FEDERAL COURT OF AUSTRALIA

Delaware North Marine Experience Pty Ltd v The Ship “Eye-Spy” [2017]   
FCA 708

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| File number: |  |
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| Judge: | **MCKERRACHER J** |
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| Date of judgment: | 23 June 2017 |
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| Catchwords: | **ADMIRALTY**– bareboat charter – whether charter breached due to failure to exercise due diligence to make vessel seaworthy – whether damage to vessel a result of a latent defect – whether the plaintiff’s crew took delivery of the crew “as is, where is” – whether damage to vessel caused by the negligence of the plaintiff’s crew – whether plaintiff relieved from strict compliance with redelivery obligations pursuant to the charter – whether redelivery clause of charter imposes a penalty and is therefore unenforceable  **ADMIRALTY** – *Admiralty Act 1988* (Cth) s 34(1)(a)(i) – excessive security – whether the security sought for the release of the vessel from arrest was excessive, unreasonable and without good cause |
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| Legislation: | *Admiralty Act 1988* (Cth) ss 4(3)(f), 17, 31(2), 34, 34(1)(a)(i)  *Admiralty Rules 1988* (Cth) r 39(3)  *Real Property Act 1990* (NSW) s 74P(1) |
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| Cases cited: | *Atheman Tankers Management SA v Pyrena Shipping Inc (The Arianna)* [1987] 2 Lloyds Rep 376  *Atlasnavios Navegacao LDA v The Ship “Xin Tai Hai” (No 2)* (2012) 215 FCR 265  *Baxall Securities Ltd v Sheard Walshaw Partnership* (2002) 83 Con LR 164  *Bedford Property Pty Ltd v Surgo Pty Ltd* (1981) 1 NSWLR 106  *Clydebank Engineering and Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6  *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79  *Esanda Finance Corporation Ltd v Plessing* (1989) 166 CLR 131  *FC Bradley & Sons v Federal Steam Navigation Co Ltd* (1926) 24 Lloyds Rep 446  *Goldsmith v Sandilands* (2002) 190 ALR 370  *Howard Marine and Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd* [1978] QB 574  *Jones v Dunkel* (1959) 101 CLR 298  *Lee v Ross (No 2)* [2003] NSWSC 507  *Lloyd Werft Bremerhaven GmbH v The Owners of the Ship "Zoya Kosmodemyanskaya"* [1997] FCA 379  *Multiplex Constructions Pty Ltd v Abgarus Pty Ltd* (1992) 33 NSWLR 504  *Ocean Towing & Salvage (Vanuatu) Ltd v Custom Fleet (NZ) Ltd & Anor* [2006] NZHC 1481  *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451  *Prudent Tankers Ltd SA v Dominion Insurance Co Ltd (The Caribbean Sea)* [1980] Lloyd’s Rep 338  *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 3 All ER 570  *Riverstone Meat Co Pty Ltd v Lancashire Shipping Ltd* [1961] AC 807  *Shagang Shipping Co Ltd v Ship “Bulk Peace”* (2014) 314 ALR 230  *Transpac Express Ltd v Malaysian* *Airlines* [2005] 3 NZLR 709 |
|  |  |
| Date of hearing: | 14-18 November 2016 and 21 December 2016 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 302 |
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| Counsel for the Plaintiff: | Mr E Cox |
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| Solicitor for the Plaintiff: | Aus Ship Lawyers |
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| Counsel for the Defendant: | Ms M Harris |
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| Solicitor for the Defendant: | Gilchrist Connell |

ORDERS

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|  | | NSD 1490 of 2015 |
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| BETWEEN: | DELAWARE NORTH MARINE EXPERIENCE PTY LTD (ACN 137 854 696)  Plaintiff/Cross-Defendant | |
| AND: | THE SHIP "EYE-SPY" (OFFICIAL NO 858508)  Defendant/Cross-Claimant | |

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| JUDGE: | MCKERRACHER J |
| DATE OF ORDER: | 23 JUNE 2017 |

THE COURT ORDERS THAT:

1. Each party within 28 days file and serve upon the other a minute of orders inclusive of costs to which it contends it is entitled together with any affidavit in support and submissions not exceeding 3 pages.
2. The opposing party within 28 days file and serve upon the other a minute of orders inclusive of costs to which it contends it is entitled together with any affidavit in support and submissions not exceeding 3 pages.
3. Unless the Court otherwise orders, the remaining issues be determined on the papers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MCKERRACHER J:

# INTRODUCTION

1. This costly and protracted litigation about a mechanical malfunction is most regrettable. The Court has attempted to encourage settlement on numerous occasions. The Court has also conducted two mediations. The difficulty when it comes to judgment is that the main dispute is not one which readily lends itself to resolution on some middle ground. Essentially the question is whether a vessel part was materially, albeit latently, defective such that the plaintiff suffered loss and damage or whether some human intervention on the part of the plaintiff caused relevant loss and damage. As counsel for the defendants put it, the question is "who turned off the tap?" referring to a valve which supplied crucial cooling water to an essential moving part of the vessel. For the reasons which follow, I have concluded that there is no plausible evidence of relevant human intervention on the part of the plaintiff. I have accepted the relevant evidence given by the plaintiff's witnesses, if not all evidence of all witnesses. It follows most probably that there was a relevant “latent defect” in the vessel. There is another question as to whether this part of the vessel was properly maintained. In my view, despite maintenance efforts, this part was not shown "to have been maintained". In my view, the plaintiff is entitled to most of the damages it claims. This is not a large sum. Most, but not all of the cross-claim must fail.
2. This is, amongst other things, a proceeding *in rem* against the **vessel**, “Eye Spy”. By writ dated 25 November 2015, the plaintiff named the "relevant person" as the owner, **TKL** **Holdings** Pty Ltd, under s 17 of the ***Admiralty Act*** *1988* (Cth). Whilst TKL Holdings is the owner of the vessel, **Moreton Bay Whale Watching Tours** Pty Ltd was the disponent owner in possession of the vessel at the time of the charter. Therefore, both parties entered into the charter with the plaintiff, and as such were proper defendants, and each entered an appearance. For convenience only I have referred to the two companies as **the defendants** unless the context otherwise requires. The human face and guiding mind and will of the defendants is Ms Kerry Lopez. Ms Lopez is the sole shareholder and director of each defendant.

## A factual overview

1. The plaintiff owns and operates the “Heron Islander”, a catamaran passenger ferry. In early February 2015, that vessel was unavailable. The plaintiff chartered in its place the vessel for a minimum of 14 days from 6 February to 19 February 2015, with an option to extend the charter by mutual agreement. An amended “Barecon 89” Standard Bareboat **charter** form dated 6 February 2015 was executed. The plaintiff paid the hire for the whole charter in full on 6 February 2015.
2. The vessel was delivered on 6 February 2015 at Redcliffe, Queensland. Following an induction, the vessel was sailed by the plaintiff’s crew and a representative of the defendants to Gladstone without incident. It arrived at 0915 hours on 7 February 2015. On 8 and 9 February 2015, the vessel undertook return voyages from Gladstone to Heron Island. During the course of a voyage in the afternoon of 7 February 2015 the vessel suffered a failure of her starboard stern tube assembly (**SSTA**). The SSTA failed because there was inadequate cooling water supply. The cause of the restriction of water supply to the SSTA is the key issue in dispute.
3. The vessel did not sail on 9 February 2015 due to the condition of her stern seal. On 10 February 2015, Maritime Safety Queensland (**MSQ**), as the delegate of Australian Maritime Safety Authority (**AMSA**), issued a prohibition order prohibiting the use of the vessel until repairs were carried out. The vessel did not perform any further voyages under the charter and remained moored at the Gladstone Marina. It was returned to the defendants at 0800 hours on 18 February 2015 at Gladstone.

## The mechanical detail

1. It is necessary to say something about the nature of the mechanical problem, although as will be seen, little turned in the end analysis on the very fine detail of the mechanical issues.
2. The vessel uses a conventional propulsion system consisting of an engine and a transmission, with a propeller and propeller shaft that propels the vessel. The propeller and propeller shaft must rotate to propel the vessel. The propulsion system goes through the hull well below sea level; it is pressurised so that raw seawater external to the vessel does not pour into the vessel.
3. The rotating propeller shaft has to be sealed within the hull of the vessel to stop “raw” water entering into the bilge of the vessel. The simplest way to do this is for the propeller shaft to rotate within a stern tube assembly. The stern tube is normally an aluminium tube welded onto the hull. It is an integral part of the hull. It is a structure rather than an operating part.
4. Within the stern tube are a shaft seal and a shaft bearing. The shaft seal is bolted to the inboard side of the stern tube and to the shaft. It is difficult to seal something whilst it is rotating, so the seals used in a stern tube assembly are highly engineered pieces of equipment. A number of different seals are available on the market. The defendants say they used the reputable Wartsilla seal made by Deep Sea Seals Limited. At delivery of the vessel, the vessel was fitted with an **EJ seal**, serial number 23080205EJ, 100 millimetres in diameter.
5. Both EL and EJ seals are manufactured by Wartsilla. Ms Lopez says that the vessel was originally fitted with an EL seal in 2002 but was replaced with an EJ seal in 2004 due to regulatory requirements. The EJ Seal was installed on 25 March 2010 by Rogers & Lough.
6. The purpose of the shaft bearing within a stern tube assembly is to reduce the friction caused by the rotating shaft within it. This is achieved by the shaft bearing being lubricated by water such that a hydrodynamic film is created between the propeller shaft and the bearing. It is therefore imperative that when the propeller is rotating, the bearing is lubricated by water at all times.

## The charter

1. By the charter, the defendants chartered the vessel to the plaintiff ex-Redcliffe for a minimum of 14 days from 6 February 2015 to 19 February 2015, with an option to extend the charter by mutual agreement (**charter period**). The charter was signed by Ms Lopez for the defendants, and Ms Gabrielle Walton for the plaintiff.
2. The hire rate was $4,200 plus GST per day, payable in advance, being $58,800 plus GST for the charter period. The plaintiff paid the hire in full on 6 February 2015 (being an amount of $64,680 inclusive of GST).
3. The port of delivery provided for in the charter was Brisbane, Queensland and the port of re-delivery provided for in the charter was Redcliffe.
4. The terms of the charter required an on-hire survey and an off-hire survey to be conducted. An on-hire survey was undertaken on 6 February 2015 by Mr Darren Simmonds a director of Australian Marine Consultants Pty Ltd (**AMC**). Mr Simmonds gave evidence.
5. Key clauses of the charter were:

**2. Delivery** (*not applicable to newbuilding vessels*)

The Vessel shall be delivered and taken over by the Sub-Charterer in the port or place indicated in Box 13, in such ready berth as the Sub-Charterer may direct.

**The Owner shall before and at the time of delivery exercise due diligence to make the Vessel seaworthy** and in every respect ready in hull, **machinery and equipment** for the service under this Charter. The Vessel shall be properly documented at time of delivery.

**The delivery to the Sub-Charterer of the vessel and the taking over of the Vessel by the Sub-charterer shall constitute a full performance by the Owner of all the Owner’ obligations under Clause 2, and thereafter the Sub-Charterer shall not be entitled to make or assert any claim against the Owner on account of**:

**Any conditions, representations or warranties expressed or implied in respect of the vessel but the Owners shall be responsible for repairs or renewals occasioned by independently verified latent defects in the vessel, her machinery or appurtenances existing at the time of the delivery of the charter. Further, upon delivery of the Vessel, the Sub Charterer accepts the Vessel in its “as is – where is" condition.**

The costs of delivery are to be borne by the Sub-Charterer pursuant to the Charter Hire provisions of this agreement. (emphasis added)

**3. Time for Delivery** (*not applicable to newbuilding vessels*)

The Vessel is to be delivered not before the date indicated in Box 14 unless with the Sub-Charterer consents.

Unless otherwise agreed in Box 17, the Owner are to give the Sub-Charterer not less than 30 running days’ preliminary and not less than 14 days’ definite notice of the date on which the Vessel is expected to be ready for delivery.

The Owner to keep the Sub-Charterer closely advised of possible changes in the Vessel’s position.

…

**7. Inspection**

*Inspection* – The Owner shall have the right at any time to inspect or survey the Vessel or instruct a duly authorized surveyor to carry out such survey on their behalf to ascertain the condition of the Vessel and satisfy themselves that the Vessel is being properly repaired and maintained at any time outside of the normal operating hours of the Sub-Charterer.

…

**9. Maintenance and Operation**

**The Vessel shall during the Charter** period (i.e. commencing immediately upon the Vessel departing Brisbane and ending immediately upon the Vessel being redelivered to Brisbane) **be in the full possession, at the full risk of and at the absolute disposal for all purposes of the Sub-Charterer and under its complete control in every respect. The Sub-Charterer shall maintain the Vessel, her machinery, appurtenances and spare parts in a good state of repair, in efficient operating condition and in accordance with good commercial maintenance practice**. The Sub-Charterer is to keep the Vessel with unexpired classification of the class indicated in Box 10 and with other required certificates in force at all times.

**The Sub-Charterer will take immediate steps to have any necessary repairs done within a reasonable time failing** which the Owner shall have the right of withdrawing the Vessel from the service of the Charters without noting any protest and without prejudice to any claim the Owner may otherwise have against the Sub-Charterer under the Charter. (emphasis added)

…

**12. Insurance and Repairs**

During the Charter period the Vessel shall be kept insured by the Sub-Charterer at its expense against marine, war and Protection and Indemnity risks in such form as the Owner shall in writing approve, which approval shall not be unreasonable [sic] withheld. Such marine, war and P and I insurances shall be arranged by the Sub-Charterer to protect the interests of both the Owner and the Sub-Charterer and mortgagees (if any), and the Sub-Charterer shall be at liberty to protect under such insurances the interests of any managers they may appoint.

