing". "Outstanding" connoted something which was not yet resolved or dealt with. The ITT as at 13 October 2017 had not been responded to or indeed opened. It was accordingly something which had not been dealt with. The alternative of "ongoing" is not a synonym for "outstanding". It connoted something continuing or in progress. Thus the phrase was not confined, as the defender contended, to "the process undertaken by <u>two or more persons</u> to seek to forge […]

a consensus ad idem"(emphasis added by pursuers). The process the defender identified might qualify as "ongoing" but not as "outstanding".

[178] Lord Davidson accepted that not every ITT would so qualify but, in the particular circumstances here, the ITT did, given the existing contractual relationship between Repsol and North Star. After all, he argued, the negotiation for a vessel contract must begin somewhere. Typically, this began with a Request for Information ("RFI"), Request for Quote ("RFQ") or an ITT (or even a mix, such as an RFI followed by an ITT). The issuing of an ITT initiated the negotiation process. He submitted that it *invited* the tendering party to respond; it is the opening up of a dialogue. The ITT in context represented the opening of a negotiation by Repsol which was, as a matter of fact, followed up as such: North Star submitted a bid for the ITT on 14 November 2017. They were unsuccessful.

[179] In his evidence, Mr Lowry told the Court that an ITT is the start of a process to tender for vessels. Mr Dobbie interpreted an ITT as meaning that the "customer is providing an opportunity to tender for the contract". While Mr Dobbie thought a negotiation had to be a two-way conversation, he accepted in cross-examination that it was possible to understand an ITT as potentially opening up that negotiation. (Lord Davidson noted parenthetically that the term "tender" was used by some witnesses as habile to refer to the ITT. This was slack usage but, to the extent it appeared to be a common usage in the industry, he suggested that it may be argued the ITT would qualify as an "outstanding […] tender". The words "if accepted" suggest otherwise as the ITT could not sensibly be "accepted".)

[180] Accordingly, the passage from McQueen, *Contract Law* (at para 2.17) and *Harmon Cfem Facades* v *Corporate Officer (No 2)* (2001) 72 Con LR 2 were not germane to parties' arguments. Furthermore, he argued, the cases adduced by the defender that dealt with LR 5

CP advertisements to the general public *Spencer* v *Harding* (1870) LRSCP 561 and *Carlill* v *Carbolic Smoke Company* [1893] 1 QB 256 were also not germane to this issue. Lord Davidson submitted that the ITT had to be considered in its particular circumstances. The same point was made in respect of whether the ITT was an offer and the relevance of the defender's authorities (*Harvela Investments Ltd* v *Royal Trust Company of Canada (CI)* [1986] AC 207; *Muirhead & Turnbull* v *Dickson* (1905) 7F 686; Gloag, *The Law of Contract* (pages 23, 457-462); Cartwright, *Contract Law* (pp 110-113); *Stair Memorial Encyclopaedia*, "Obligations" (No 15, section 626; and Professor McNeill, Scots Commercial Law (para 2.25)). The pursuer does not argue the ITT is, in contract terms, an "offer".

[181] In the light of this evidence Lord Davidson argued that the ITT received on 13 October 2017 was, to paraphrase Callum Bruce's language, a "potential" piece of work. Indeed, its potential was more developed even than that of an RFI. Therefore, Lord Davidson reasoned, if an RFI was disclosed, then the ITT ought to have been disclosed. He invited the court to find that an ITT was potential outstanding work, and that the matters the defender considered to be disclosable were not confined solely to the current charters themselves.

The Disclosure Letters and the 3 outstanding tenders

[182] Lord Davidson then turned to consider the evidence about disclosure discussed against the warranties (see para [71], above). He noted that in both his witness statement and in cross-examination, Douglas Crawford provided the Court with an overview of the purpose of contractual warranties. Douglas Crawford went to some length to explain that, in negotiating warranties, the sell side expended a great deal of time and effort on "slimming" the warranties down and making sure the wording was as precise as possible.

Douglas Crawford informed the Court that, having done this, what the vendor categorically did not do was to "over-disclose". Douglas Crawford stated that disclosure was strictly against the precise wording of the warranties, and that approach was followed in this situation. Douglas Crawford insisted to the Court that "you do not disclose when you do not have to disclose" and that "you do not make a disclosure unless the warranty requires you to". In cross-examination, the defender was asked whether it was his understanding that he would only disclose material that was required to be disclosed by the warranties in the Agreement. The defender confirmed this. He also agreed that all the material that was ultimately disclosed was that which was required to be disclosed by the warranties.

[183] From all of this, Lord Davidson drew out the following proposition: If the disclosure of two RFIs and one ITT was made pursuant to warranty 11.3, then it followed from the defender's (and his legal advisor's) reasoning, that these were required on the basis of their being either "*outstanding or ongoing negotiations of material importance to the business, profits or assets of the Company*" or "*outstanding quotations or tenders for a contract that, if accepted, would give rise to a material Contract*". The RFIs disclosed pursuant to warranty 11.3 were more premature in the negotiation process than an ITT (and, in the present case, did not even progress as far as an ITT). The following logic therefore applied: if the RFIs were disclosed because they required to be so disclosed under warranty 11.3, then so too did the ITT require to be disclosed under warranty 11.3. The ITT was not disclosed and, accordingly, the warranty contained in warranty 11.3 was breached.

The defender's submissions

[184] Mr Howie began by noting that warranty 11.3 could be analysed as having two limbs: one concerned with *"tenders and quotations,"* and the other with *"outstanding or*

ongoing negotiations" of material importance to the business, profits or assets of the Company or any of its subsidiaries. Conspicuously, the warranty did not mention ITTs, as it could no doubt readily have been done had it been thought necessary or desirable that it should extend to cover such invitations. Mr Howie submitted that the meaning of the first limb was straightforward: it warranted that, as at the date of execution, there are no "negotiations" in train the results of which were to be viewed as having a significant effect on the business, profits or assets of one of the specified entities. Further qualifications on the negotiations which they have to meet in order to be relevant as subjects of the warranty were imposed by the application of the words "outstanding" and "ongoing". The use of both of these terms implies that the negotiations have to have been in existence both at and before the crucial date, howsoever vigorously it may be that they were being prosecuted on that date, if they are to be the subject of this limb of the warranty.

[185] He submitted that the arrival of the ITT did not entail a falsification of the warranty. Irrespective of the view one might take of the importance of the Repsol charter parties to the business profit or assets of the Company, the receipt of the ITT did not give rise to any "ongoing" or "outstanding" "negotiations" within the meaning of the warranty.

[186] Mr Howie submitted that in ordinary English, the word "negotiations" signified a bilateral or multi-lateral process of conferral or treaty with another or others for the purpose of bringing about some mutual agreement. It was not a unilateral activity which, on the other hand, the issue or the receipt of an invitation to tender was. In the commercial context of which the warranty afforded an example, the natural and ordinary meaning to be accorded the word "negotiations" was a reference to the process undertaken by two or more persons to seek to forge by compromises or exchange with the other party a *consensus in idem* which will create a contract of some description. The receipt of an invitation to tender is not

part of such a process. An invitation to tender or to treat is an invitation to negotiate and is thus by definition, not a part of the negotiation itself. An invitation to tender may pass unaccepted in which case no process of negotiation ever comes into existence. It may be accepted by the issue of an offer which is thereafter ignored by its recipient or accounted unworthy of response. Again, in either of those events, there were no negotiations which came into being. Unless the offer born of the invitation was met with a response of qualified acceptance from the issuer of the initial invitation, no negotiations come into being.