All insurance policies shall be in the joint names of the Owner, Charterer and the Sub-Charterer as their interests must appear. If the Sub-Charterer fail to arrange and keep any of the insurances provided for under the provisions of this clause in the manner described therein, the Owner shall notify the Sub-Charterer whereupon the Sub-Charterer shall rectify the position within seven running days, failing which Owner shall have the right to withdraw the Vessel from the service of the Sub-Charterer without prejudice to any claim the Owner may otherwise have against the Sub-Charterer.

The Sub-Charterer must, before delivery, and thereafter at any time on request by the Owner provide evidence of all insurances to the Owner including copies of certificates of currency of insurance policy wording and endorsements and evidence of payments of premiums.

The Sub-Charterer shall, subject to the approval of the Owner and the Underwriters, effect all insured repairs and shall undertake settlement of all costs in connection With such repairs as well as insured charges, expenses and liabilities. All insurance payments for such repairs shall be paid to the owner who shall pay and apply the moneys to payment or reimbursement of all proper repair costs to the repairer, Sub-Charterer or other party entitled.

The Sub-Charterer will also remain responsible for and to effect repairs and settlement of costs and expenses incurred thereby in respect of all other repairs not covered by the insurances and/or not exceeding any possible franchise(s) or deductibles provided for in the insurances.

All time used for repairs under the provisions of this Clause or otherwise (apart from for repairs of latent defects according to Clause 2 above) including any deviation shall count as time on hire and shall form part of the Charter period.

**Notwithstanding Clause 2** and Clause b the **Sub** **Charterer shall not be responsible** for the costs of repairs and / or replacement of any major engine failure of the vessel where it is found and proven through independent third party consultation that such component had **latent defects** contribution [sic] to or causing the failure during the period of the charter. In the event that the insurance held covers all or part of the cost of such repairs the owner shall be responsible for both the insurance excess payment and any shortfall in the cost of such repairs over and above the insurance payout.

(emphasis added)

…

**14. Redelivery**

**The Sub-Charterer shall at the expiration of the Charter period redeliver the Vessel to the place as indicated in Box 16.** The Sub-Charterer shall give the Owner not less than 30 running days preliminary and not less than 14 days definite notice of expected date, range of ports of redelivery or port or place of redelivery. Any changes thereafter in Vessel’s position shall be notified immediately to the Owner.

**The Vessel shall be redelivered to the Owner in the same or as good structure, state, condition and class as that in which she was delivered, fair wear and tear not affecting class excepted**. The Vessel upon redelivery shall have her survey cycles up to date and class certificates valid for at least the number of months agreed in Box 12.

**The costs of redelivery are to be borne by the Sub-Charterer pursuant to the Charter Hire provisions of this agreement**.

In the event that the Vessel is not redelivered by the date specified in Box 20 (or any other date agreed in writing between the parties to this agreement) or if it necessary for repairs to be carried out to the Vessel to restore the Vessel to the condition which it was in prior to departure for the Charter (save for fair wear and tear) as detailed following surveys detailed in clause 6 above, **the Sub-Charterer agrees to pay to the Owner/Charter (as applicable) a penalty of $10,000 (including GST) for each and every day that the vessel is delayed or is undergoing such repairs**.

**The Parties to this agreement agree that this amount represents a fair estimate of the loss and damage which will be suffered owing the delay/Vessel undergoing repairs**.

(emphasis added)

## Overview of claim and cross-claim

1. The plaintiff contends that the failure of the SSTA and resultant damage to the vessel were caused by the defendants’ failure to exercise due diligence to make the vessel seaworthy, a breach of cl 2 of the charter. The plaintiff also says that the defendants are liable for the repairs to the stern tube pursuant to cl 2 of the charter because the problems were caused by a latent defect. Pursuant to cl 9, there is an obligation on the charterer to repair the vessel during the charter, however, this obligation does not apply to latent defects.
2. The plaintiff says that the nature and extent of the breach of cl 2, rendering the vessel entirely inoperable, relieved it from strict compliance with the redelivery obligations under the charter. The plaintiff then chartered alternative vessels from Rob Benn Holdings to perform as a ferry between Gladstone and Heron Island. The plaintiff says it was not practical for it to redeliver the vessel at Redcliffe as originally contemplated because of the latent defect in the SSTA and it is not liable for any consequent costs the defendants incurred at Gladstone in making the vessel seaworthy.
3. Some months later, despite exchanges and the commencement of other court proceedings in Queensland concerning these events, the plaintiff caused the vessel to be arrested in Tasmania on 26 November 2015 pursuant to s 17 of the *Admiralty Act* on a general maritime claim within the meaning of s 4(3)(f) of the *Admiralty Act*. The defendants originally contended that the arrest was “unreasonable and without good cause” and still maintains that the security sought for its release was excessive. The defendant’s former cross-claim for unjustified arrest was ultimately abandoned at trial.
4. The plaintiff’s case is that the condition of the SSTA had been deteriorating over time prior to 6 February 2015 due to water starvation during the previous operation of the vessel. This, it says, was the cause of the failure on 7 February 2015. It says the stern tube bearing (contained within the SSTA) had reached such a deteriorated condition that with the continued operation of the vessel, the bearing failed only two days into the charter.
5. The plaintiff contends that the problem with the SSTA had developed prior to the charter manifesting in excess exhaust heat and water leakage a fact which, the plaintiff says, was known to the defendants but not the plaintiff. The plaintiff says that the detection of a defect of this kind was not able to be discovered at delivery without knowledge of the vessel prior to operation or an internal investigation, and was therefore a latent defect.
6. The defendants, however, say that the damage to the vessel was caused by the negligent incompetency of the plaintiff’s master, engineer and/or crew of the vessel.
7. The plaintiff denies this and further denies that the failures and damage were caused by the failure of the plaintiff’s master/engineer to act in accordance with instructions given to them during an induction by Ms Lopez when the vessel was delivered into the charter on 6 February 2015.
8. The plaintiff claims the cost of substitute vessels that were required to continue performance of the charter and the costs incurred which they say were wasted as a consequence of the inability to use the vessel for the full period of the charter.
9. On 26 March 2015, the defendants issued an invoice to the plaintiff seeking payment of $271,120 comprising:
   1. $270,000 for "Redelivery delay" (27 days at $10,000 per day);
   2. $1,000 wages for a Mr Egan who assisted in the initial trip to Gladstone; and
   3. $120 for certain charts.
10. The plaintiff has refused to pay the invoice, denying any liability to do so.
11. On 31 October 2015, the plaintiff issued a letter of demand for payment of $316,000 plus interest for:
    1. $235,000 for the cost of replacement vessel and services incurred as a result of the vessel not being in service;
    2. $48,000 for the period the vessel was out of service;
    3. $5,000 for expenses incurred in positioning the vessel from Redcliffe to Heron Island;
    4. $13,000 for other miscellaneous costs in dealing with the breakdown: insurance, marina, ship keeping etc; and
    5. $15,000 for legal and survey fees.
12. The defendants have refused to pay the demand, denying any liability to do so.
13. At delivery, TKL Holdings, as the owner of the vessel, held a number of regulatory certificates. Relevant to the issues in this litigation, TKL Holdings:
    1. was the holder of Certificate of Operation number 900034230 current for the period 26 September 2014 to 25 September 2015 issued by a delegate of the National Regulator on 24 September 2014;
    2. was the holder of Certificate of Compliance for Survey number 35740 issued on 18 June 2014 by Mr Stephen Earp, an AMSA accredited marine surveyor for the category of aluminium machinery;
    3. held each of the design and construction standards to which the vessel was built; and
    4. complied with the NSCV vessel Equipment List - Class 1C and Vessel Equipment List - Class 1D, as issued by AMSA.

(**Certificates**)

1. At delivery on 6 February 2015, the vessel:
   1. was entered in class 9:
      1. IC for 319 passengers and 6 crew; and
      2. ID for 319 passengers and 6 crew;
   2. held current Certificates;
   3. was operating under a certificate of operation and not a certificate of survey whilst in Queensland waters; and
   4. was not in class at the election of TKL Holdings.
2. The defendants contend that they (through Ms Lopez, her servants and agents) were the ordinary and careful owner and operator. As discussed, the vessel is a passenger ferry that operated under a certificate of operation in Queensland waters, but not under a certificate of survey. The defendants say that under the National Law that was permissible as it was a “Not in Survey (Scheme NS) existing vessel”. The consequence of not operating under a certificate of survey was that there was no regulatory requirement to pull (remove, inspect and maintain or replace) the vessel’s shafts every four years. Even so, the vessel was, the defendants say, properly maintained by **Rogers & Lough** Marine Engineers. Both the defendants and the plaintiff used Rogers & Lough to maintain their respective vessels.
3. The defendants say that the vessel was maintained annually by Rogers & Lough, and at times calls were made to that firm by the defendants to query whether maintenance work might be required as a result of operational matters that occurred during the year.
4. Of the vessel's documentation, the defendants say the relevant documents (which were on board the vessel at and after induction) were:
   1. the Certificate of Operation issued 24 September 2014;
   2. Certificate of Compliance Survey SUR35740 issued 16 June 2014;
   3. the Safety Management System Manual dated 10 June 2014; and
   4. the Technical Manual for EJ Seal published by Deep Sea Seals Limited on 1 April 2003.
5. The defendants say that:
   1. the annual maintenance work on the vessel carried out by Roger & Lough prior to delivery is described in tax invoices from Rogers & Lough. At the request of the defendants, Mr Justin Lough of Lough & Rogers was asked to inspect the SSTA, “as was” (that is, not by pulling the stern gear off) and to calibrate the stern seals, port and/or starboard, if required. Specialised callipers were used for that work. The defendants observe that as no charge for that work was made, that work is not identified in any of the Rogers & Lough tax invoices;
   2. part of the maintenance work is for Rogers & Lough to set the position of the tap/valve to the SSTA so there is sufficient water flow but not excessive water flow;
   3. the last time the defendants adjusted the SSTA was on 21 August 2014. The valve was re-opened after that adjustment. Rogers & Lough were contacted and they said no further steps needed to be taken;
   4. between that date and delivery, there is no record in any log and no evidence produced by the plaintiff, that the SSTA was ever described or evidenced as being “hot”;
   5. since 21 August 2014, there was no maintenance work or operational requirements that caused the tap/valve to be closed; and
   6. at the time of delivery, the tap/valve to the SSTA was observed to be open or partially open.
6. The defendants also say that:
   1. the vessel passed the “bump test”, a test used to measure the tolerance of the bearing in June 2014;
   2. the EJ Seal was only five years old out of an operational life of 10 years (as per the Technical Manual). The bearing in the SSTA had been replaced in 2011 and was only four years old. There was a history of maintenance and monitoring of the SSTA and the vessel as a whole;
   3. historical documents support their contention that they had a longstanding history of being “careful” and “prudent” owners of the vessel. There was no reason for them to depart from that history for this charter; and
   4. the cl 2 due diligence obligations do not extend to the defendants being obliged to induct the plaintiff’s crew as to the operation of the vessel. The defendants contend that the induction process, as to machinery and documentation, demonstrates the conduct of a “careful” and “prudent” owner. It does not in any way absolve the plaintiff from deploying competent crew to operate the vessel.
7. The defendants emphasise that the plaintiff, by cl 2 of the charter, was bound by two critical amendments to the standard terms:
   1. the “standard” term that (in effect) the plaintiff would not be entitled to recover against the defendants on account of any conditions, representations or warranties, save for any latent defect; and
   2. the specific amendment, that the plaintiff accepted the vessel "as is, where is".
8. The defendants contend that:
   1. the “standard” term has been given narrow meaning, where the defendants have not provided the plaintiff with any reasonable opportunity to discover by ordinary physical inspection of the chartered vessel: see *Howard Marine and Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd* [1978] QB 574 (at 599);
   2. the **plaintiff’s crew**, Mr Mark Ryan, the Master, Mr Ronald Mathew Snaith, the engineer, and Mr Michael Harvey, the deckhand arrived on the vessel around 0930 hours. The parties agree that the vessel departed Redcliffe at 1745 hours. During that time, the plaintiff’s crew had unrestricted access to the vessel. They were inducted by Ms Lopez as to the vessel’s operation and its documentation. All agree that an induction occurred, however, the ambit of that induction and the length of time it took is in issue. The on-hire surveyor, Mr Darren Simmonds was there for the same time. Mr Peter Egan was also present during that time;
   3. there was ample opportunity to make an ordinary physical inspection:
      1. of the external view of the SSTA (that is, as to whether it was vulcanised and deteriorated as now claimed by the plaintiff);
      2. to identify the location and position (on or off) of the taps and valves in the starboard and port engine rooms by tracing the lines from the stern seals back to the engine;
      3. to identify which lines fed the SSTA, including which was the hot feed and which was the cold feed, and identify whether the taps/valves for each of the hot and cold feeds were open, partially open or closed; and
      4. to inspect the logs to determine how the vessel had been maintained and operated in the preceding months, and what issues, if any, the vessel had experienced.
   4. if the observed conditions of machinery or documents were different from that which they would expect, given their training and their experience, there was ample opportunity to make appropriate enquiries of Ms Lopez, Mr Simmonds the surveyor and/or Mr Egan, who was to accompany them on the delivery journey;
   5. having had that opportunity over nearly nine hours, to inspect a 29.5 metre long vessel and her engine rooms, the plaintiff’s crew took delivery of the vessel, “as is, where is”. The term, “as is, where is” as used in the maritime industry (and construction industry) means acceptance of the vessel in its current condition “warts and all” (i.e. latent defects and all) in Redcliffe. Such words are clearly understood to exclude liability for any latent defect, and as the specific amendment to a standard form contract, is by application of the usual construction principles of contract, to prevail over the generic “standard” term, should there be any tension between the two terms; and
   6. if the plaintiff’s crew elected not to avail themselves of the opportunity to inspect the vessel, this should not detract from the agreed basis the plaintiff accepted the vessel “as is, where is”.
9. According to the defendants the plaintiff is liable for the loss and damage caused to the vessel whilst under charter. The defendants also contend that if they were liable for repairs arising from any latent defect (which they deny), the matters identified are not latent defects, as by ordinary inspection, any one or more of the plaintiff’s crew could have observed:
   1. the state of the “lamination” of the SSTA;
   2. the apparent age of the EJ Seal;
   3. the wear between the EJ seal and the rubber body, including how many millimetres the EJ Seal was already compressed. The Technical Manual identified what the distance of 3-6 millimetres meant in terms of age and replacement. The Technical Manual was onboard at delivery; and
   4. from the logs, that there had been one incident on 21 August 2014 of the SSTA being "hot". The plaintiff’s experts contend this is the date that evidenced the beginning presumably, although that is not expressly stated, of the "extended" period of time that the SSTA had been running hot. If any other entries in the logs for the period of the whale watching season (which ended in October 2014) reported the SSTA being hot (which they do not) then the alleged defect contended by the plaintiff’s experts would have been observable to the plaintiff.
10. The defendants note that no contemporaneous complaint was made in regards to any of these matters, and the vessel was not accepted by the plaintiff’s crew under protest.
11. It is agreed between the parties that the delivery was effected when the plaintiff’s crew took possession and control of the vessel at Redcliffe to sail to Gladstone. However, costs relating to delivery are in issue. The plaintiff’s crew flew from Gladstone to Brisbane on 6 February 2015 to take delivery and undertake the delivery voyage from Redcliffe to Gladstone. The plaintiff seeks recovery of these costs.
12. On arrival at the vessel, the plaintiff did not have:
    1. charts for the delivery voyage;
    2. a SOLAS life raft; and
    3. its own SMS manual with their own procedures for operating a vessel.