[187] In the present case, the "Tender" or "Quotation" would come from the Company, not Repsol. The ITT was merely an invitation. It was not a tender or quotation. When it was issued there were no outstanding negotiations. In support of these submissions Mr Howie referred to the following:

1) *Spencer* v *Harding* (1870) LR 5 CP at 563-564 ("*Spencer*") (per Willes J):

> "…the question is, whether there is here any offer to enter into a contract at all, or whether the circular amounts to anything more than a mere proclamation that the defendants are ready to chaffer for the sale of the goods, and to receive offers for the purchase of them. In advertisements for tenders for buildings it is not usual to say that the contract will be given to the lowest bidder, and it is not always that the contract is made with the lowest bidder. Here there is a total absence of any words to intimate that the highest bidder is to be the purchaser**. <u>It is a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt.</u>"** (Emphasis added)

2) *Carlill* v *Carbolic Smokeball Company* [1893] 1 QB 256 at 268-269, where Bowen LJ observed that:

> "…advertisements are offers to negotiate - offers to receive offers - offers to chaffer, …If this is an offer to be bound, then it is a contract the moment the person fulfils the condition. That seems to me to be sense, and it is also the ground on which all these advertisement cases have been decided during the century; and it cannot be put better than in Willes, J.'s, judgment in Spencer v. Harding. "In the advertisement cases," he says, "there never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was

> an offer to become liable to any person who before the offer should be retracted should happen to be the person to fulfil the contract, of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. If the circular had gone on, 'and we undertake to sell to the highest bidder,' the reward cases would have applied, and there would have been a good contract in respect of the persons." As soon as the highest bidder presented himself, says Willes, J., the person who was to hold the vinculum juris on the other side of the contract was ascertained, and it became settled.

1) Gloag on "*Contract"* adopted the analysis of Willes, J in *Spencer*.

The ITT showed its author "*ready to* chaffer" (see p23 of Gloag). Negotiations were contemplated, but not yet begun.

[188] Mr Howie submitted that invitations to put in offers are invitations to negotiate, and, hence, not in themselves part of such contemplated negotiations. In support of that proposition he referred to the following:

1) *Harvela Investments Ltd* v *Royal Trust Company of Canada (C.I.) Ltd* [1986] AC 207, in which Lord Diplock distinguished the terms of the request for bids for the shares in that case (which included a provision that a bid would be accepted if it were to be made) from *"a mere invitation to negotiate for the shares…"* (see page 224). Mr Howie argued that, by definition, the "negotiation" cannot begin until there has been a formal response. In the present case, the pursuer does not aver that there was any formal response to the ITT as at the date the defender gave the relevant warranty. That, it is submitted, is fatal to this limb of the pursuer's case.

2) The current edition of Cartwright's "*Contract Law*" describes *"preliminary discussions and proposals to enter into negotiations"* as "*invitations to treat*" and gives as an example of the species the invitation to submit tenders (see page 110).

3) A similar analysis was adopted in Professor McQueen's "*Contract Law in Scotland*" (at paragraph 2.17) and the entry in the "Stair Memorial Encyclopaedia" on "Obligations", volume 15, (at section 626).

4) Professor McNeill's book, "Scots Commercial Law" was particularly clear, noting that people will: "…indicate that they are willing to do business, but without intending to begin the process of contract formation. These types of pre-contract statements or actions are sometimes referred to as 'invitations to treat' and must be distinguished from 'offers'." The former, he added, merely invite offers, and gives as an example of what he is talking about, the invitation to submit tenders (paragraph 2.25).

[189] Accordingly, Mr Howie submitted that the "*tenders and quotations*" portion of the warranty was readily construed. Those words bore the meanings normally attributed to them in English when used in connection with commercial dealings with a view to the formation of contracts (the subject of the whole of warranty 11). They connote offers, a point which is underlined by the immediately succeeding phrasing, which stated that they are such as would lead to a material contract were they to be accepted. The causal relationship between acceptance and the creation of a contract which was envisaged by the draftsman in this passage of the warranty was, he submitted, a direct and immediate one. Leaving aside the qualification imposed by the word "material" on the contemplated contract, that was the position which obtains in relation to any offer. By contrast, it was never the position of an invitation to treat. Acceptance of such an invitation can give rise only to an offer.

[190] In short, the pursuer's complaint arises from non-disclosures of the ITT of one of the subsidiaries of an invitation to treat from Repsol. That could not constitute a state of affairs falsifying the warranty because, as at the date of execution of the SPA, Mr Howie argued,

there were no tenders or quotations "outstanding" (*ie*, extant but awaiting a response – be it counter-offer, *de plano* acceptance or outright rejection) which, if accepted, would "give rise to" a material contract. The ITT was not an offer. Quite the contrary, Mr Howie suggested. If accepted, it would not give rise to an immediate contract, only an offer. It follows that the second limb of the warranty was not breached by virtue of the receipt of the invitation to tender.

[191] As at the crucial warranty date ITT was newly received and lay unanswered. Indeed, he noted that on the evidence of Messrs Payton, Bruce and Wallace, the ITT lay unread. It therefore had not instituted any negotiations, still less did it demonstrate negotiations "outstanding" or "ongoing" from some date in the past. In the present case, there is no special provision attached to the invitation as stopped that in *Harvela* from being the mere invitation to negotiate, and so that is what it would appear to be. The ITT was never a part of the negotiations; those begin with the tender which a ship-owner or charterer by demise submits when he takes up the invitation to negotiate. The tender submitted, after all, might be an alternative tender with little resemblance to the standard template in the invitation to tender, and it would be on that alternative, rather than the template, on which the parties would negotiate. Alternatively, in such a case, Repsol might want nothing to do with the alternative, and no negotiation would take place at all.

[192] Mr Howie turned from the law, to consider the evidence about the ITT. He submitted that the fact that the ITT was a mere invitation to treat and not the start of negotiations, far less an offer open for acceptance, was clear from its terms. He identified the following evidence:

1) The covering email of 5.23pm stated that: "Tenders are required by COB 31/10 and any fixture based on attached C/P";

2) Tenderers were requested to return section C which detailed the intention to submit or otherwise. The recipient was not entering negotiations far less submitting an offer capable of acceptance;

3) The ITT was a unilateral request for the recipient to submit a "tender". It clearly narrates that Braemar were instructed: "…to obtain competitive Tenders…" (Emphasis added);

4) The ITT was heavily qualified and made it clear that there was no "tender" capable of acceptance which could result in a contract. For example, the ITT state:

> "RSR reserves the right to award a contract to none, one or more Tenderers and will consider the submission of 'alternative tenders' as per Annex B in so far as they are technically compliant and provide a robust and cost effective solution";

5) This was emphasised in the Instructions to Tenderers:

> "3. A RSR, shall be under no obligation to accept the lowest or any Tender submitted hereunder and it reserves the right to reject any or all proposals without providing a reason"

6) The Form of Tender states that: "We hereby undertake that, if this Tender is accepted: (a) That we shall execute a contract for the Work". Accordingly, if any tender was accepted by Repsol then a formal contract would need to be agreed by the parties.

7) The ITT stated that the "Charter party to apply" was: "RSR Supply vessel CP, subject to mutual agreement" (Emphasis added).

[193] Accordingly, Mr Howie submitted even acceptance by Repsol of a tender would merely be a counter-offer or an agreement to agree. This point was reinforced by the fact that the terms and conditions attached to the ITT were only in draft form. For example, the

terms stated (in bold and highlighted in red), in clause 40.2: "Please note an alternative termination will apply which will be advised in due course." Similarly, the ITT reinforced the conclusion that its receipt did not open negotiations: Section A3 C reads, *inter alia*, that:

> "RSR shall not be held liable for any expenses incurred in the preparation or submittal of Tenders or any subsequent discussion and or negotiations…"

Plainly, the negotiations envisaged in this case will – as one would expect – be followed by the receipt by Repsol of North Star's tender. The drafting was inconsistent with the notion that the very receipt of the ITT even initiates negotiation anent the completed charters.

[194] Accordingly, even if any Tender was accepted by Repsol, this would require the parties to agree a formal contract. The terms of any such contract would need to be negotiated and subsequently agreed by the parties. The pursuer's argument under this warranty was misconceived.

Discussion of Issue 2: Warranty 11.3

Warranty 11.3

[195] Warranty 11.3 provided that:

> "There are no outstanding or ongoing negotiations of material importance to the business, profits or assets of the Company or any of the Subsidiaries, or any outstanding quotations or tenders for a contract that, if accepted, would give rise to a material Contract."

[196] While Mr Howie addressed himself in his submissions to both limbs of warranty 11.3, as I understood his submissions, Lord Davidson relied essentially on the first limb. In my view, on the evidence, only the first limb of warranty 11.3 was potentially engaged. I therefore need not address in any detail Mr Howie's submissions in respect of the second limb or the cases he referred to and which arose in very different circumstances (eg cases about the advertisement of goods for sale in *Spencer* and *Carlill*). In any event, the cases

cited by Mr Howie, some of antique vintage or arising in a context lacking the specific features of the present one, are readily distinguishable.

[197] The essence of Mr Howie's submission is that "negotiations" require to be bilateral and, by reason of the inactivity on the part of any of the sell side management team, the un-responded to ITT was necessarily unilateral at the specific point in time that the warranty bit. In support of this submission he referred to the language of "tender" and words of qualification to preclude acceptance of an offer used in some of the documentation.

[198] In my view, this warranty is particularly fact-sensitive. General observations about "negotiations" do not assist. It is necessary to construe this warranty against the evidence about the use of ITTs in this sector and the *de facto* monopoly the Company had to satisfy Repsol's special displacement requirement in the form of S-Class vessels. Much of the evidence I have referred to in relation to warranty 26.6 is relevant to this warranty. I need not repeat it.

[199] By reason of the fact-sensitive nature of receipt of an ITT (eg as explored in the discussion of the scenarios outlined above), I did not find the discussion of the word "negotiations" under reference to cases (eg such as *Harvela*) whose circumstances are very different from the instant case, or the general textbook discussions (cited in para [188], above) seeking to characterise "negotiations", "offers" or "offers to negotiate" etc., to provide any assistance.

[200] In my view, in this case the evidence is critical to the interpretation of warranty 11.3. The existence of an option in a charter party meant that, if the counter party wished to secure the services of that vessel beyond the duration of the charter party, it could do so *without further* negotiation. It simply exercised the option and the charter party would continue on the terms previously agreed. In the context of an optionable charter party, the

receipt of the ITT signalled the reverse: it was saying, in effect, "we are considering not exercising the option but, rather, are renewing negotiations for vessels currently subject to a charter party between us, but on terms other than those contained in the charter agreement and which exercise of the option would have continued". Again, in the context provided by the evidence and the particular significance of the S-Class Vessels and the Repsol charter parties, the defender's failure to disclose the ITT breached warranty 11.2.

[201] Construed against the specific background known to the parties in this case, "negotiations" acquires a particular complexion. Consider the circumstances of the sell side's understanding of Repsol's position. The business possessed the only vessels capable of meeting Repsol's specific requirements (especially the displacement requirement). Repsol was obliged by the health and safety requirements of the industry to have 24/7 365 days-a-year ERRV cover. The ITT related to the S-Class Vessels which were subject to options for a further five years. The commencement dates proposed in the ITT were inconsistent with the exercise of these options. That is, in my view, a significant fact. The options constituted a standing offer by North Star to Repsol that the S-Class Vessels could be operated on like terms for one or more of the one-year periods, at Repsol's choice. No *further* negotiations were required if Repsol wished to exercise one or more of the options.

[202] On the evidence, the ITT could only be understood to be a gambit to secure the necessary services of an ERRV from the same counterparty (ie North Star) but by departing from the current optionable charter party's terms and rates: it was the opening of negotiations. If the option constituted a standing offer to obtain the services of the S-Class Vessels in like terms as in the extant charter parties (as I find it is), the sending of the ITT signalled Repsol's clear intention to *re-negotiate* the options on offer. (This, indeed, was the very language used by Ross Atkinson to describe the ITT: see para [90], above.) It was the

re-opening of negotiations which could, from that point, be considered to be "outstanding or ongoing". Accordingly, the ITT falls within the phrase "outstanding or ongoing negotiations of material importance". In this very specific context, the description of the ITT as a "unilateral" negotiation is inapposite, even assuming that negotiations must necessarily be bilateral (which I do not accept as a universal proposition). Given the significant contribution of the S-Class to the profitability of the business, North Star had no option but to respond. In other words, it could not fail to engage in what was effectively a re-negotiation of the provision of the same vessels (the S-Class Vessels) to the same customer (Repsol) for the same period covered by the options in the extent charter parties, but seeking different day rates. For these reasons, in the very particular circumstances disclosed in the evidence in this case, the ITT was disclosable under warranty 26.6

The parties' submissions on issue 3: Agreement clause 8.1.3

The pursuer's submission

[203] The third issue, based on clause 8.1.3, related to the pre-completion window (see para [5], above). Lord Davidson began with a series of observations: The Signing Date was 14 October 2017 and completion was 2 November 2017. The obligation was personal to the defender. It required writing and referred to a "*material event*". The purpose of the clause was to oblige the Warrantor (ie the defender) to notify the Buyer (ie the pursuer) pre-completion of any event, material in its effect on the business, so that the pursuer can open up the issue at or prior to completion. He noted that clause 9.3, the payment clause, was conditional on, *inter alia,* the Warrantor having complied with clause 8. The defender disputed the application of clause 8.1.3 on both the facts and interpretation.

[204] Turning to the evidence, Lord Davidson submitted that what was clear was that no one opened the ITT prior to the signing of the Agreement. What was also clear fact was that the only alert to the pursuer, in the relevant time frame, was Mr Bruce's email of 22 October 2017. Thus the Warrantor had no knowledge of the content of the ITT prior to the signing. He only became aware after the signing. On the issue of knowledge, Lord Davidson submitted that it will not do for the defender to argue that, as the ITT came in before signing, the Warrantor was not obliged to notify. The defender's evidence revealed he was ignorant of the content of the ITT and of the covering Repsol email. Neither he, nor the management team, nor Simmons knew whether or not it was material prior to the ITT being opened the following Tuesday. On Tuesday, 16 October 2017, Mr Wallace opened up the ITT (Mr Bruce cannot recall when in the week he opened it, and Mr Payton has never opened the ITT). Mr Bruce's email was sent on 22 October 2017. In cross, the defender indicated that his management team, and subsequently he, became aware of the content of the ITT – but only after signing. Thus the Warrantor became aware of the content of the ITT in the relevant period.

[205] On the issue of materiality Lord Davidson submitted that the ITT raised questions, at the very least, about the sustainability of the option exercise of the S-Class given that, at the time, an ITT appearing indicated the client was looking to push down the rates. Such an attack on the rate raised a question as to whether the S-Class contracts would be rolled over. A reduced rate being applied to the S-Class would not be a rollover of the charter. This was material, given the importance of the S-Class contracts to the business. Further there was the issue of methanol capacity which imposed a cost for one vessel of between £400,000 - £500,000 and a cost for both vessels of between £800,000 - £1 million.

[206] Turning to interpretation, Lord Davidson submitted that the purpose of clause 8.1.3 referring to the Warrantor made it a direct obligation for him to notify the Buyer. The requirement to notify in writing placed a degree of formality on the obligation. It referred to the Warrantor expressly. It referred to notifying "in writing". It referred to a "material event", thereby indicating an important obligation in the context of moving forward to completion. Compliance with clause 8 was a condition for payment per clause 9.3. In his submission, Mr Bruce's email of 22 October 2017 did not meet either formality or accuracy. It did not notify a "*material event*". It did not come from the Warrantor. At completion nothing else had been communicated by the defender, nor by management, nor by Simmons. Thus neither the arrival of the ITT before signing nor the email of 22 October 2017 avail the defender. The defender was accordingly in breach of clause 8.1.3.