The defendants purchased charts for the plaintiff’s expense. The defendants also collected a SOLAS life raft for the charter.

1. Mr Ryan requested that Ms Lopez accompany the plaintiff’s crew on the delivery voyage so they could make enquires about the vessel’s operations. Ms Lopez was unavailable, but arranged for Mr Egan, a master and engineer, to accompany the plaintiff’s crew on the voyage. The defendants claim from the plaintiff Mr Egan’s wages of $1,000.
2. The defendants contend that:
   1. Mr Egan and the plaintiff’s crew sailed the vessel for sailed 11 hours from Redcliffe to Gladstone in 30 knot south-easterly winds. The average speed was 23-24 knots. The defendants contend the vessel could not have sailed for that long, in those conditions and at that speed if the valve to the SSTA was closed, as the plaintiff contends it was. The defendants observe that there was no log entry, noting that the SSTA had been hot or that there had been water leakage;
   2. the vessel arrived in Gladstone at 0715 hours. Mr Egan then flew to Brisbane. The plaintiff’s crew along with another deckhand, Mr Nathan Crow, undertook the voyage from Gladstone to Heron Island departing at 1122 hours. During the voyage water spray from the SSTA was observed at around 1530 hours, as was a “burning smell” emanating from the SSTA. The water spray was said to be “manageable”. A manageable water spray is consistent with the “normal operations” of the vessel. There was no record of any overheating of the SSTA or what its measured temperature was using the onboard heat gun;
   3. these are matters that relate to the competency of the plaintiff’s crew; and
   4. the plaintiff’s crew had an opportunity to adjust the compression of the EJ Seal (as a means of stemming the water flow) when the vessel had effectively stopped in the lee of Polmaise Reef.
3. The experts agree that it was likely that the bearing in the SSTA failed at around 1500 hours on 7 February 2015 and that it was “catastrophic” and caused by an inadequate supply of sea water to the SSTA. What is in issue between the experts, is whether:
   1. the failure was acute, caused by the closure of valves A or B (as identified in the engineering drawing attached to the joint expert report) just before the incident; or
   2. the failure occurred over an extended period of time.
4. The defendants also point to the following sequence of events:
   1. following the events of 7 February 2015, Mr Ryan telephoned a local boat maker and operator, Mr Rob Benn (in Gladstone) on the morning of 8 February 2015 and requested that he come to the vessel to look at the SSTA. Mr Benn observed “shiny marks” inside the grub screws of the EJ Seal, and considered them to have been recently tightened. Neither of these observations was logged in the engineer’s or master’s log. The defendants say neither of these observations was made at delivery and the reasonable inference is that the valve was turned off after delivery, but before Mr Benn made the observations. The defendants say one or more of the plaintiff’s crew must have done this;
   2. on topic, the plaintiff filed the affidavits of Messrs Ryan, Snaith and Crow, but not Mr Harvey, who was a deckhand on board the vessel for each of the voyages on 6, 7 and 8 February 2015. (According to Mr Snaith, Mr Harvey was the person who identified the leaking SSTA. As a material witness, the defendants pressed for him to be available for cross-examination and consequently was called to give evidence *viva voce*); and
   3. when the vessel sailed on 8 February 2015 the plaintiff’s crew had difficulties with getting the starboard engine to run at more than 1500 RPM on the return voyage to Gladstone. That evening, Messrs Ryan and Snaith informed Ms Lopez of the incident by telephone. During the course of those discussions it emerged that there was a problem with the SSTA. The defendants say that what was described to Ms Lopez (but not to MSQ or entered in any log), was that on 7 February 2015, the SSTA started to leak, heat up and smoke. Those matters were entered in the logs, which the defendants say again relates to the competency of the plaintiff’s crew.
5. The defendants claim under cl 14 of the charter, $10,000 per day for every day the vessel remained undelivered. The defendants say this sum was a genuine and fair pre-estimate of the defendants’ damages and the onus is on the plaintiff to prove that cl 14 is unenforceable (as it claims) due to it being a penalty clause rather than a genuine pre-estimate as to liquidated damages: *Clydebank Engineering and Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6 (at 15). On that topic, the defendants contend that:
   1. the fact that the word "penalty" is used in an internationally based standard form document, amended in part for this charter, does not mean it is a penalty at law (which may be accepted);
   2. Ms Lopez’s affidavit sets out what factors she took into account when nominating $10,000 per day in damages (a figure that was not challenged by the plaintiff). The calculation was based on the "cost" to the defendants if the serious event of late delivery occurred, namely, loss of hire and the cost to effect re-delivery;
   3. the largest conceived damages were more than $10,000 per day for the 27 day period in which the vessel was late in being re-delivered (0500 hours on 18 March 2015 in Redcliffe). During that time, the vessel underwent repairs at MIPEC and re-certification in order for the prohibition notice to be lifted so that the vessel could operate commercially again. Each of the matters listed in the prohibition notice arose during the term of the charter. All items had to be repaired for the vessel to regain its certificate of operation; and
   4. the defendants could not fix a lucrative fixture due to the delay in delivery. That fixture would have paid up to $5,000 per day if the vessel was actually used, otherwise $2,200 per day (ex GST for both amounts). By chance, the vessel was fixed for charter later in March 2015, but after re-delivery.
6. The defendants also contend that the charter gave rise to a duty of care for the plaintiff to employ a competent crew to navigate and operate the vessel safely. The defendants submit that based on all the matters set out above, the duty was breached and they are entitled to:
   1. damages for breach of contract under cll 7, 9 and 12; or
   2. liquidated damages under cl 14; or
   3. common law damages for negligence.
7. The defendants also claimed damages for unjustified arrest and excessive security “under s 34 of the *Admiralty Act*. However, as will be discussed in more detail below, their claim for unjustified arrest under s 34(1)(a)(ii) was abandoned late in the trial.
8. The defendants still claim under s 34(1)(a)(i) that the plaintiff unreasonably and without good cause sought excessive security for the release of the vessel from arrest of $366,000 (which was comprised of $316,000 for its claim, $50,000 for legal fees and the balance interest).
9. On application by the defendants for the partial release of security, the Court ordered the release of $100,000 to the relevant person (or its nominee) on 4 April 2016. Based on the plaintiff’s documents produced in response to the 5 February Orders, the plaintiff’s “best case” was according to:
   1. the plaintiff, $120,379.61 (including GST but excluding costs and interest); and
   2. the defendants, about $85,000 (including GST but excluding costs and interest).

# ISSUES IN THE CASE

1. While some of the issues listed below did not fall for determination by virtue of other findings having been made, it is helpful to illuminate in greater detail the contested matters.
2. The parties agreed that the pleadings and exchanged submissions gave rise to the following issues in the plaintiff’s claim and the defendants’ cross-claim:

**Issues arising in relation to the plaintiff’s claim:**

A1 As to the failures that the vessel experienced on 7 February and/or 8 February 2015:

(a) what was the nature of those failures?

(b) whether the SSTA failed on 7 or 8 February 2015?

(c) whether at delivery the tap/valve to the SSTA which prevented the flow of cold water to the SSTA was open or closed?

(d) whether at delivery the SSTA had not received an adequate supply of water for an extended period of time?

(e) whether at delivery the condition of the SSTA was in a state of disrepair beyond acceptable limits?

(f) what damage was sustained by the vessel as a consequence of the aforesaid failures?

(g) what repairs were required to remedy the aforesaid damage?

(h) what was the cause of the aforesaid failures and resultant damage to the vessel?

A2 The proper construction and effect of cl 2 of the charter, including what, if any, obligations did it impose upon the defendants prior to and at the time of delivery?

(a) What is the meaning of the term, “as is, where is”?

(b) What is the meaning of the term, “latent defect”?

(c) To what extent, if any, did the acceptance of the vessel by the plaintiff at delivery on an “as is, where is” basis:

(i) extinguish or vary any of the due diligence obligations, including any latent defect in the hull, machinery, appurtenances, and documentation of the vessel;

(ii) ratify any breach of any of the due diligence obligations including any latent defect in the hull, her machinery and appurtenances, and documentation?

A3 Who is liable for the aforesaid failures and resultant damage to the vessel?

A3.1 whether (as the plaintiff contends) the defendants are liable:

(a) because the aforesaid failures and resultant damage to the vessel were due to the defendants’ alleged failure to exercise due diligence to make the vessel seaworthy and in every respect ready in hull, machinery and equipment before and at the time of delivery, in breach of cl 2 of the charter; alternatively

(b) because the aforesaid failures and resultant damage to the vessel were caused by latent defects in the vessel, her machinery or appurtenances existing when the vessel was delivered into charter and for which the defendants remain responsible under cl 2 of the charter;

(c) the tap/valve to the SSTAwhich prevented the flow of cold water to the SSTA was closed, whether that closure was:

(i) a breach of the due diligence obligations;

(ii) an acceptance of the condition of the vessel, as is, where is;

(iii) a latent defect.

(c) the SSTA had not received an adequate supply of water for an extended period of time, was that:

(i) a breach of the due diligence obligations;

(ii) an acceptance of the condition of the vessel, as is, where is;

(iii) a latent defect.

A3.2 or whether (as the defendants contend) the plaintiff is liable:

(a) because the aforesaid failures and resultant damage were caused by:

(i) the alleged incompetency of the master, engineer and/or crew of the vessel; and/or

(ii) the alleged failure of the master/engineer to act in accordance with the oral instructions allegedly given to them when the vessel was delivered into the charter on 6 February 2015;

(b) for the repair of the resultant damage to the vessel pursuant to cl 9 of the charter;

A3.3 Whether (as the plaintiff contends) the defendants by reason of those breaches of the due diligence obligations at delivery, they caused the SSTA failure and are liable for the SSTA failure.

A4 If issue A3.1(a) above is answered in the affirmative, what loss and damage has the plaintiff suffered as a consequence of the defendants’ breach of cl 2 of the charter? and what damages is the plaintiff entitled to in respect of that loss and damage?

**Issues arising in relation to the defendants’ cross-claim**

B1.1 In relation to the defendants’ claim for delay damages:

(a) when was the vessel redelivered from the charter by the plaintiff?

(b) was the vessel redelivered from the charter by the plaintiff at 0800 hours on 18 February 2015 at Gladstone or at 0500 hours on 18 March 2015?

(c) whether in breach of cl 14 of the charter, the redelivery of the vessel by the plaintiff:

(i) at 0800 hours on 18 February 2015 at Gladstone (as the defendants contend), what damages arise from such a breach?

(i) at 0500 hours on 18 March 2015, was there a 27-day delay in the redelivery of the vessel, as the defendants contend?

(d) was there was a 27 day delay in the redelivery of the vessel, as the defendants contend?

(e) if so, was the plaintiff was responsible/is liable for that delay ?

(f) whether any such breach caused the defendants the loss of opportunity to earn future hire from the vessel?

(g) if so, are the defendants entitled, as they claim, pursuant to cl 14 of the charter to payment from the plaintiff of $10,000 per day?:

(i) for each day of the delay period?

(ii) for each day during the period in which the vessel is to undertake the starboard shaft damage repairs?

(h) or is, as the plaintiff contends, cl 14 of the charter a penalty and as such unenforceable by the defendants?

B1.2 Whether by cl 9 of the charter, the plaintiff was obliged to:

(a) appoint competent crew;

(b) maintain the vessel in a good state of repair;

(c) take immediate steps to repair the vessel at its expense;

(d) man, operate, supply fuel and repair the vessel whenever required, at its expense.

B1.3 If issue B1.1 [sic-B1.2] above is answered in the affirmative, whether the plaintiff breached cl 9 by:

(a) appointing incompetent crew because the master, engineer and/or deckhand:

(i) closed the tap/valve to the SSTA after delivery (for whatever reason); and/or

(ii) failed to open the tap/valve to the SSTA, whether it was closed at delivery or closed after delivery (for whatever reason);

(iii) having observed the consequences of the tap/valve to the SSTA being closed on 7 and/or 8 February 2015, whether there was a failure by the Master / Engineer to:

1. act in accordance with the oral instructions allegedly given to them when the vessel was delivered into the charter on 6 February 2015;

2. operate the vessel in accordance with or consistently with the instructions contained in the EJ Seal manual on board the vessel;

3. operate the vessel consistently with the SMS Manual on board the vessel by contacting Ms Lopez, as the designated person ashore to determine the problem.