The defender's submission on issue 3

[207] Mr Howie noted that the pursuer's case under clause 8.1.3 of the Agreement was that in the period between signature and completion of the Agreement the defender "…failed to notify the pursuer…of the terms of the ITT". The pursuer accepts that the ITT was referred to in correspondence, but argues that it was not notified "as a material event".

[208] In relation to the wording of clause 8.1 and 8.1.3 of the Agreement, Mr Howie submitted that what required notification was, first, a matter of which knowledge first comes to the Warrantor in the period from 15 October 2017 to 2 November, and, secondly which as at the date it so comes to his attention was such as forms a material event or might reasonably be thought likely to amount to such an event in the future. Mr Howie noted that, quite aside from the qualifications with which the clause hedges the notification to be given,

on this central issue of the subject of the clause, on the evidence led, the pursuer's allegation of breach of the clause failed.

[209] Mr Howie developed his submission as follows. The pursuer complained of a want of notification of the "terms of the ITT", not the fact of receipt itself. The latter could not have been complained of under the clause, because the receipt of the Repsol email and attached ITT came just prior to the commencement of the pre-signing window. On the evidence of all of the witnesses present at the Brodies meeting, the defender was informed of the receipt of the ITT on the evening of 13 October 2017. That date preceded, and hence fell outwith, the period of time referred to in clause 8.1.3. The fact of that receipt could not therefore be a "*matter*" which the clause would ever oblige the defender as Warrantor to intimate to the pursuer. A case of breach on that account would be irrelevant.

[210] The pursuer's claim was that breach arose through failure to notify the buyer of the terms of the ITT. But that allegation was, Mr Howie submitted, more relevant than would be an averment to notify of the receipt - or the existence - of the ITT. The "matter" to be notified is such as is or might be expected to be a "material event" *quoad* the business. It must therefore be an "event" – a happening or occurrence. The qualification about reasonable expectation relates to the future "materiality" of the happening. The word "event" is not an apt description of the terms of a document. The presence, for example, in an ITT of a reference to a mandatory requirement on a vessel offered for charter in May 2018 that it have a methanol capacity is not an "*event*" – it is not an occurrence. It is Mr Howie argued, a continuance of a state of affairs which has existed since the document was composed prior to it being sent to the addressee. From that it followed that the contents of the ITT could never be a "*material event*" in relation to the business, and so a failure to notify the buyer of those terms could not be the basis of an allegation of breach of clause 8.1.3.

[211] In any event, he argued that the pursuer's the claim under 8.1.3 would still fail on the facts established at the proof. The obligation to notify was not triggered unless the "*matter*" becomes known to the defender (*qua* warrantor) in the relevant space of time. Something becomes known to a man only on the first occasion it is drawn to his attention – hence the inability of 8.1.3 to apply to the mere fact of receipt of the ITT. The defender first knew about the receipt on 13 October 2017, whereas the critical period for the purposes of clause 8.1.3 began on 15 October 2017. The defender's evidence however (and no other witness could speak to this matter) was that he did not know of the terms of the ITT until after Completion in November 2017, and, therefore, not until after the end of the pre-completion window and any clause 8.1.3 obligation to notify. His position at the proof was that he had never seen Repsol's covering email or the terms of the ITT prior to the intimation of the warranty claim made against him.

[212] Mr Howie noted that it appeared to be common to the evidence of Callum Bruce, Gordon Wallace and the other witnesses to the 13 October meeting that the content of the ITT was not then discussed. Nobody appeared to have opened up the ITT to find out what it said. It was the next week before Mr Bruce himself did so. The defender was then aboard a ship, out of the country, and so his only chance to find out about it was to be told of it in the course of the meeting on 13 October 2017 or at some other date. No production attests to his being told of the ITT's contents at any time prior to November 2017 and in oral evidence no witness deponed to telling the defender about it (Graham Payton couldn't have done so as he still hadn't seen it himself; nor had Fraser Dobbie or Ross Atkinson). That, Mr Howie suggested, is not surprising. The defender was not a "hands on" chairman of the Company and had not been for some years. He was selling his shares. The details of the ITT, of interest as they would no doubt be to those in North Star who had to respond to it, would

not be of concern to the defender. In re-examination, the defender was quite clear that he himself had not known of the terms of the ITT until after the instant dispute broke out. That evidence was, Mr Howie said, destructive of the pursuer's case under clause 8.1.3.

[213] In addition to the above, Mr Howie made one or two points about the email of 22 October 2017. The evidence clearly disclosed that, for whatever reason, given that there was to be a change in ownership, on 22 October, Callum Bruce notified Steven Lowry, a partner in Basalt, that the ITT had been received. Notwithstanding Callum Bruce's use of "RFQ", rather than an "ITT", this was not actually of significance. Mr Howie suggested that the difference between an "RFQ" and an "ITT" seemed to be rather elusive. Graham Payton could not say what it was and Fraser Dobbie thought the abbreviations meant the same thing, a view shared by Callum Bruce the author of the email. Steven Lowry did not seem to have been misled by some subtle difference (if any) in the usage of the two abbreviations. He appreciated that each of the two S-Class Vessel charters were going to have to be re-tendered for, not least because that was what Mr Bruce had written. The reference to the abbreviation "RFQ" was, accordingly, of no moment. No more does it matter that the author of the email was Callum Bruce. The function of notification is not one to which *delectus personae* applies. Callum Bruce gave evidence that he was acting in this on behalf of the vendors and was thus capable of notifying for them, whether or not he said that in the communication.

Discussion of issue 3: Clause 8.1.3 anent the pre-Completion window

[214] The defender argues that the pursuer complains about not being advised of the "terms of the ITT" and, as that was received before the pre-Completion window (and of which the defender says he was not aware until after Completion), clause 8.1.3 did not bite

in respect of the ITT. I did not understand Mr Howie to dispute that (apart from Callum Bruce), the sell side management team only became aware of the terms of the ITT (or of the Repsol email or the cover letter) after the Signing Date, but within the pre-Completion window. Separately, Mr Howie argued that the "terms of the ITT" do not constitute an "event".

[215] I consider first the defender's argument that the *terms* of the ITT are not capable of constituting an "event" and that the *receipt* of the ITT pre-dated the period covered by this warranty. In my view, this distinction is too fine. It is inconsistent with the terms of this warranty, construed in the context of the Agreement and the relevant evidence. Clause 8.1.3 related to the pre-Completion window, as I have termed it. Consider the purpose of a clause covering the gap between signing the Agreement and payment of the final sum under it at completion. By the point in time that this clause became operative, the sell side would (or should) have provided all of the information provided under the warranties already discussed. Having regard to its place within the Agreement, the commercial purpose of this clause was obvious: to oblige the defender to bring to the pursuer's notice in writing (ie denoting this as a matter of some importance) "any matter which becomes known to him" after the signing date and which "constitutes, or might reasonably be expected to constitute, a material event in respect of the Business".

[216] The starting point is to note that the scope of the clause is very broad: it requires disclosure of "*any* matter… which constitutes, or *might reasonably be expected* to constitute, a material event…" (emphasis added). In my view, there is little force in the argument that *the terms* of the ITT do not constitute an event for the simple reason that the potential "event" is what might, in the real world, flow from the terms of the ITT. The terms of the ITT are not

just words; they convey *in words* an intention to bring into existence a state of affairs having legal effect (in the form of a contract for the services of ERRVs for Repsol's North sea assets). If North Star declined to respond to the ITT or responded so unsuccessfully, with the result that Repsol did not exercise the options in the charter parties for the S-Class Vessels, that would (by reason of its adverse effect on the profitability) constitute a material event.

[217] Furthermore, if it was clear from the terms of the ITT (or, indeed, from the email or cover letter), that Repsol was proposing to go to the market (eg by ditching the displacement requirement or, separately, by imposing a methanol condition with which the S-Class Vessels as configured could not immediately comply) so it could widen considerably the body of potential providers of ERRVs with a view to securing their services during the period which options for the S-Class Vessel would otherwise have covered. Against that background, Repsol's issue to the only provider capable of servicing its very particular needs (in the form of the displacement requirement) of an ITT that was inconsistent with the exercise of those options was significant. It undermined any assumption that the first option would be exercised. It signalled a disinclination to secure the use of the S-Class vessels by that means, ie without further negotiations. This is in my view a potentially "material event" in terms of this clause. On the evidence of all of the buy side witnesses, the ITT created a risk with serious consequences underpinning the sell side's certitude about Repsol's exercise of the options for the S-Class Vessels. None of the sell side witnesses asked about this demurred from this assessment. Separately, in my view, the inclusion of the requirement for methanol capacity, compliance with which would cost the business c£400,000 to £800,000, also fell within the terms of clause 8.1.3. The sell side's appreciation of this new requirement emerged during the pre-Completion window.

[218] Mr Howie relies on the fact that the defender himself remained ignorant of the terms of the ITT until this litigation ensued. I have already explained why I do not accept that evidence. In any event, even if that were the case, I accept Lord Davidson's submission that this does not avail the defender. The defender cannot rely on the sell side's email of 22 October 2017 for the purpose of satisfying the pre-Completion window clause, but at the same time try to avoid attribution of the knowledge (of the ITT) of those sending it on his behalf for the purpose of complying with clause 8.1.3.

[219] On the whole evidence, and construing clause 8.1.3 against that background and in the context of the Agreement, I find that the terms of the ITT, knowledge of which was only acquired by the sell side and the defender during the relevant period, had the potential to constitute a material event. I reject the defender's argument to the contrary. That brings me to Mr Howie's second argument under this clause.

[220] Did the 22 October 2017 email (see para [69] to [70], above) comply with the requirement to give notice in writing? In my view, it failed to do so for a number of reasons, as follows:

(1) In the first place, the receipt of the ITT compelled the buy side to convene an after-hours meeting with Brodies on the eve of the Signing Date. Its receipt at that stage was treated with the utmost seriousness by the sell side. However, it did not communicate the fact of the ITT to the pursuer until nine days after it was received or six days after it was opened. This was not "as soon as reasonably practicable", as the opening phrase of clause 8.1.3 required.

(2) Secondly, it was not highlighted in any way in that email that the ITT was significant. Rather, the impression given was to bury this in a list of matters (slotted in as item 5 of 7 matters) in that email.

(3) More concerning still, was the mis-description of the ITT as an "RFQ" and which downplayed its significance in terms of risk.

(4) In two further respects, what was said about the RFQ was misleading by omission:

(i) the pursuer was not advised that the displacement requirement had been dropped (and which was the single factor that gave the S-Class Vessels the commercial monopoly or advantage in which their profitability resided), and

(ii) the pursuer was not advised about the new requirement for methanol storage capacity or its £400,000 *per* vessel price tag.

These features are dissonant with the bland sentence in the email describing what North Star would do in reply, "[a]s per our *normal approach* as the *incumbent*…"(emphasis added). While North Star was the "incumbent", the abandonment of the displacement requirement cast very serious doubt on its certainty in retaining that status. Further, the need to respond to the new methanol capacity (and a spend of £800,000 to £1,000,000 for the S-Class Vessels) did not credibly fall within the phrase "our normal approach".

(5) Finally, there was no reference whatsoever in the email of 22 October 2017, or subsequently, which conveyed that this matter was being notified for the purposes of clause 8.1.3. (As noted above (at para [119]), the defender remained equivocal in his evidence as to whether the ITT *was* notifiable.) This is not mere formalism. The defender could have complied by referring expressly to clause 8.1.3 in relation to the ITT (and which would have signalled that this was a matter which constituted or might reasonably

constitute a material event), or by using language which unambiguously conveyed that meaning. The email of 22 October 2017 did neither.

All of the factors just described minimised the potential significance of the ITT (including its timing and terms) and was apt to mislead the buy side as to its real significance and potential effect.

[221] Accordingly, I find that the email of 22 October 2017 did not constitute compliance with clause 8.3.1. The defender breached this obligation.

Parties' submissions on issue 4: misrepresentation and the entire agreements clause

Precis of questions arising under issue 4

[221] This part of the pursuer's case is a common law claim for negligent misrepresentation. A number of discrete questions arise on this aspect of the pursuer's case, namely:

(1) Was the representation in the email a representation of fact or opinion?

(2) If it was a representation of fact, was it of continuing effect as at the Signing Date?

(3) Did the pursuer rely on the representation?

(4) Does the law recognise a duty to correct a representation made in pre-contract stage, if by reason of events it subsequently becomes a misrepresentation by the point the representee and representor enter into a contract?

(5) Was it in any event excluded by the entire agreements clause? Yes- with some reluctance?

Submissions on behalf of the pursuer

[222] Lord Davidson presented his submission under a number of headings.

The areas of dispute on the law

[223] He submitted that the primary issue between the parties was the law in respect of false representation in circumstances where facts change between the statement and the formation of the contract. He posed the matter thus:

> When a statement made by one party to another party contemplating entry into a contract is true when made, but becomes untrue prior to the contract being entered, the question is whether the statement-giver is liable for misrepresentation to the statement-receiver? To put it another way: if the relevant statement was accurate when given, but is false at the time of the contract, where does the risk fall?

Lord Davidson submitted that the statement-giver bears the risk. The pursuer accepted that the statement must be one where there was reliance on the statement by the party entering into the contract. Where there is a statement relied upon by that party made during negotiations which continues in effect but is in fact false when the contract is entered into, it constitutes a misrepresentation. It is a misrepresentation that would permit reduction or if that were not possible damages.

[224] In support of that submission Lord Davidson referred the observations of Lord Reed at paragraphs 16 to 19 *Cramaso LLP* v *Ogilvie-Grant and Others* [2014] UKSC 9[[2014] AC 1093 ("*Cramaso"*) (with whom all other Justices concurred) setting out the law regarding the effect of representations in pre-contractual discussions which may lead to setting aside the contract by reason of error or fraud. He also referred to Lord Reed's observations that:

> "[The law] is thus capable in appropriate circumstances of imposing a continuing responsibility upon the maker of a pre-contractual representation in situations where there is an interval of time between the making of the representation and the conclusion of a contract in reliance upon it on the basis that where the representation has a continuing effect the representor has a continuing responsibility in respect of its accuracy." (at para 23)

and (at para 42):

> "[…] it has long been accepted that the relationship between the parties to contractual negotiations may give rise to such a duty in respect of representation which the representor can reasonably foresee is likely to induce the other party to enter into the contract, unless circumstances negating the existence of such a duty […] are present."

These passages supported the continuing effect of a representation and the imposition of a duty of care where a person has entered into a contract after a misrepresentation has been made to him by the other party to the contract. The Inner House had applied this passage in *Royal Bank of Scotland Plc.* v *O'Donnell* [2014] CSIH 84 . ("*O'Donnell"*) He also cited Gloag *On Contract* at p 461 ("*Gloag"*).

[225] Applying these to the instant case, Lord Davidson submitted that the statement in the Simmons email relative to the S-Class contracts, though accurate at the time it was sent, was rendered false by the arrival of the ITT on 13 October 2017. Any claim by the defender, that the sell side believed the statement remained accurate, was not the test. Objectively the facts were as follows: the sell side took no steps to assess the ITT; the management team knew in context that an ITT signified at least a challenge to the S-Class Vessel rates; they knew the importance of the information to the buy side both at 5 October 2017 and at 13 October 2017; they did not inform the buy side before signing the Agreement.

Was Simmons email a representation?