(a) the appointment of the incompetent crew which caused:

(i) the SSTA to fail;

(ii) the prohibition notice to be issued by AMSA (and the resultant consequences of such a Notice being issued).

(b) failing to maintain the vessel in a good state of repair, repair or taking immediate repair works for the SSTA failure and each of the other items identified in the prohibition notice;

(c) failing to fuel the vessel in Gladstone for a delivery voyage to Redcliffe.

B2 In relation to the defendants’ claim for breach of charter:

B2.1 (a) whether the plaintiff was in breach of cl 14 of the charter as the defendants allege? and; if so

(b) whether the defendants are entitled to recover the delay damages claimed?

B2.2 (a) whether the plaintiff was in breach of cl 7 of the charter as the defendants allege? and; if so

(b) whether the defendants are entitled to recover the costs of the defendants Inspection claimed?

B2.3 (a) whether the plaintiff was in breach of cl 9 and cl 12 of the charter? And; if so

(b) whether the defendants are entitled to recover by way of damages the costs claimed in?:

(i) the cost of the inspection of the vessel once the prohibition notice had been issued (cl 7);

(ii) the cost of the survey work undertaken on 5 and 11 March 2015 to remove the prohibition notice (cl 7)

(iii) the cost of the repairs;

(iv) the replacement of the lost equipment;

(v) the cost of Mr Egan’s wages of $1,000 on the delivery voyage;

(vi) re-fuelling the vessel in Gladstone for the Gladstone to Redcliffe voyage;

(vii) re-fuelling the vessel in Redcliffe to reinstate the vessel to the state of repair as at delivery;

(viii) replacement of the broken and unusable firebox; and/or

(ix) loss of opportunity for future hire of the vessel.

B2.4 Alternatively, whether the defendants are entitled to an indemnity from the plaintiff under cl 9 of the charter as claimed in respect of:

(a) the repair costs?

(b) the shaft repair costs?

B3 In relation to the defendants’ claim in negligence:

(a) whether the plaintiff owed the defendants the duty of care, namely, to take all reasonable steps to ensure the safety of the vessel including by:

(i) employing a competent master, engineer and crew; and

(ii) navigating and operating the vessel safely?

(b) if so, whether the plaintiff was in breach of that duty of care, in the particular respects?

(c) if so, whether the defendants are entitled to recover by way of damages for the plaintiff’s breach of duty of care?

B4 In relation to the defendants’ claim for wrongful arrest:

B4.1 whether the plaintiff unreasonably and without good cause obtained the arrest of the vessel? and; if so:

(a) what, if any, loss or damage did the defendants suffer as a result?

(b) whether the defendants suffered the loss and damage claimed?

B4.2 whether the plaintiff unreasonably and without good cause demanded excessive security at the time of the arrest by reason of the matters alleged? and if so

(a) what if any loss or damage did the defendants suffer as a result?

(b) whether the defendants suffered the loss and damage claimed?

B5 What damages, if any, is each of the defendants entitled to as against the plaintiff, in respect of their aforesaid claims?

# KEY WITNESSES

1. Before addressing the competing contentions on the evidence, the findings and the law, I propose to comment on the evidence of those persons treated as the key witnesses.
2. Mr Ryan, as Master of the vessel, gave evidence about the induction. Mr Ryan said that the induction was a busy occasion, with a lot of movement of people on the vessel in the morning. He left the vessel to get something to eat and returned at about lunchtime. Upon his return, there continued to be a lot of activity. He said there was a short induction of 30 minutes or so conducted by Ms Lopez. He was happy with the shortness of the induction because he understood that a person experienced with the vessel would be provided to sail as part of the crew for the voyage to Gladstone. This would enable the plaintiff’s crew to further familiarise themselves with the vessel and its operation. Mr Egan was subsequently provided to join the crew for the voyage. Mr Ryan recalls Ms Lopez saying that if she could not find anyone, she would go herself. He also recalled Ms Lopez pointing out the vessel’s procedure manual and safety manual during the induction, but did not recall her making any references to taking temperature readings from the stern tube seals. Ms Lopez did not show Mr Ryan the stern tube seals or inform him as to the method of inspecting the stern tube seals, or of any potential issue that could arise in relation to the stern tube seals, or that an inspection of the stern tube seals should be conducted hourly and recorded in the log book.
3. Mr Ryan went on to describe the vessel, the vessel’s voyage from Redcliffe to Gladstone and being uncomfortable at times due to a following sea. He then recalled the voyage from Gladstone to Heron Island and return on 7 February 2015. This commenced at about 1122 hours, when the vessel sailed from Gladstone Marina on a return voyage to Heron Island, arriving at Heron Island about 1340 hours on 7 February 2015. Mr Ryan describes this voyage as uneventful. On the same day, at about 1450 hours, the vessel sailed from Heron Island bound for Gladstone Marina. Shortly after leaving Heron Island Mr Ryan recalls Mr Crow, one of the vessel’s deckhands, coming to the wheelhouse where Mr Ryan was standing with the vessel’s engineer, Mr Snaith, and saying words to the effect that he could smell a burning smell coming from the rear of the vessel. Mr Ryan then recalls backing off the vessel’s speed, whilst Mr Snaith left the wheelhouse to investigate. At this time, the vessel had passed Erskine Island and Mr Ryan altered course slightly to shelter in the lee of Polmaise Reef. Mr Ryan said that they had “pretty much stopped there whilst the burning smell was being investigated”. Around five minutes later, Mr Snaith reported back to Mr Ryan in the wheelhouse saying words to the effect of “we have a small oil leak onto the transmission. I don’t think it’s anything to worry about. I’m going to have a look at the engine room then come back and report”. Mr Snaith then left the wheelhouse.
4. Another five minutes or so later, Mr Snaith reported back to Mr Ryan in the wheelhouse saying that there was “water leaking from the [SSTA] at a fast drip but it [was] manageable”.
5. Mr Ryan then decided to continue with the voyage to Gladstone Marina, arriving at Gladstone Marina about 1715 hours on 7 February 2015. During that voyage back to Gladstone Marina, Mr Snaith reported to Mr Ryan every 20 minutes or so with words to the effect that everything was fine and there was no change in the leak, it was manageable.
6. After returning to Gladstone and disembarking passengers, Mr Ryan recalls entering the starboard engine room to inspect the SSTA. He observed the stern seal to be dripping water at that time and said that it did not look “healthy” to him. Although Mr Ryan held a relevant qualification, he thought that someone more experienced with stern seals should be invited to come and have a look at it. The following day was a Sunday, so he deferred any contact at that point. His evidence was that he did not attempt to undertake any maintenance of the SSTA on Saturday, 7 February 2015, nor had he undertaken any maintenance of the seal prior to that day, nor did he observe any other person attempting to undertake any such maintenance on 7 February 2015 or prior to that date.
7. On the Sunday, 8 February 2015, prior to embarking on its passage, Mr Benn attended on board the vessel to inspect the SSTA. With Mr Snaith and Mr Benn, Mr Ryan inspected the SSTA, although he was “popping” in and out as he had other things to do to get the vessel ready for sailing again. Whilst Mr Benn was looking at the seal, Mr Ryan heard him say to Mr Snaith words to the effect “this has just been adjusted recently, there are marks on the grub screws on the coupling”. Mr Ryan gave evidence that he did not adjust that coupling and he had not observed any other crew member adjust that coupling at any time prior to the evening of Sunday, 8 February 2015. Mr Ryan noted that at that time Mr Benn did ask Mr Snaith whether he had just adjusted it. In response, Mr Snaith said that he had not adjusted it at all.
8. During this inspection, Mr Benn tracked the water supply to the SSTA and Mr Ryan recalls Mr Benn saying that he had found the inside valve in the closed position. Again, Mr Ryan said he had not closed this valve, nor had he observed anyone in the plaintiff’s crew close the valve.
9. Following Mr Benn’s inspection, to check whether this valve should in fact have been left in the closed position, Mr Snaith and Mr Ryan both went to check whether the same valve in the port engine room was closed. Significantly, as will be seen, Mr Ryan observed that the valve to the same cooling line in the port stern tube assembly was missing its handle, and on checking, using another handle, he could see that it was also in the closed position. Again, he had not closed the valve at all, nor had he observed any of the plaintiff’s crew close the valve. Mr Ryan says that neither he nor anyone he observed removed the handle from the valve.
10. Mr Ryan’s recollection of Mr Benn’s advice at the completion of the inspection was that doing a trip was manageable and it could be adjusted on return that evening.
11. At 1140 hours, on Sunday, 8 February 2015, Mr Ryan said the vessel sailed from Gladstone Marina on a return voyage to Heron Island, retuning to Gladstone Marina at about 1645 hours. During that voyage the plaintiff’s crew monitored the condition of the SSTA, Mr Snaith saying words to the effect “it’s still the same. It’s still manageable”. The voyage to and from Heron Island was otherwise uneventful, subject to a fuel pressure issue which arose on the trip back to Gladstone Marina.
12. On the same day and on returning to Gladstone and after disembarking passengers, Mr Ryan loosened the coupling that abuts the rubber boot part of the SSTA, pushing the coupling up the shaft by a few millimetres in order to tighten the stern tube seal before tightening the coupling. Before doing so, he used a marker pen to mark the shaft so that when he pushed up the coupling he could ensure that it remained perpendicular to the shaft. In the late afternoon, or early evening of 8 February 2015, after the vessel had returned to base and disembarked passengers, Mr Ryan had a telephone conversation with Ms Lopez to discuss the fuel pressure issue which had arisen that afternoon on the return voyage from Heron Island. During the call Mr Ryan also recalls a discussion about the starboard stern tube. He handed the phone to Mr Snaith who also had a discussion with Ms Lopez before returning the phone to Mr Ryan. Mr Ryan recalls the substance of the telephone conversation between Ms Lopez, Mr Snaith and Mr Ryan, insofar as the starboard stern tube was concerned, was that the stern tube had, on 7 February 2015, begun leaking, heating up and was smoking and that upon inspection it was discovered that the valve on one of the cooling water lines to the SSTA was closed and that the plaintiff’s crew had not touched the valve.
13. A transcript and audio recording of that phone conversation was produced and is in evidence.
14. On the morning of 9 February 2015, Mr Tim Fish of MIPEC Slipway inspected the vessel’s SSTA. Mr Ryan does not recall Ms Lopez’s request for Mr Fish to attend, but rather thought it was Mr Snaith who asked him to attend. Mr Fish said that without opening up the seal and having a look at it, he would not go to sea with that seal. On the same morning, after the inspection, photographs of the SSTA were forwarded to Rogers & Lough seeking an opinion as to whether the vessel should proceed to sea. Mr Snaith spoke with Rogers & Lough and reported to Mr Ryan that Rogers & Lough had indicated that they could not evaluate the seal based on photographs alone. No voyages were undertaken on 9 February 2015.
15. On 10 February 2015, an inspector on behalf of AMSA attended on board and inspected the vessel. Following the inspection, the inspector issued a notice to the vessel prohibiting the vessel from any further operation.
16. Mr Ryan produced his log book entries for 6-8 February 2015. He wished to correct two time records. The first was an entry on 7 February 2015, when he had said “stern tube seal failure STB, drift behind Polmaise Rf to monitor water ingress. Observed fast dript water ingress. Monitored until arrival alongside marina”. He wanted to qualify that the timing of that entry should be about 1525 hours, rather than 1500 hours, because he recalled that the stern tube failure was reported to him in the wheelhouse after the vessel had passed Erskine Island (recorded in the log book as being 1513 hours) and before the vessel passed North West Polmaise (recorded in the log as being 1535 hours) on 7 February 2015. He also sought to correct an error in relation to the time for arrival at Heron Island on 8 February 2015. The log book entry showed this relevant time as being 1555 hours, whereas the entry should have read 1335 hours. Mr Ryan had also made a handwritten statement in which he noted that the time at which the statement “deckhand [Mr] Crow came to bridge to advise of a burning smell coming from sub-engine room” was made should have been 1525 hours and not approximately 1500 hours as indicated in that statement. These timing adjustments were explored at considerable length by the defendants.
17. Mr Ryan said that when the vessel could not be operated due to the requirements of AMSA, the plaintiff took steps to hire from Mr Benn’s company its vessels “Seawatch”, “RB Trojan” and “Sarah B” to take passengers to and from Heron Island instead. Mr Ryan worked on “Seawatch” and “Sarah B” as a Master taking passengers between Gladstone Marina and Heron Island.
18. The relevant cross-examination of Mr Ryan (and the other witnesses for the plaintiff) will be considered when I come to consider the submissions advanced for the defendants. I considered that the Master of the vessel, Mr Ryan, was an honest witness. I think he tried to cooperate and although there were gaps in his recollection, that is not a factor inconsistent with common experience. In particular, his recollection was hazy about the matters he was shown on the induction, but that is not surprising.
19. I accept the plaintiff’s submission that Mr Ryan gave evidence in a straight forward and reliable way. I accept his evidence that the first indication of a problem with the stern seal was when Mr Crow discerned a burning smell at about 1525 hours after the vessel left Heron Island on the afternoon of 7 February. No real challenge was made to his credibility in cross-examination. He denied (to the extent he could be aware of it) that anyone on the vessel adjusted the valves prior to the smell or that there was any earlier problem with the SSTA.
20. Mr Snaith was the engineer on the vessel from 6-8 February 2015.
21. His evidence was largely corroborative of the evidence in chief given by Mr Ryan. I was initially impressed with Mr Snaith as being a reliable witness, but towards the end of his evidence, in cross-examination, certain inconsistencies between his recollections and what was said in the telephone conversations were identified.
22. More particularly, a real difficulty with Mr Snaith was the following cross-examination:

Now, you might recall that last evening the judge gave you a direction about not conferring with anybody about the evidence. Do you recall that? - - - Yes.