[226] The defender contends it was a statement of opinion and therefore not actionable. However, Lord Davidson invited the court to consider the circumstances: the buy side had to look to the sell side for the necessary data to assess whether to buy. The buy side were provided with clear statements of both the S-Class being the only vessels for the contract and the consequent stability of rates over time due to the options available to Repsol. These statements were not simply an expression of a view, but the information gathered from the North Star management team, passed on by Simmons and where the whole sell side were aware of the importance of contracts, options and rates and especially regarding the S-Class Vessels, to the buy side.

[227] The buy side asked about the S-Class Vessel contracts eight days before the Signing Date. Although financially astute and assisted by WoodMac, nonetheless the buy side were dependent on the statements in the Simmons email. WoodMac altered its assessment of the S-Class contracts as a result of the representation made in the Simmons email of 5 October 2017. The Simmons email contained statements about the present state of knowledge of the sell side. This was based on facts relative to the S-Class Vessels and Repsol. It was not the equivalent of advice (cf. *Grant Estates (In Liquidation) and Others* v *The Royal Bank of Scotland plc* [2012] CSOH 133 (*Grant Estates"*); *Standard Chartered Bank* v *Ceylon Petroleum Corp*[[2011] EWHC 1785 (Comm) at para 544) but rather the communication of information required by the buy side to assess a price for the Company.

Were the Sell side negligent regarding the ITT?

[228] Lord Davidson submitted that the answer must be yes. What was entirely clear was that no one on the sell side thought to open the ITT. None of the North Star management

team or Simmons thought they should inform the defender about the statement in the Simmons email. The defender did not inquire into the content of the ITT. All of those present at the meeting at Brodies' knew that the buy side required information relative *inter alia* to the S-Class contracts.

Does the entire agreement clause 18 enable the defender to avoid liability?

[229] Lord Davidson next addressed the defender's argument that the entire agreement clause extinguished all representations and thus excluded the misrepresentation case based on the ITT. He argued, however, that the pursuer was induced into entering the Agreement by a misrepresentation. The misrepresentation occurred before the Agreement was entered into and subsisted right up to the moment when it was signed. The misrepresentation was the concealing, or not revealing, the arrival of the ITT which had rendered statements in the Simmons email no longer correct. The representations in the Simmons email were not covered by the entire agreement clause up to the signing of the Agreement. The misrepresentation occurred on 13 October 2017 before the Agreement was signed. It was in these circumstances that the pursuer was induced to enter the Agreement.

[230] He submitted that the entire agreement clause did not exclude misrepresentations of this type. The express reference to fraud or fraudulent misrepresentation does not exclude this misrepresentation even were fraud not present. If it were argued that *expressio unius* dictates that the reference to fraudulent misrepresentation excludes this misrepresentation, the answer would be that the Latin tag is not a rule of construction – one must interpret the words as they stand. The clause does not expressly or impliedly exclude pre-contractual misrepresentations. Of course, were the defender to claim some implied exclusion, he would have to confront clause 18.2 whereby the parties excluded all implied terms.

[231] While the entire agreement clause referred to representations (which were not the same as misrepresentations) the case here is not caught, he submitted, as the point is the representation in the Simmons email and the non-disclosure were in play before the Agreement was entered into. The pursuer would not have signed the Agreement had it known the truth. No entire agreement clause would have operated at all between parties but for the misrepresentation. As Lord Toulson states in *Cramaso (*at para 57):

> "As a matter of general principle, a representation made during contractual negotiations for the purpose of inducing a contract will ordinarily be regarded as continuing until the contract is actually concluded because it will generally be reasonable for the representee to continue to rely on it."

[232] In *BSA International SA* v *Hugh McLelland Irvine and Others* [2010] CSOH 78 Lord Glennie (at para 9) envisaged that a misrepresentation claim may survive an entire agreement clause, making clear much depends on the actual language of the relative clause. One must also distinguish the nature of the misrepresentation where it arises out of non-disclosure rendering false a prior representation. Non-reliance clauses do not normally envisage such a type of representation where a party has the means of correcting the falsity of a prior representation but fails or chooses not to inform the other party.

[233] The law would not exclude a claim based on being induced to enter a contract by a negligent misrepresentation without clear contractual language excluding it. Theory suggests the law would not fail to protect a party being induced to sign away legal protections Accordingly in the absence of very clear language an entire agreement/non reliance/waiver clause does not exclude this type of misrepresentation.

Submissions on behalf of the defender

[234] Mr Howie began by noting that while the Pursuer asserts that there has been a "*misrepresentation*", on the pleadings it was not clear what kind of misrepresentation was intended. He assumed that the pursuer's case was one of negligent misrepresentation. The defender's reply was straightforward: first, the pursuer's claim was irrelevant, given the terms of the entire agreement clause, and, secondly, there was no misrepresentation of fact in the present case.

The Law

[235] Mr Howie observed that the starting point was that there is no general duty for a party to make any form of disclosure (*O'Donnell*, *cit supra* at para 25). The Pursuer therefore needed to aver, and prove, that a duty existed. The only duty relied upon appears to be a duty to correct. He submitted that, in the present case, this was irrelevant. The terms of the entire agreement clause were clear. The background facts and circumstances demonstrate that there was no duty of care imposed.

Duty of Care

[236] In relation to whether there is any duty of care in relation to statements made, he submitted that it was important to note that the team engaged by the defender made it clear from the outset that neither he nor his advisor would accept responsibility for the accuracy of any information provided or opinion expressed; and that, as a consequence, the pursuer required to make its own investigations into the accuracy of the information supplied. The pursuer engaged WoodMac to assist it in relation to verifying the accuracy of the information and assumptions communicated to it by the Defender. In support of this

submission, Mr Howie cited passages from a number of pre-Agreement communings. The following passage (from the "Project Barents Business Plan" dated August 2016) is representative of the many passages Mr Howie cited:

> "This Business Plan does not purport to be all inclusive or contain all information a potential participant in the Potential Transaction would desire and is not intended to form the basis of any investment decision and should not be considered as financial opinion or recommendation by the Company, the Client, SCIL or any other person in relation to the Potential Transaction. In each case, the recipient should conduct its own analysis of the information, data and statements set forth in the Business Plan.
>
> …
>
> … A purchaser will be required to agree in any formal sale and purchase agreement that it has not relied on or been induced to enter into such agreement by any representation, warranty or undertaking save as expressly set out in such agreement.
>
> …
>
> … No parties shall have a right of action against the Company, the Client, SCIL, or any other person in relation to the accuracy or completeness of the information contained in the Business Plan or any other written or oral information made available to it in connection with the potential sale of the Company, except to the extent that any representation or warranty is provided…in a binding Sale and Purchase Agreement…" (Emphasis added to all three passages.)

He noted that very similar caveats were contained in the "Project Barents Business Plan May 2017. The business plan clearly stated that all currently contracted options were forecast to be exercised by customers at rates without any escalation. It was for the Pursuer to make its own investigations and satisfy themselves of the future prospects of the Company. He submitted that the pursuer did this engaging its own team of advisers, led by WoodMac. It was clear that the Pursuer made its own investigations into the commercial assumptions that the Company's management team had set forth.

[237] Accordingly, Mr Howie submitted that from the very outset it was made clear that: (i) there would be a non-reliance statement inserted in any formal agreement; (ii) no action

could be raised in relation to the accuracy of completeness of information provided; and (iii) that the Pursuer required to make its own investigations into the accuracy of information provided to it except insofar as that information might be the subject of a warranty in the Agreement. In these circumstances, no duty of care arose.

Breach of Duty?

[238] Mr Howie noted that if the Court accepted that a duty of care arose in relation to statements made, the Court will need to be satisfied that there has been a breach of such a duty and that the Pursuer relied on any such breach of duty (in this case a misrepresentation) when entering into the Agreement.

Expression of Opinion

[239] Mr Howie acknowledged that, in appropriate cases (especially cases where there are no non reliance and/ or entire agreement clauses) concealment of facts may amount to misrepresentation (*O'Donnell* at para 27). However, an expression of opinion though unfounded is not a misrepresentation if it is honestly made (*O'Donnell*, para 26; *Gloag* at p462).

[240] The defender disputed that there has been any false statement of fact made to the pursuer. The two charter parties were disclosed; the dates that they expired and the options were clearly set out in the CCS. The pursuer's witnesses (Steven Lowry, Wil Jones and Malcolm Forbes-Cable) accepted that the pursuer knew of the existence of the expiry dates of the contracts and that there were five one-year options. There was no guarantee that Repsol would take up these options.

[241] Mr Howie argued that what the pursuer sought to rely upon was a statement made by the management team in relation to their *opinion* on the likelihood of the options being exercised by Repsol. It was a statement of their belief. He submitted that that statement was a classic statement of opinion as opposed to a statement of fact. It cannot found the basis for a claim in misrepresentation.

[242] Moreover, as at the date the Agreement was concluded, the management team still firmly held the view that Repsol would exercise the options to extend the S-Class Contracts. Given the ageing nature of the Repsol platforms, the previous investigations undertaken by Talisman, and the contents of the platform safety case, North Star's management team firmly believed that the options would be exercised notwithstanding the receipt of the ITT. Mr Howie referred passages in the evidence of Malcolm Bruce and Gordon Wallace in support of the latter observation. (It is not necessary to set these out, as it was patent on the evidence that the sell side management team's confidence that Repsol would exercise the options remained unquestioned throughout the relevant period and there was no challenge to this evidence.) He also referred to Malcolm Forbes-Cable's evidence that WoodMac had provided advice about the sell side's assumptions. Mr Howie observed that it was entirely unclear why the existence of the ITT would have made any difference to WoodMac analysis. They claim to be experts in the oil and gas market. They were clearly aware that Repsol had the option of testing the market at the end of the contractual period regardless of the ITT actually being issued. These known risks were presumably factored into the analysis by WoodMac or, at the very least, certainly should have been.

The Entire Agreement Clause and The Non-Reliance Clause in the Agreement

[243] Mr Howie noted the terms of clause 18.1 and 18.3 (set out above, at para [7]). He submitted that these clauses were clear. The parties have delineated the nature of their relationship. This excludes any duty of care and any possibility for a claim based upon negligent misrepresentation. Moreover, the Pursuer is contractually barred from asserting otherwise.

[244] Mr Howie submitted that the law in this area was well established and he cited the following passages: *Peekay Intermark Ltd* v *Australia & New Zealand Banking Group Ltd* [2006] 2 Lloyd's Rep 511 (*per* Moore-Bick LJ, at para 56), *Springwell Navigation Corp* v *JP Morgan Chase Bank (formerly Chase Manhattan Bank)* [2010] EWCA Civ 1221(at paras 143, 144 and 169), *Standard Chartered Bank* v *Ceylon Petroleum Corp*, *cit. supra*, *per* Hamblen J at para 544(3). Mr Howie noted that these principles have been applied in Scotland. In *McMullen Group Holdings Ltd* v *John Harwood* [2011] CSOH 132 (*per* Lord Hodge, at para 58). In that case, Lord Hodge had observed that:

> "… a clause such as this, in which the *soi-disant* recipient of a representation has limited or defined the material on which he has relied in entering into the contract, is fatal to a case of negligent misrepresentation in relation to material outside of those defined limits. In my opinion, where the parties have agreed such a provision, the law will not impose on the representor a duty of care in relation to a representation of the extraneous matter and the representee cannot be heard to say that such matter induced him to enter into the contract."

Finally, Mr Howie noted Lord Hodge's observations, albeit referring more generally to the law about the imposition of liability for negligent statements) in *Grant Estates (In Liquidation) and Others* v *The Royal Bank of Scotland PLC*, *cit supra*, at para 73.

[245] Mr Howie submitted that given the terms of entire agreement clause, no duty of care arose as between the defender and the pursuer. That clause was, he argued, a comprehensive clause which precluded any case made in reparation (as opposed to breach

of contract), in relation to any representation. He developed this submission as follows. In light of case-law and having regard to the entire agreement, that clause "extinguished", *inter alia,* representations in relation to the subject-matter of the Agreement and the documents referred to therein (a phrase, which, on the pursuer's case, would be apt to cover the Repsol charters) unless they be in that Agreement or those documents. On the pursuer's case, the ITT was not included. Any representation in relation to the ITT or day-rates (or in the Simmons email) was extinguished, whether it was, or became, inaccurate, or not. Secondly, the entire agreement clause also included an acknowledgement by the pursuer that, "in entering into this agreement" it did not rely on any statement, representation …or other assurance given or made by any person (whether a party to the agreement or not) other than as expressly set out or referred to in this agreement". That was a statement which on its face alone spoke to the absence of any actual such reliance. If it were not true, the pursuer, presumably, would not have allowed this part of the clause to stand and would not have signed a contract containing it. As receipt of the ITT was not set out or referred to in the Agreement, any case of negligent misrepresentation in relation to the ITT was irrelevant. Nor did it induce the pursuer to enter into the Agreement at the price paid. Thirdly, the case of negligent misstatement was irrelevant. The Simmons email was a statement of opinion as at its date by a director of the company by the sell side about future hire rates on the Repsol charters. It was not a statement capable of forming an actionable misstatement by the defender. It was not falsified the receipt of the ITT. In any event, even if there were an actionable misrepresentation, the entire agreement clause limited the remedies open to the pursuer. Its "only remedy" was for "breach of contract", and that in the form of a breach of warranty claim. The Agreement was, he suggested, designed, *inter alia*, to prevent those protections from being circumvented by the use of delictual or other non-contractual

grounds of action. The overall intent was to secure that a misrepresentation did not give rise to a case in delict. Either it had been incorporated into the Agreement, and it fell to and was to be remedied by an action in breach of warranty alone, or it did not induce the contract and has been extinguished – in which case, no ground of action existed. Finally, as a fall back, Mr Howie argued that, in the event that the court was not with the defender on whether there was actual reliance, the entire agreement clause amounted to a contractual bar on the bringing of an action in delict on the ground of negligent misrepresentation. The Agreement included an express waiver of any claim which might otherwise be open to the pursuer on account of a misrepresentation not made in the Agreement itself. Again, the wording was clear and should be given effect to. Mr Howie submitted that it was fatal to the pursuer's case, in so far as it is raised in delict.

[246] Mr Howie submitted that the significance of the business plan and its inter-relation with the entire agreement clause should not be overlooked. Any actual reliance on a representation needed to be a reasonable one. In the face of the business plans and he entire agreement clause (of which the pursuer was aware prior to signing – Mr Lowry in cross examination), that requirement simply could not be met. *Ab initio*, the pursuer would have been aware of its inability to rely on any representation which was not within the four corners of the Agreement itself, and that if a matter was of consequence to the pursuer, the latter should be astute to secure that it appeared in the Agreement as a warranty or otherwise. *Ex hypothesi* the delictual case, that was not done by the pursuer. Reliance on a representation not so incorporated, in the teeth of such provisions, would not be reasonable and hence preclude a case in misrepresentation on that representation.

Discussion of issue 4: misrepresentation and the entire agreement clause

Was there a relevant representation?

[247] Notwithstanding Senior Counsel's full submissions, I can deal with this issue shortly. It is important to recall the question (posed by the buy side) to which the Simmons email was a reply. Having noted the reduction in rates in respect of the S-Class Vessels, the buy side asked for the management team's "expectation and rationale" for the day rates of these assets during the option period. (In passing I note that, while evidence was elicited about the sell side's internal revisions to their draft answer, nothing was made of this in submissions.) The answer in the Simmons email, when it came six hours later, began with the statement that the S-Class had been purpose-built to meet the specific tonnage requirements for Repsol, following a global tender exercise. In essence, this was the rationale for the certainty underpinning the sell side's expectation that the options would be exercised. (That statement was consistent with the evidence led, and no party suggested otherwise.) The Simmons email continued:

> "consequently, *we believe* that the Grampian S class vessels are the only vessels capable of meeting this specific requirement. As such the rate *expectations* would be in line with the *projected expectations*" (emphasis added).