Where did you go to when you left the court here yesterday? - - - I went to a – a bar at – on Ann Street, and I spoke to Mark.

You met with the master, didn’t you? - - - Yes.

And whilst you were there, you spoke about Kerry Lopez? - - - No.

And you spoke about the log entries? - - - No.

And you spoke about the wharf at Redcliffe – what happened? - - - No.

And you spoke about Heron Island, and what happened at the wharf in Heron Island? - - - We did – we did speak generally, but not about the case. That was my understanding.

Well, what exactly did you say? - - - asked him how he felt. He said he needed a rum, so I said, “Okay. I will go into the bar and grab you a couple of rums.” As soon as we came out – when I first got there, we – we spoke how was it going, and basically I was interested in how he felt. And then he – he said it was a bit – a bit out there, and a bit – what do you call it – it was a long day sort of thing. I bought him a couple of rums, sat down, and I got a text from Drew, saying, “Don’t talk to anyone.” We – I showed him the text, and he said, “All right, Ron. We better go,” and we agreed that – to have – we agreed to have room service to – to not talk about it any more.

And what time did you leave? - - - It was – it was basically 10 minutes later, I suppose.

Well, roughly what time was that? - - - I – I can’t recall the actual time I was there.

Well, did you leave straight from the court and go there? - - - Yes.

Yes. And so what time did you receive the text from Drew? - - - Are you able to text that on your phone? - - - I’ve actually deleted all that, so.

Okay. And I put it to you that you were there until 5.15, that you left here when we – the court was adjourned at 4.15, and you went to that bar until 5.15? - - - That’s a long time. That’s - - -

Well, you had two glasses of rum? - - - I had one – one.

Well, okay. Well, Mr Ryan had two glasses of rum? - - - Mmm.

I put it to you that there were two girls seated beside you, and they overheard your conversation, and that you were speaking about what happened at Heron Island and the significance of the time entry in the logs of 14:54? - - - Yes, that did happen.

Yes. And as a consequence of that discussion, today you’ve come to this court and you have told the court that it’s in your usual practice to mark in the time that you leave Heron waters rather than admit what really happened was at 15 – 14:54 was there because that’s when the water leakage was first observed? - - - No, I disagree with that.

But you admit discussing significance of the 14:54 entry - - -?- - - Yes, .....

- - - in the logs? - - - Yes, I do.

And you would admit to me that that is discussing the evidence that was before this court? - - - Yes, I do.

And it’s fair to say that that’s not the only thing that was discussed by you about the evidence before this court? - - - Yes, that’s right.

That’s all you said? - - - We – we – Mark was saying how your accusations were a bit outlandish or whatever.

He’s allowed to say that? - - - .....

He’s entitled to his opinion, but in the process of doing that, you discussed what questions that he had been asked? - - - Yes.

Yes. And what answers he had given? - - - They were vague.

Well, did you or did you not discuss the answers that he gave to this court? - - - Very quickly.

Yes. So you knew what questions were being asked in this courtroom? - - - The 14:54 question, yes.

And other questions? - - - Well, I don’t recall.

And is it fair to say that you don’t actually recall a lot of things that are not convenient to recall? - - - No, I disagree.

1. If the plaintiff’s evidence depended solely on the evidence of Mr Snaith, there would be difficulties for the plaintiff. Nonetheless, I do not accept that the shortcomings in the evidence of Mr Snaith that I have identified positively indicate that he or anyone else in the plaintiff’s camp was established to have turned the valve to the closed position.
2. The timing of entries in the log book were treated as being of great moment by the defendants (as will be seen below), but for reasons I discuss below, very little it seems to me, turns on this topic.
3. As noted above, I will deal with his other relevant cross-examination when considering the defendants’ submissions.
4. Mr Crow was a deckhand on the vessel. His evidence was very brief. In evidence in chief, like other witnesses, he denied touching or turning off any valve to the SSTA. Both in evidence in chief and in cross-examination, there were some minor inconsistencies between his evidence and that of Mr Ryan and Mr Snaith (as there were with Mr Harvey, discussed below). However, I accept the plaintiff’s submission that these variants did not suggest any dishonesty and they were inconsequential on the key issues.
5. Mr Harvey was also a deckhand. The plaintiff had proposed calling Mr Harvey by video. The defendants had opposed this course. With some urging from me, the plaintiff arranged for Mr Harvey to fly to the hearing and give evidence. Mr Harvey was clearly not delighted to be there. Nor was he delighted with the “50 million” questions he was asked, but despite all of this, I found him to be a plausible witness. I certainly do not consider that Mr Harvey “turned off the tap”.
6. Having heard the plaintiff’s evidence and cross-examination of the lay witnesses, I am satisfied that the plaintiff has established that none of its crew went into the engine room on 7 February 2015 prior to noticing the burning smell. The vessel arrived in Gladstone at about 0915 hours on 7 February 2015 and the crew then spent time loading life-rafts and preparing for passengers. During this time, there was no reason for any of them to enter the engine room, other than Mr Snaith who conducted regular checks. There was no evidence of any problem on that voyage. At Heron Island the plaintiff’s crew again say they were assisting passengers disembark and assisting new passengers to embark in accordance with standard practice. I accept this evidence.
7. As will be discussed further below, the defendants have raised some speculation of sand or coral getting into the stern tubes because the tide was low. The tide was in fact half tide, rather than low tide. I do not accept that it is established that the manner of operating the vessel in and around Heron Island caused coral or sand to enter the SSTA. In my view, this was speculation created for the defendants in circumstances where it was difficult to prove that any of the plaintiff’s crew had actually turned off the relevant valve. I do not mean this in any sinister sense. The defendants were simply looking for answers and thought coral or sand might be one of them, but there is no more reason to find that this hypothesis was established than to find someone for the plaintiff turned off the valve. To do so would be merely to speculate which is, in my view, unwarranted.
8. There is no doubt that the SSTA did fail. I accept the evidence of the burning smell, which was caused by the stern tube bearing having failed.
9. To prove that the valve was open at the time of delivery of the vessel, the defendants relied upon the evidence of Mr Simmonds, a marine surveyor, who, as previously discussed, is an AMSA accredited marine surveyor employed by AMC. He conducted the on hire survey and the off hire survey. During on the on hire survey, he took some 946 photographs of everything which he considered was relevant and important.
10. Mr Simmonds reviewed all of those photographs and although one is of the starboard shaft and the SSTA, none identified the position of the valve of the SSTA. Notwithstanding this, Mr Simmonds’ evidence was that he observed that the valve to the SSTA, which supplied cooling water, was partly open. This he said was the correct position for the valve, which should be partly or wholly open so that the water cools the bearing. The valve, he said was, partly open as a means of regulating the amount of water entering the seal, but so as still to allow pressured water through. His evidence was that Ms Lopez had informed him that the position of the valve had been set by Rogers & Lough.
11. Unfortunately, I found Mr Simmonds’ account somewhat problematic. His recollection, despite the absence of any corroborative photograph amongst the 946 that he took, that the starboard valve was in a partially closed or partially open position (which was the correct) position, did not accord with evidence he gave that the port side valves were fully open. Nor did he give evidence, despite a very detailed statement, of observing that the port side valve was missing a handle. I considered this to be of some importance given his very detailed evidentiary account. He gave evidence that a partly closed valve or a removed handle were matters of concern which he would have photographed and included in his report, but there were no such photographs. His report contains a disclaimer that only a reasonable visual inspection was conducted and no responsibility was accepted for latent or other defects not discoverable on that basis and that his report was not a certificate of seaworthiness or a guarantee of condition. I also found the tenor of the evidence given by Mr Simmonds to be somewhat defensive, although it must be said, in fairness, that he was being pressed in cross-examination. He sought, in my view, to support the defence position rather than to deal with questions dispassionately. It is possible, although I do not need to affirmatively find, that he was, over time, confused with matters he had been told by Ms Lopez. As will be seen, I also did not consider the evidence of Ms Lopez to be reliable, which presents a considerable difficulty for the defence. The following extract of transcript in cross-examination of Mr Simmonds is an example of those difficulties:

But what I want to suggest to you is, that where you don’t have access to a photo and it’s not in your report, you are unlikely to have a specific recollection of a particular part of the vessel? - - - It all depends on the circumstances and what phase of an inspection I’m going through. I understand the basis of your question, and if I can elaborate.

Only if it’s necessary to answer my question? - - - Yes, it is, because I was sitting on top of the particular valves that are the point in case why we’re all here and I had a good conversation with Kerry Lopez as I was effectively sitting on it. So

I will come back to the conversation in a moment. I’m not? - - - Yes.

I’m not asking you about that subject at the moment? - - - Yes. It’s because of that I

Okay. And I? - - - I have a strong recollection.

Okay. Now? - - - In fact, it’s fact.

All right. You appreciate I haven’t asked you about that yet, don’t you? - - - Yes. Fair enough.

I appreciate you want to tell me about it but? - - - Okay.

This will be quicker if we stick to the questions that I ask? - - - Okay.

Would you agree that proper practise with the stern tubes or a vessel of this kind was for both of the valves to be fully open?- - - Not necessarily, no.

Well, certainly none of them should have been fully closed, should they? - - - For the supply water for the valves to the stern seal and stern tube, no, they should not have been fully closed.

Neither the raw water nor the water that has gone via the gearbox? - - - The water that goes via the gearbox or via the – the oil cooler are two separate circuits particularly in that vessel. But they’ve been pre-set. All the parameters on the valves that fed to the stern tube were pre-set by Rogers and Lough.

I suggest to you that that’s wrong? - - - Well, you can suggest that. That’s my understanding.

On what basis do you understand that they were set by Rogers and Lough? - - - Based on the information given by Kerry Lopez when I was sitting on the valve.

Now, would you agree that it’s bad practise to remove the handles off the valves for the stern tube seals – the valves? - - - Which – which particular valve are you talking about? - - - There’s three valves.

I’m asking you as a general proposition? - - - Well, you’re asking a specific valve question.

Okay. I will put the question again? - - - Yes.

Would you agree that it would be bad practise to remove the valve handle off any of the valves for the stern tube arrangements? - - - Not necessarily, no.

Certainly if that’s something that you saw on a survey, you would record it in your report, wouldn’t you? - - - Not necessarily, no, because I don’t – I don’t inspect every subsystem on a vessel.

All right? - - - I’m trying to gather a snapshot on the day.

Unless there’s something Ms Lopez particularly tells you about? - - - Well, she happened to be there when I was in that section of the vessel. And she was with me when we were doing tank dips.

Right. If you saw a water cooling valve to the stern tube system, would you agree that you would have photographed it if it was closed? - - - Yes, I would have.

And the reason you would have done that is because it was a matter of concern? - - - Matter of interest.

Well, it would indicate that the stern tube arrangement was not getting adequate water supply, wouldn’t it? - - - I inspected the engine when the engine was in a shut-down condition so

Is there a reason why you don’t want to answer my question? - - - I’m answering the question, thank you.

Okay. Please continue? - - - Well

Have you answered it? - - - The engine wasn’t running and you’ve asked earlier if – if the raw water salt water valves to the main engines were open or closed and it all relates to the same cooling system circuit for a main engine and its components.

Right? - - - So up to individual operators on how they run their vessels. Any valves that re set and then often with valve handles, we move – to go back to your valve handle question – is often so that people don’t inadvertently change parameters or turn them on or off beyond what hopefully they had set it at.

Right. Did you have a conversation with Ms Lopez about whether valves had been removed by Rogers and Lough? - - - No, I didn’t. We had a conversation about valve setting.

Right. And it was your understanding that they were set by Rogers and Lough and never changed except for maintenance? - - - That’s my understanding.

Right. Now, you would agree that you took no photographs of the port stern tube valve arrangements either, did you? - - - No, I didn’t.

Right? - - - I’m going off memory. I would have to check that but I – I believe that to be the case.

And would you accept that if you go off memory alone, you had no recollection of how the port side valves were set? - - - No, that’s not true.

Well, what do you remember seeing on the port side? - - - Very similar arrangements as the starboard.

Could you describe what you recall seeing? - - - The main water inlet branch pipe coming out of the – the cooling water circuit to the stern tube arrangement has two valves – one main feed valve and then they go into inlet water for the seal and inlet water for the stern tube.

And I take it from that answer that you do not recall the position of the valves when you made those observations? - - - Okay. **The valves were set at about 45 degrees which is partial flow**.

**And you made that observation by the position of the handles? - - - Yes.**

**Right. Can I suggest to you you are mistaken in that recollection? - - - You can suggest that but I disagree.**

**All right. What I want to suggest to you is that one of the valves on the port stern tube had its handle completely removed and it was set in the off position. Do you recall that? - - - Yes. Would you like to describe which one it was?** - - -

But you do recall that? - - - Yes.

**Well, I want to suggest to you that that’s inconsistent with your last answer**? - - - No. It comes back to my question to you – which particular valves are you talking about because there are three valves down there.

In your prior answer, you made no reference to the valve handle being removed, did you? - - - The valve handle that was removed was the one that was coming from the main engine oil cooler I believe which means that it’s a hot water circuit and was a – it’s there. I – I won’t query why it’s there but it’s there. It goes into the – the seal but it’s isolated. The salt water circuit that’s the cooler side of the circuit that then branches that goes to the seal and the stern tube was open – or partly open. Certainly wasn’t isolated.

(emphasis added)

…

**I thought you just told me that she told you about a prior problem in August with overheating at some stage during the inspection?** - - - **Yes, she did but it was in passing and I didn’t pursue it down to the nth degree because the logbooks I showed had showed that there had been an issue which, sort of, confirmed what she had mentioned and that they attended to it in a normal maintenance type manner**.

You had only reviewed? - - - So I didn’t – I didn’t grill her or give her the third degree.

Right. **But you had only referred to logbooks between December** **and February**, correct? - - - Yes.

Can I suggest to you that there is **no entry between December and February that refers to any such maintenance work?** - - - **Look**, I can’t tell you without checking my images because I take photos of the logbooks.

I ask you to assume that there is no such record? - - - I can’t answer that.

All right? - - - You can ask me to assume; I can’t answer it, so I won’t.

Okay. I want to suggest to you that **you never looked at any logbook records that showed maintenance work during that period and you know it**? - - - I beg your pardon? - - -

That you know you **never looked at no [sic] such maintenance records**? - - - **No, that’s incorrect**.

(emphasis added)

...

You regard yourself as giving evidence on behalf of Ms Lopez, correct? - - - I believe so, yes.

And expressing questions on general engineering questions, you regard yourself as doing so on behalf of Ms Lopez? - - - I believe so.

Yes. **You don’t regard the purpose of you attending here today to be an independent expert to assist the court, do you?** - - - **That’s not your understanding?** - - - **I’ve been here – I’ve been called here on behalf of Ms Lopez’s legal team**.

Yes. **But not as an independent expert to assist the court?** - - - **I don’t believe so**, no.

…

You referred in your affidavit to **engine hours of 4,000** hours. I think it’s paragraph 26? - - - Yes.

Are you able to tell me where you got that figure from? - - - Without reviewing everything no, not off the top of my head.

It’s not recorded in any of the logbooks I would suggest? - - - Okay. **Well then I must have got that from Lopez**.

…

(emphasis added)

1. Apart from Mr Simmonds, the defendants called three other witnesses.
2. Mr Benn gave evidence as to the appearance of the SSTA and the valves and, particularly of the grub screws on 8 February 2017. I accept Mr Benn’s evidence. I do not accept the contention that the shininess of the grub screws is necessarily indicative that there could only have been work performed on the grub screws while the vessel was in the hands of the plaintiff. There is no evidence to support this contention at all. The shininess could have been on the screws for a longer period of time. I am not prepared to speculate that the shininess must have been caused by some intervention on the part of the plaintiff during the voyage.
3. Mr Egan gave plausible evidence which, in my view, was neutral to the actual dispute. In his affidavit he explained that from 2008 he worked on the vessel on a casual basis for Moreton Bay Whale Watching Tours as a master or engineer during each whale watching season (which runs from about June to November each year). He explained that during his work as an engineer on the vessel, amongst other things, he knew which valves should be on and which valves should be off due to familiarisation with the vessel’s systems. He also noted that he has never seen a valve to the stern seal (port or starboard) off whilst the vessel was underway. He further stated that whilst he was a master or engineer on the vessel, there had never been a problem with either the port or starboard stern seals.
4. Prior to the delivery voyage, Mr Egan recalls the induction taking place, although he played no active role in the handover. He spoke with the Messrs Ryan and Snaith of the plaintiff’s crew and recalls telling them that he was not the master and that the plaintiff’s crew were responsible for the vessel, although he would assist if requested. Before leaving Redcliffe, Mr Egan recalls changing a water pressure switch with Ms Lopez located on the inboard side of the port main engine on the fresh water side of the cooling system. In his opinion, at the departure of the vessel from Redcliffe, the vessel was fully operational and in a seaworthy condition.
5. During the evening of the delivery voyage, Mr Egan recalls walking around the main engines to check for leaks, smoke and any other issues. He notes that he did not specifically check the stern seals on port or starboard but rather did a quick visual inspection. During this inspection, he did not notice any issues. In his opinion, if the cooling water for the stern tube was off, it would have been over heating the seal and he would have smelt it burning. From his understanding, there were no mechanical problems with the main engines, generators, shafts and stem seal assemblies during the 13 hour voyage.
6. Mr Lough was also an independent witness, but he did not corroborate the account of Ms Lopez regarding the August 2014 stern tube problems. To the extent there was a dispute about maintenance of the vessel generally, I would prefer his evidence to that of Ms Lopez. He gave his evidence in a detached manner and, in my view, was a credible witness.
7. The remaining witness, Ms Lopez, gave a great deal of evidence. My views in relation to her credibility I regret to say are not as positive. The plaintiff contends (but I do not fully accept) that the evidence of Ms Lopez should not be accepted, except where it is corroborated by documents, for the following reasons:
   1. her evidence was unresponsive and evasive, particularly when she thought the answer might adversely affect the defendants’ case;
   2. her evidence on critical issues was inconsistent with the account previously provided to MSQ. When challenged she unreasonably refused to concede that the two versions were inconsistent;
   3. the defendants’ discovery prepared by Ms Lopez was inadequate, particularly the failure to include maintenance records. She initially said the documents were all destroyed in a flood in 2011, but the documents were then produced during re-examination when another employee conducted a search. The Court should infer that Ms Lopez did not properly comply with the defendants’ discovery obligations, proffered an inaccurate excuse, withheld documents which she thought would not assist the defendants’ case and swore an affidavit verifying the discovery which was either incomplete or false;
   4. her evidence on the conversation with Mr Lough in August 2014 is incorrect and should not be accepted;
   5. her evidence on the position of the stern tube valves in her affidavit was inconsistent with her statement to MSQ. Further, her evidence that Rogers & Lough set the valve positions is inconsistent with Mr Lough’s evidence;
   6. her evidence on whether the recording of the telephone call on 8 February was intentional was inconsistent with her MSQ statement. The plaintiff submitted she intentionally recorded the telephone call in anticipation of a dispute because she was aware of a pre-existing problem with the vessel’s stern tube assemblies;
   7. she exaggerated her role as a supervisor at the Gladstone repairs in March 2015. MIPEC charged the defendants for supervision. When challenged in cross examination her evidence was unimpressive and evasive;
   8. she exaggerated the claim for the vessel fuel, and when challenged in cross examination her evidence was again evasive;
   9. her evidence in chief and in cross-examination on the pre-estimate of redelivery losses was exaggerated and directed solely to inflating her claim;
   10. her evidence on the interest rate applicable to the security to release the vessel from arrest was obviously incorrect and can only be explained as an attempt to inflate the defendants’ claim; and
   11. her evidence that there was no induction form for signature is inconsistent with the SMS manual.
8. The evidence of Ms Lopez was given in different tranches with various other witnesses interposed, notably, Mr Crow, Mr Egan and Mr Simmonds. I accept the defendants’ submission that giving evidence in a broken up manner like that is not particularly easy. That said, little, if any, of this was the plaintiff’s fault. The written evidence prepared for Ms Lopez, particularly on the cross-claim topic of actual loss, was not satisfactory. Regrettably, there were inconsistencies between her evidence and the account given to MSQ. I did find her responses on such matters both aggressive and at times evasive. It was clear that the discovery she provided was substantially inadequate, including the failure to produce maintenance records when that was a key issue in the case. On this topic she explained that the documents were all destroyed in a flood in 2011, but the documents were in fact then produced during re-examination when another employee conducted a search. I can accept this may be an unfortunate oversight, rather than deliberate obstruction or deliberate non-compliance with discovery obligations, but nonetheless, it was inappropriate and particularly inappropriate in a key area of the case. In my view, her account as to the setting of the valve positions and, in particular, that Rogers & Lough set the valve positions was inconsistent with, or at the very least not supported by, the evidence given by Mr Lough and I prefer the evidence of Mr Lough.
9. At about 1859 hours Mr Ryan telephoned Ms Lopez to discuss the performance of the vessel. The telephone call was recorded by Ms Lopez. The telephone call lasted for about 10 minutes. On 8 February 2015, at about 1917 hours Ms Lopez telephoned Mr Ryan to further discuss the performance of the vessel. During the telephone call Ms Lopez also spoke with Mr Snaith. Part of the telephone call was recorded by Ms Lopez. The telephone call lasted for, at least, about 30 minutes. I am not prepared, however, to conclude, as the plaintiff would invite me to do, that the reason Ms Lopez recorded the telephone call of 8 February 2015 was because she anticipated a dispute being fully aware of pre-existing problems with the vessel’s SSTA. While I do find the recording of that telephone conversation and the explanation for it strange, I am not prepared to speculate as to the motive. In any event, I do not consider that the content of the 8 February telephone call assists the defendants’ case in the way they contend. Rather, the case is consistent with Messrs Ryan and Snaith’s evidence.
10. From the commencement of the telephone call there is a discussion between Ms Lopez and Mr Ryan about a problem with the starboard engine’s RPM. It is clear that it was Mr Ryan who, in the context of the discussion of the problem with RPM, volunteered that the issue with the stern tube may have provided an explanation for the problem with RPM. He said “What would be a restriction was the stern tube seal. We had an issue with that and there was a valve closed off on one side on the port side”.
11. Mr Ryan freely volunteered that one of the valves was closed off. He would be unlikely to have done so if he had turned off that valve or knew that a crew member had done so.
12. Ms Lopez then told Mr Ryan not to “muck around with the stern tubes”. This caused Mr Ryan to ask whether one of the water supply lines to the stern seal assembly should be closed because the crew had observed one to be closed:

Mr Ryan: Yeah from both coolers need to be open? - - - Like the starboard on the inside the upside, out-board side and the in-board side of that...

Ms Lopez: That’s heat on the stern tubes right and if there’s any problem with the seals you’ll get over heating and then what will happen there is - basically that’s got nothing to do with the engine side of it. That’s nothing to do with the fuel that’s only water.

Ms Ryan: Okay. That’s what’s caused a restriction because they did heat up and the in-board side valve was turned off for the cooling running to the stern tube.

Ms Lopez: When was that?

1. Ms Lopez then suggests that the engineer must have closed off the valve, which is denied by Mr Ryan:

Ms Lopez: Did Ronny close one of those valves or something?

Mr Ryan: **No, no, no it was closed because we went and checked and thought it was strange, we went and checked the other side and that was open. So we opened up the in-board valve**.

Ms Lopez: But how did you know the stern seal was hot?

Mr Ryan: It was heating up, it was smoking.

Ms Lopez: Smoking?

Mr Ryan: Yeah, we believe it was that.

Ms Lopez: Oh shit so he’s closed off a valve then.

Mr Ryan: **No we didn’t close it we didn’t touch them. We didn’t touch that valve we didn’t even know it was there until we followed the plates all the way up. We’ve been inspecting them through the little inspection plate**.

(emphasis added)

1. Mr Ryan then handed the telephone over to Mr Snaith who continued the telephone call with Ms Lopez. Ms Lopez and Mr Snaith then discussed debris or sand getting in under the rubber boot (seal) to prevent it from spinning on the shaft. Then Ms Lopez asked about the collar (coupling):

Ms Lopez: You didn’t loosen off the collar at all?

Mr Snaith: We loosened off the collar [unclear].

1. Messrs Ryan and Snaith’s evidence was that the collar was not adjusted until that afternoon (8 February 2015) after passenger services had been completed for that day. Snaith makes this clear later in the case.
2. There was then a discussion about the volume of water that leaked through the stern seal and further discussion of “backing off the seal.”

Ms Lopez: How much did you have in there?

Mr Snaith: Enough for the alarm to go off.

Ms Lopez: Enough for the bilge alarm to go off?

Mr Snaith: Yeah.

Ms Lopez: The engine room bilge alarm?

Mr Snaith: Yes.

Ms Lopez: Oh shit. Right so a lot of water?

Mr Snaith: Yeah it came up [unclear] right up to the [two prongs] it came up to the top.

Ms Lopez: That’s not good, so you had a lot of water because those prongs are up high and that’s the highest point of the engine room so when that happens you actually have to - yeah right.

1. As I understand it, Mr Snaith is there referring to the level of the water on the return trip on the afternoon of 8 February 2015.
2. Then the discussion returns to the closed valve and Mr Snaith said that he does not know who closed the valve:

Ms Lopez: So you backed off that seal a lot then you must have had a lot of water coming in from that seal aye? That’s the only way it could have come in, to get it that high.

Mr Snaith: Yes what’s happened is that ever since yesterday when we found the valve closed, today we’ve closed the valves open.

Ms Lopez: Who closed the valve though?

Mr Snaith: No idea, I didn’t even know that the valve was there ... situation. The port side valve … handle was missing ... and some of the [unclear] ... on the starboard side the handle is still there.

1. At the time of this telephone call, the problem which the crew had identified with the SSTA was a leak in the stern seal as one of the valves (the inboard valve) providing water to the stern tube seal assembly was closed. The crew queried whether it should in fact be closed. At this time, no one was aware of any problem with the stern tube bearing.
2. Generally, I did not accept Ms Lopez’s evidence about the pre-estimate of redelivery loss. The cross-examination on this topic made it clear that the $10,000 figure was, as described, a penalty. As I will discuss in more detail below, I find that there was no predetermined computation of actual losses.
3. Ms Lopez’s evidence in relation to the interest rate applicable to the security to release the vessel from arrest was also quite unreliable and disorganised. I accept the plaintiff’s submission that she attempted to inflate her claim in relation to the interest component.
4. Ms Lopez was present during the induction and I will touch on her evidence in relation to this, while indicating in advance that I prefer the evidence of the plaintiff’s witnesses in relation to the induction for the reasons I have indicated. I should obverse additionally, that the affidavit of Ms Lopez on the topic of the induction, like some other topics was very detailed and, in my view, having observed her recollection on other matters in cross-examination, artificially so. It was clear when she gave her evidence, particularly in cross-examination, that she was not able to recount events to the extent and with the same meticulous recollection that her affidavit portrayed. Her evidence in chief in relation to the induction was essentially as follows.

47. [The plaintiff’s] crew came on board at about midday. They were [Mr] Ryan, as the Master, [Mr] Snaith the Engineer and a deck hand crew member (**[plaintiff’s] Crew**) for the delivery voyage from Redcliffe to Gladstone. I do not recall his name, but have refreshed my memory by looking at the log for 6 February 2015. The deckhand's name was [Mr] Harvey. I knew [Mr] Ryan from my days of working at Heron Island.

48. [Mr] Ryan and [Mr] Snaith familiarized themselves briefly with the Vessel, then went shopping for food provisions for the delivery voyage. [Mr] Harvey assisted with placing the life rings including smoke flare re-fitted to external safety points.