In my view, this passage amounts to no more than a statement of opinion by the sell side of their expectation that the rates would continue because the options would be exercised. Accordingly, it does not have the requisite quality of a statement or representation of fact.

[248] Furthermore, while the terms and receipt of the ITT called into question the degree of certainty with which the sell side's expectation could be expressed, the factual statement underpinning the rationale continued to be correct (ie it remained the case that the S-Class Vessels were bespoke vessels commissioned to meet Repsol's needs). The abandonment of

the displacement requirement affected the certainty of the expectation; it did not render the factual basis for the rationale untrue or incorrect.

[249] I therefore find that there is no relevant foundation in the evidence for the pursuer's case based on misrepresentation.

Comment on the other questions arising under this issue

[250] My answer to the first question is determinative of this issue in favour of the defender. Out of deference to the arguments advanced, I should indicate how I would have answered the following questions:

(1) If it was a representation of fact, was it of continuing effect as at the Signing Date?: Had I found that the Simmons email constituted a representation of fact, and not opinion, I would have readily held that it continued to operate as at the Signing Date.

(2) Did the pursuer rely on the representation?: Yes. On the evidence, there is no doubt that the pursuer relied on the Simmons email in its purchase of the Company at the price it paid. I am not persuaded by Mr Howie's submission that the interposition of WoodMac displaced any reliance by the pursuer on the Simmons email.

(3) Does the law recognise a duty to correct a representation made in pre-contract stage, if by reason of events it subsequently becomes a misrepresentation by the point the representee and representor enter into a contract?: In my view, the law would recognise such a duty. Mr Howie contended that there is no general duty of disclosure. But, in my view, that does not exclude a duty of care from arising in respect of representation (and

embracing a duty to correct a *misrepresentation*), subject, of course, to the terms of any entire agreement clause. I accept as well-founded Lord Davidson's submissions on the possibility of a duty of care arising, based on the case of *Cramaso* (a case, Mr Howie did not challenge). The cases Mr Howie cited were concerned, as a generality, with the effect of an entire agreement clause; they were not inconsistent with a *Cramaso*-type duty arising. It all depended on the terms of the particular entire agreement clause, as to whether it is capable of excluding a misrepresentation inducing the contract.

(4) In any event, was the pursuer's case of misrepresentation excluded by the entire agreements clause?: In my view, the terms of this entire agreement clause were sufficiently broadly drafted to exclude the pursuer from founding on any representation in the Simmons email.

Parties' submissions on issue 5: wilful concealment

Submissions on behalf of the defender

[251] On this issue, Lord Davidson rested on the argument in the pursuer's addendum to their note of argument, which was in the following terms:

1.1 "At Article 6 it is averred that on 5 October 2017 the Pursuer was told on behalf of those acting on behalf of inter alia the Defender of their belief the S-Class Vessels were the only vessels capable the requirement. This was in context of a request for support for S-Class Vessels' day rates in the option period. For these purposes it is accepted this was a true statement when made. The arrival of the ITT objectively challenged the correctness of the statement. Gordon Wallace and others acting on behalf of the Defender knew or should have known the effect of the ITT on the correctness of the prior statement. They so knew or should have known prior to the signing on 14 October 2017. They knew or should have known the importance of the S-Class Vessels and the relative option exercise to the pursuer and the price it was to pay for the Company. The Defender on whose behalf they were acting thus

> was subject to a duty to disclose the change of circumstances represented by the ITT. The Defender neither directly nor indirectly made such disclosure. (*With* v *Flanagan* [1936] 1 Ch 575 is an example of the proposition that a vendor comes under a duty to communicate such a change of circumstances being supported by the Court of Appeal as is *Royal Bank of Scotland* v *O'Donnell* 2015 SC 258)." (Emphasis in original).

Submissions on behalf of the defender

[252] Mr Howie's reply to this issue may be summarised in two propositions: first, as there was no duty on the defender to disclose (for the same reasons advanced in meeting the pursuer's case on misrepresentation), there was no concealment; secondly, in any event, there was no wilful concealment, particularly as the defender took advice from is solicitor, Douglas Crawford.

[253] In relation to the first proposition, after noting that "unlawful concealment" was not a *nomen juris*, Mr Howie referred to the submissions he had made on issue 4, namely, that there was no general duty to disclose and, in any event, any such duty was negative by the terms of the Agreement. Mr Howie referred to a number cases to support the proposition that, for concealment to give rise to a cause of action, there must be concealment of a fact which the party had an obligation to reveal: *Irvine* v *Kirkpatrick* (1850) 7 Bell's App 186 (*per* Lord Brougham at 233); *Broatch* v *Jenkins* (1866) 4 M 1030 (*per* Lord President Ingles at 1032*);* and Gloag pp 457-462. There was neither a general duty of disclosure nor a special duty to inform arising in the circumstances of this case. In addition to the reasons already canvassed, Mr Howie added two more. First, if the court was considering this issue at all, it was because there is no warranty breached by non-disclosure of the ITT and hence the warranties – being directed to other matters – cannot set up a duty to inform of the ITT. Nor did the statement made in the Simmons email. Secondly, the statement in the Simmons email was an expression of opinion; a belief on the part of the management on a given date.

Not only did that remain true – it could not become untrue – but on the evidence, the belief there expressed continued to be held into November, beyond completion. There was nothing to correct, even if (as Mr Howie submitted it was not), there had been some theoretical duty to correct statements of the intervening inaccuracy of which one becomes aware before signing of the Agreement. The ITT had not been opened, and the management still thought they would win the tender at old rates as there was no realistic competition.

[254] Mr Howie's second proposition was that there had been no wilful concealment. Wilful concealment was a deliberate decision not to disclose that which it is, as you know, your duty to disclose. It connotes that one's objective in not disclosing that which one ought to disclose is to evade that duty. He noted the definition of "wilful" in the Oxford English Dictionary :"Done on purpose or wittingly; purposed, deliberate, intentional; not accidental or casual. Chiefly, now always, in a bad sense, of an action either evil in itself or blameworthy in the particular case…" Here, there was no concealment, "wilful" or "unlawful". The Pursuer took advice from his solicitor, Douglas Crawford. Mr Crawford gave consideration to this issue and advised the defender that he was under no duty to disclose the ITT. The defender accepted that advice. There was no suggestion in cross examination of either Douglas Crawford or the defender that the advice was defective or that the defender could be criticised for accepting the advice of his solicitor. Mr Howie submitted that this was fatal to the pursuer's case of wilful concealment. If it were suggested that Douglas Crawford may have been hampered in giving advice by the limited factual information he was himself given about the ITT, critically he had been told that the ITT concerned the S-Class Vessel charters. Whether Douglas Crawford's advice was correct or not, the defender accepted that advice and acted accordingly. That cannot amount to

wilful concealment. On professional advice, the defender's view was that there was nothing to disclose. He could not, therefore, wilfully conceal any such thing.

Discussion of issue 5: Wilful concealment

[255] From parties' submissions, it is clear that their arguments on this issue are closely related to, if not dependant on, those advanced in respect of the pursuer's misrepresentation case. Given my finding that the sentence founded on in the Simmons email did not constitute a representation of fact, the case on wilful concealment is also bound to fail.

Decision

[256] The pursuer has succeeded on three of the five cases it advances, namely the three claims based on breach of warranties and a clause in the Agreement, and it is entitled to declarator in terms of the first conclusion of the Summons (as amended). However, as parties did not make formal motions as to which of their 10 pleas-in-law should be upheld, repelled or reserved, I shall put the case out By Order for discussion of the terms of the interlocutor to give effect to the court's decision and to discuss further procedure.