49. On the return of [Messrs] Ryan and Snaith from their shopping, [Mr] Ryan expressed concern to me that he was unsure about sailing out of Moreton Bay, and asked if I could sail with them. I advised I had prior engagements and was unable to however, I would contact [Mr] Egan who had previously acted as the ship's master on the Vessel and also the ship's engineer whilst I was Master. I telephoned [Mr] Egan to see if he would assist in making the delivery voyage with the [plaintiff’s] crew. [Mr] Egan agreed to assist in the delivery and boarded the Vessel at about 15:30 hours on 6 February 2015. I introduced [Mr] Egan to the [plaintiff’s] Crew.

50. I would have charged [the plaintiff] for my time if I had sailed on the delivery voyage, as I would have been crew. As [the plaintiff] had requested and agreed to [Mr] Egan's services and return flight as crew, and under the charter, [the plaintiff] was responsible for providing the crew and paying for the crew, I have sought to recover the $1,000.00 I paid to [Mr] Egan for the delivery voyage.

51. After that, I undertook a handover of the Vessel to the Heron Crew as required by section 0.2.0 of the SMS Manual. This induction included but was not limited to all operating procedures for the Vessel. It took about 2 hours. I did not have a form for the [plaintiff’s] crew to say they had been inducted. It did not occur to me then, that such a form would be necessary, until the [plaintiff] charter, there has never been any issue about my handover procedure of the Vessel to any sub-charterers. Since 2002, I have bareboat chartered the Vessel 13 times.

52. My handover consisted of demonstrating to [Mr] Ryan and [Mr] Snaith the port and starboard air-flap shutoffs located in the main saloon along with locating each and every fire extinguisher located in that saloon area at each exit. I physically activated these flaps so they knew how to contain air from the engine-rooms in the event of a fire.

53. I then physically showed Ryan and Snaith in my presence at all times (in the following order):

(a) the fuel shutoff lever located at the top of the entrance to the engine room compartment;

(b) the activation switch for the fire suppression system located above the bulk head engine room door on both port and starboard sides;

(c) the fire hydrant and fire hose located outside the starboard engine room door on the aft deck;

(d) by entering the starboard tiller flat and demonstrated:

i. how to complete from the transom to the bow consisting of 5 water tight compartments being the tiller flat, engine room , fuel void, void 2 and void 1

ii. how to operate the Vessel's steering, including the emergency steering and rudder locking device and its location, the individual bilge pumping systems, the firefighting pump and valve and discharge arrangement and the Mistex fire suppression arrangement located in the tiller flat;

iii. the Vessel's discharge and overboard valves - grey and black water systems, ships tool boxes and spares and the salt water sea pumps for toilet systems.

(e) by entering the engine room and:

i. demonstrating the auxiliary exhaust valves and start up and shut down system, operations, the battery isolating breakers advising which ones requiring activation and which breakers activated each battery bank and the complete start up and shut down procedures for the Main MTU Engines including the Engine Management System and breakers;

ii. demonstrating systematically, the stern seal inspection plates and arrangement, clearly advising the model and operation of the seals, advising that the valves remain open and that the seals and bearings are water cooled from the main engine raw water system and the gearbox cooling system being both a warm and cold water feed. I explained that these valves were set and that there was no requirement to alter the water feed. I asked [Messrs] Ryan and Snaith if they were familiar with the EJ Inboard Seals, to which they replied 'yes'. The Heron Crew did not ask me any questions regarding the seals and or the bearing arrangements.

iii. advising [Messrs] Ryan and Snaith that upon taking up RPM the procedures for my operation of the Vessel was that the engineer completes a physical engine room check which includes using the digital onboard heat gun to place around stern tubes, injectors, cylinder heads, oil coolers and to physically visualize the shaft and seals.

iv. advising [Messrs] Ryan and Snaith that my procedures required the onboard engineer to conduct an hourly engine room check along with entering the engineers log recording engine management data;

v. showing [Messrs] Ryan and Snaith the heat gun (i.e. temperature gun), which is kept at the top of the stairs in the engine room. The heat gun is used to test the temperature of various engine parts, including the stern seals, which were checked hourly by her crew; and

vi. showing [Messrs] Ryan and Snaith the Sea Cock located at the front of the main engine. I demonstrated a complete start up and shut down of the Main MTU Engine and her engine management system including scroll down pages for engine logging;

(f) the location and operation of the engine room bilge pump located at the front of the main engine compartment;

(g) the fuel void, and demonstrated the fuel valve feed to the main engine and the auxiliary engine. I showed them all the oils, spares and tank arrangements including the transfer fuel pumping system. I also showed them the individual 240 volt bilge pump located in the fuel void;

(h) by entering through the bulk head door to the second compartment void, I showed them the individual 240 volt bilge pump locate in this void;

(i) by entering the Void 1 Compartment showing, I showed them the individual 240 volt bilge pump locate [sic] in the void, the escape man hole hatch, the fuel and breather vents and the valve located in the void to drain the forepeak compartment.

54. By then I had then completed the ship compartment induction and its operating procedures. At no time did either [Messrs] Ryan nor Snaith indicate they were not happy or did not understand any of the operating procedures.

55. [Mr] Ryan did make mention to me that he witnessed a slight fuel leak from the first gallery on the outboard side of the main engine. I acknowledged this and explained it did not alter the performance of the Vessel. I advised there was [sic] minimal oil leaks on the main engines. I advised the Vessel did not use any excessive oil due to leaks and in fact the usage is 1% of the capacity of 160 litres per day which is Manufacturers recommendations.

56. I then took [Messrs] Ryan and Snaith into the wheelhouse and showed them all of the Vessel's documents and manuals including the complete written operating procedures for all aspects of the Vessel.

57. I told [Messrs] Ryan and Snaith that all of the relevant manuals were kept in alphabetical order in a white metal container. I gave the SMS Manual to Ryan and the Vessel's complete operating manual to [Mr] Snaith to read. Snaith commented to me that he wished his company had the documentation and manuals for their own Vessel and its operations. Snaith said to me in the presence of [Mr] Ryan how detailed the operating manuals were.

1. Ms Lopez also gave evidence about the maintenance of the vessel prior to this engagement.
2. On that topic, Ms Lopez said that she had commissioned Rogers & Lough to maintain the vessel and her running gear from 2007. Since 2007, Rogers & Lough had completed yearly routine maintenance on the vessel while it was slipped at the Brisbane Marine Industry Park. Rogers & Lough were commissioned by her through a previous entity that operated the vessel know as Eye-spy Events Company.
3. Ms Lopez said the vessel's maintenance logs record the maintenance work undertaken by Rogers & Lough. She said that it has been her practice to archive documents relating to the vessel at a storage facility so she does not lose these documents when the vessel is not under her control and out on charter. This storage facility is located at Redcliffe. Unfortunately, the storage facility was flooded during the Brisbane floods in 2011 and many documents were destroyed. She was unable to produce many documents relating to the vessel, including the 2010 maintenance log. She assumed it was one of the documents that was lost during these floods. She had no accurate way of knowing the extent of documents that were lost due to that flooding. Until this litigation, she had no cause to refer to the 2010 or previous maintenance logs. It was only when asked to produce these logs for this litigation that she realised that it must have been one of the documents lost in the floods.
4. From Ms Lopez’s discussions with Mr Lough, and from her review of each of the invoices that Rogers & Lough issued for work undertaken on the vessel since 2010, she said that:
   1. in 2010, Rogers & Lough fitted the vessel with a new seal on the starboard side and re-machined the face of the port side seal that had been replaced by Rogers & Lough in 2007. She referred to Rogers & Lough's tax invoice numbered SI2174. CHS Marine in June 2010 undertook a survey inspection and certificate, this inspection required a full out of water inspection including shafts being pulled and inspected and the starboard stern seal replaced;
   2. in 2011, the vessel was slipped and Rogers & Lough undertook works identified in their tax invoice number SI4246. At that time, no issue was raised with her about the seals and it was not a survey requirement for them to be removed and checked;
   3. in May 2011, CHS Marine Surveyor, Mr Tom Davies, attended the vessel whilst on the hardstand at Rogers & Lough to inspect and sign off on repairs for the annual maintenance slipping. The annual maintenance of running gear included the shafts, bearings and seals;
   4. in December 2011, Mr Davies attended the lift of the vessel for the purposes of providing an on-hire condition report for Riverside Marine (as the sub-charterer). During this lift the running gear was measured by way of a bump test condition report. Ms Lopez did not have any documents except the on-hire condition report accepted by Riverside Marine for the Barecon Charter. The bump test passed the surveyor's requirements and Riverside Marine accepted the results of that test. The condition of the vessel at delivery of any charter has always been agreed by all previous charterers, as the condition of the vessel has been surveyed by independent surveyors;
   5. in December 2012, the vessel was slipped for the purpose of a refit post the Gladstone Charter and during this slipping Rogers & Lough were engaged to carry out routine running gear maintenance, as set out in their tax invoice number SI7196. During the slipping, no issue was raised about the seals by Rogers & Lough and it was not a survey requirement for them to be removed and checked. During this slipping Ms Lopez engaged Mr Joe Akacich, an AMSA accredited surveyor from Blackpond Marine Consultants, to complete an on hire survey report for the purpose of a new charter agreement between Great Adventures and herself;
   6. in 2013, the vessel was slipped and Rogers & Lough performed the annual maintenance work identified in their tax invoice number SI9163. No issue was raised by Rogers & Lough about the seals and it was not a survey requirement for them to be removed and checked; and
   7. in 2014, she slipped the vessel prior to the on-season, as the annual routine procedure that she does, and Rogers & Lough carried out their inspection and completed minor works identified in their tax invoice number SI10034;
5. Two weeks before the charter with the plaintiff, the vessel underwent some minor maintenance repairs and sea trials. That maintenance work, Ms Lopez said, did not require the valve to the SSTA to be turned off. She says there was no reason for that valve to be turned off any time after that maintenance work. It is Ms Lopez’s practice, to leave the taps/valves to the stern tube assemblies in the same position that have been set by Rogers & Lough. Ms Lopez says that the only time that they are turned off (other than by Rogers & Lough) is if maintenance work has to be undertaken (such as on 21 August 2014), and then the taps are turned back on again, as they must for the vessel to operate properly.
6. Ms Lopez said that to satisfy regulatory requirements, the vessel was inspected on the slip on 12 June 2014 by Mr Earp for a below water line survey. The Commercial/Fishing Ship Certificate of Compliance for Survey (SUR 35740) was issued by Mr Earp following that inspection.
7. Further, Ms Lopez said that she was aware that in these proceedings, the plaintiff considers the SSTA to have been an ongoing issue rather than a catastrophic event and that she had failed to replace and/or maintain that seal. Ms Lopez disputed that. She was also aware, that the plaintiff intended to rely upon the events of 21 August 2014 for their case. She therefore gave evidence about the events of voyage of 21 August 2014 as they relate to the SSTA.
8. Ms Lopez said that before each voyage, a "Pre-Departure Check List" is worked through, which is found at s 7.37.1 of the SMS Manual. As the Master (and "owner") she ensures that the engineer has undertaken the Pre-Departure Check List and that the machinery and equipment are operational, as required by s 7.37.0 of the SMS Manual. It is her practice to record that these checklists have been worked through by ticking the box beside "Pre-Departure Check List" on the log for that day.
9. As "owner" and Master of the vessel it was her practice to have the engineer check the engine rooms once the safety brief has been announced and immediately upon taking RPM up and reaching continuous 1800 RPM after departure and then continuously each hour whilst the vessel is underway. That check includes using the heat gun on board the vessel, which is kept at the top of the steps of the engine room, to take temperature measurements on several different points throughout the engine room. That temperature check includes each of the port and starboard stern tubes and stern seals. Ms Lopez says that it is also procedure to physically visualise the external view of the stern seals by lifting the specially designed engine room plates.
10. On 21 August 2014, the vessel's engineer, Mr Daryl Sowinski was temporarily leaving the vessel to continue with his maritime studies. Ms Lopez said that a handover occurred with Mr Peter Vijver, as the new engineer. Mr Vijver had previously acted as engineer onboard the vessel for two whale watching seasons, however, Ms Lopez said the practice is to complete inductions/handovers to refresh the engineers due to the seasonal nature of her business. Therefore the Pre-Departure Check list and the post-departure requirements of the engineer were explained and refreshed to Mr Vijver as part of his handover.
11. After departure from Redcliffe, when the vessel was at normal sea speed, Ms Lopez said that engine room rounds were carried out by Mr Sowinski. Ms Lopez was the Master on the day and confirmed that Mr Sowinski used the digital non-contact thermometer. She received a message from the senior deck-hand that he had been asked by Mr Sowinski to relay a message to her to take the starboard engine back to neutral and travel on the port engine RPM only. Mr Sowinski noted a slightly higher than normal temperature on starboard stern tube. Ms Lopez said that she acted immediately upon engineer's instructions. She said she is very hands on in the operation of the vessel, as the safety of the vessel, her crew, passengers and whales are her prime concern. If she ever received notification that there might be a problem with the vessel, Ms Lopez would inspect and investigate the problem with the engineer, where possible. She said that the events of 21 August 2014, was an example of that. Ms Lopez said her involvement and decisions were based on the objective of operating a safe vessel for everyone.
12. Ms Lopez navigated the vessel on the port engine only for a further six nautical miles whereby Messrs Sowinski and Vijver remained in the starboard engine room. To allow the engineers to inspect the seal, Ms Lopez landed at the Tangalooma Jetty as opposed to continuing. Ms Lopez confirmed that once secured alongside the jetty, the vessel was completely shut down. Mr Sowlinski along with Mr Vijver and Ms Lopez then investigated and found the problem - a component fitted to the valve had collapsed. The engineers replaced the fitting whilst the vessel was shut down and secured alongside the Tangalooma Jetty. Ms Lopez observed that Mr Sowinski:
    1. released the compression collar so he was able to inspect the seal faces on both the rotating and stationary faces, both engineers were satisfied there was no damage;
    2. placed the adjusting bolts required to adjust the seal faces evenly using the digital verniers, measuring in all four places to ensure the seal faces were parallel;
    3. adjusted the minimal adjustment 2mm max and measured in four places to ensure seal faces were parallel; and
    4. removed the adjusting bolts. He then took measurements again in four places to make sure the seal had not moved and was still parallel.
13. Ms Lopez said that she knew this to be the correct procedure for adjusting the tension on the seals because it is clearly outlined in the Manufacturer's Manual that is located onboard the vessel. She said it is her responsibility as a master to understand the fundamental operating procedures of the stern seals on on her vessel or any other vessel she is master of. Ms Lopez said as a prudent owner she must minimize any issues that could cause her operation to have downtime which in turn would cause her a loss of income. Again, Ms Lopez submitted that it is her practice, since owning the vessel, to be completely hands on during the annual slipping so she is familiar with the working dynamics of the seals, and the importance of the watertight integrity of the seals. She says that she has been present during replacement and adjustments of the seals which is carried out by Rogers & Lough and her onboard engineers.
14. Returning to the events of 21 August 2014, Ms Lopez said that once the relevant components were reassembled, the passengers boarded the vessel and continued the whale watch tour. At Ms Lopez’s instruction, Messrs Sowinski and Vijver physically monitored the seal temperature in the engine room on departure and during the whale-watch tour (which consisted of a further four engine hours) to ensure its integrity and to ensure the seal was running at normal temperatures. She said they monitored the seal throughout the remainder of the tour with the non-contact thermometer and visual checks and determined that the seal, stern tube and bearing were all running within the required temperature and range.
15. Ms Lopez said that as the failure was unforeseen, she cancelled the next day's whale watching tour to thoroughly inspect all components and as a precautionary measure planned the lay day to replace all fittings, including valves and spares, associated with the shaft seal/stern tube water feed. This occurred. Ms Lopez said that she did this because, again, the safety of the vessel’s crew, passengers and whales are her principal concern. She says that she would prefer to be cautious as a vessel operator, even if it is a loss of a day's income, rather than go to sea and risk a marine incident occurring. Mr Vijver was involved in all events of the day 21 August 2014. Despite this, Ms Lopez recalls Mr Vijver expressing that he was content to take over from Mr Sowinski as the vessel’s engineer the following day. She further recalls Mr Vijver saying to her that he was happy with his handover and that the vessel was in operating order.
16. As a result of maintenance work on 21 August 2014, Ms Lopez said that no further incident occurred with either stern seals. She also said that following a passenger incident on the vessel on 30 July 2014, MSQ undertook a full audit of the vessel and her operations. Ms Lopez said that at no time during the vessel’s life had MSQ/AMSA identified a defect. If there was a defect she says that she would attend to the rectification of the defect without hesitation and that being a safe operator was her objective. Ms Lopez noted that whilst under her control, and during the vessel’s life, the vessel has never had a prohibition notice issued on it until the plaintiff’s charter.

# EXPERT EVIDENCE

1. With no criticism intended whatsoever of the experts, they ultimately added little to resolution of the dispute. Essentially, the case is about, as counsel for the defendants said, who “turned off the tap”. As I have explained, I am satisfied that none of the plaintiff’s personnel turned the valve off. I am not satisfied that the defendants have established the relevant tap or valve was not in a substantially closed position at the time of handover of the vessel at the commencement of the charter.
2. Of course, the experts can express no view on that, but have simply expressed views as to the likely cause of the damage.
3. The experts, Prof Hargreaves, Mr Ainscough and Dr Casey substantially agreed with one another. On analysis in the end, to the extent they reached different conclusions, it was largely on the basis of the assumptions they had been given and the information on which they based such views. The plaintiff’s witnesses had access to slightly more material, specifically Prof Hargreaves and Mr Ainscough had considered the content of the vessel’s log book and maintenance history, which supported a factual assumption for their conclusion that the cause of failure had developed over a period of time. Dr Casey, on the other hand, had not been provided with those records. He had not expressed an opinion as to what those records suggested. There was also a difference of view between the experts on the difference in pressure between the raw water and heat exchange lines to the seal, but on my understanding of the expert evidence, that distinction did not carry with it any consequence to what was substantially an overall agreement as to the cause of the problem. I thought all the expert witnesses gave their evidence helpfully and to the best of their ability on the material and information with which they had been supplied. Given that the plaintiff’s experts had the benefit of the information and material to which I have referred, I preferred their view as to the cause of the failure in the SSTA.
4. The experts gave contemporaneous evidence, having previously participated in a conclave. The outcome of the conclave was essentially to this effect and formed the basis of their oral evidence.
5. Several reports were created in relation to the failure of the starboard stern tube bearing on the vessel on the 7th of February 2015 (the bearing failure).
6. They agreed that:
   1. the failure of the bearing was catastrophic. The failure was caused from inadequate supply of sea water to the starboard stern tube bearing. In this case, the sea water both lubricates and cools the bearing;
   2. it is highly likely that the catastrophic failure of the bearing occurred at approximately 1500 hours on the 7th of February 2015;
   3. the loads generated by the shafting system are carried by a fluid film. The fluid film is located between the bearing surface and the propeller shaft. The distance between the bearing surface and the shaft is known as bearing clearance. The correct bearing clearance is fundamental for the load carrying capacity of the shafting system. The clearance enables the required fluid film thickness to be generated and thus transfer the loads back to the ship’s structure. The clearances are very small and measured in parts of a millimetre;
   4. the bearing eccentricity was calculated by Prof Hargreaves and Dr Casey to be 0.99. The methods of calculation differed, however, the result was the same;
   5. there are two supplies of water to the stern tube bearing. Pressure and the subsequent flowrates of seawater through the stern tube bearing are derived from the engine driven centrifugal pump located on the forward inboard side of the starboard main propulsion engine;
   6. one supply of sea water to the bearing is direct from the outlet of the seawater pump. The seawater supply line runs down the inboard side of the starboard engine. The line also supplies the sea water to the inlet of the gearbox heat exchanger. The sea water supply to the stern tube bearing is via **valve B** (in accordance with a coloured engineering drawing of Cameron Engineering – attached to the joint expert report). Valve B is located on the inboard side just aft of the starboard Main Engine. The valve is located just above the walkway plates at a height of approximately 100 millimetres. Valve B should be fully open when the vessel is operational;
   7. another supply of seawater to the starboard stern tube bearing is via the main engine gear box heat exchanger sea water outlet and the main engine jacket water heat exchanger sea water outlet. The seawater flows to the stern tube bearing via valve A. The documentation supplied to both parties indicated that valve A is kept in a position between open and closed when the vessel is operational. Valve A is located on the outboard side of the starboard main engine. The valve is located approximately 500 millimetres under the plates directly behind the starboard main engine;
   8. the vessel travelled from Redcliffe to Gladstone on the 6 February 2015 departing at about 1745 hours. The vessel departed from Gladstone to Heron Island on the morning of 7 February and left Heron Island to Gladstone at 1450 hrs on the same day. In the approximate 21-hour period prior to the accident the vessel was extensively utilised;
   9. for the outlined operations to have occurred prior to the incident the bearing was receiving water through some combination of valves A and/or valve B being fully open or partially opened. Closure of valve A and closure of valve B simultaneously would cause the bearing to catastrophically fail in a short space of time due to no water supply. The time estimated for catastrophic bearing fail without water flow is conservatively in the order of 16 minutes calculated by Dr Casey;
   10. in the lead-up to the catastrophic failure of the bearing, the bearing was receiving sea water supply. If the bearing was not receiving a supply of seawater at all it would have not operated in the 21 hour or so window leading up to the incident; and
   11. the logs indicate that the stern tube assembly had records indicating it leaked and ran hot on the 24 August 2014.
7. The essential point of difference between the experts is when and how the supply of sea water became inadequate. Dr Casey considers the bearing failure was acute. For an acute bearing failure to have occurred there would have been an abrupt stop to the supply of seawater to the stern tube bearing while the vessel was operational or just prior to it becoming operational. Such an abrupt stop may occur by closing valves A or B just prior to the incident.
8. Professor Hargreaves and Mr Ainscough considered the failure of the bearing was chronic. For a chronic bearing failure to have occurred, the supply of sea water would not be adequate to allow the correct film thickness to be generated and heat to be transferred away from the bearing over an extended period of time. For a chronic failure to occur, the valves supplying seawater to the stern tube bearing would not be changed in the moments just prior to the incident occurring.
9. For both the acute and the chronic failure rationales, the end failure scenario is the same. The inadequate supply of water causes hard surface on hard surface contact, generating large quantities of heat. The sea water in the clearance space (between the rotating shaft and the bearing) boils. The rubber material from which the stern tube bearing is constructed, is then damaged. The flutes which form part of the stern tube bearing construction can clog and impede the flow of water through the bearing. The consequential reduction of flow through the bearing increases pressure in and around the bearing and seal. The increase in pressure can cause a drip or leak of sea water into the engine room space via the stern tube seal.

## Chronic failure (Prof Hargreaves and Mr Ainscough)

1. Prof Hargreaves and Mr Ainscough believe the starboard stern tube bearing failed over an extended period. The length of time for the failure of the bearing to occur is directly proportional to the amount of water which was under supplied to the bearing itself. A measured reduction in seawater flowrate could cause the failure of the bearing to occur over a period of months or years while a larger shortfall in sea water could see failure of the bearing in a significantly shorter period.
2. These experts noted that the information that was available to them indicated that the starboard stern tube had been problematic for an extended period. In their report, Prof Hargreaves and Mr Ainscough stated that “there are clear records indicating that 6 months prior to the incident that the SSTA was running hot and continually leaking water.” There are limited records after September 2014 on the vessel’s operations predominantly due to it being laid up and not operational for large amounts of time.
3. These experts opine that for the SSTA to run hot, it is highly likely that it was not receiving adequate seawater to remove the heat. If the SSTA was hot and not receiving adequate water supply it is likely that the film thickness required to be generated to absorb the load of the shafting system was not being generated. This lack of film thickness would result in hard surface on hard surface contact. To begin with, this hard surface contact would form micro contacts in small isolated areas on the bearing’s surface. Without detailed inspection of the bearing surface, these areas would not be readily detected. Over time, with continued lack of water supply, these areas would grow and eventually join other areas further damaging the bearing surface and load carrying ability of the bearing. The migration of these areas would not be readily identified unless the shaft had been removed and inspected. Eventually the areas would grow to a point where they would be unable to support the load of the shafting system and a catastrophic bearing failure would occur.
4. Professor Hargreaves and Dr Casey noted that the records indicate that the starboard shaft had not been removed. As a consequence, the starboard stern tube bearing had not been examined at the 18 June 2014 dry docking just prior to the incident occurring.
5. Prof Hargreaves and Dr Casey also carried out calculations with respect to the eccentricity of the bearing/shafting system. The calculations indicated a ratio of 0.99. A ratio of 0.99 would indicate that the shaft and bearing would be continually touching and as such, generate heat. This continued contact would create areas of micro contact and bearing damage.
6. At the time of the incident, the documents indicate that a smell was reported from the engine room. They consider that it is likely that the smell was a consequence of a failure of the bearing. The fast drip from the seal which was recorded after the smell being reported is further evidence of the failure of the bearing. There is no indication from the ship’s records that the ship’s personnel had entered the space and carried out work prior to the incident or since the vessel was delivered the previous day. The records indicate that plaintiff’s crew entered the engine room after the incident.

## Acute failure (Dr Casey)

1. In Dr Casey’s opinion, the information available to him was far more consistent with an acute failure than one which developed over an extended period of months or longer. The logic and reasoning by which Dr Casey came to this opinion is as follows.
2. The symptoms occurring around the time of the failure on 7 February 2015 that alerted the crew to the fact that there was an issue with the seal are described in Mr Ainscough’s report as:
3. a burning smell was reported coming from the starboard engine room; and
4. upon investigation, it was observed that water was leaking from the seal at a fast drip.
5. In Dr Casey’s opinion, if the conditions that caused this level of damage had been present for a long time, then the symptoms of that damage ought to have manifested themselves for a long time also. That is, it makes sense that if the damage was accumulating for a long time, then the symptoms ought to have been accumulating (and worsening) over similar lengths of time. To the contrary, there is no evidence of any build-up of symptoms over a long period of time. The fact that a “burning smell” noticed on 7 February 2015 occurred in isolation on just that day, is consistent with the fact that the events that led to that burning smell occurred around the same time. There are no other mentions of a burning smell in the vessel’s various logs in the months preceding that day. It does not make sense that if the bearing was slowly getting hotter over a long period of time (as claimed), that a progressively worsening burning smell was not noticed.
6. Taking this further, even if the bearing was slowly getting hotter over a prolonged period of time, but it was not getting hot enough to cause a burning smell, it does not make sense that this condition had not been detected prior to 7 February 2015. That is, there is a notation in the vessel’s engineering log (about 6 months prior) which notes that the starboard shaft seal was hot due to a problem with the cooling water restriction. In Dr Casey’s opinion, this indicates that the bearing’s temperature must have been monitored to have detected that condition. It does not make sense that if the bearing continued to degrade (as claimed) and therefore continued to heat as a consequence, that the bearing did not get hot enough after that point to warrant a notation in any of the vessel’s logs. In Dr Casey’s opinion, the absence of any mention of a “hot” seal in the interim (August 2014 - February 2015) is consistent with the fact that the bearing did not get hot in that period, which is inconsistent with a scenario in which damage built-up/escalated over that time.
7. Applying the same logic to water leakage, it does not make sense, in Dr Casey’s opinion, that if damage was accumulating over the months leading up to the final failure, that escalating water leakage was not noted in the vessel’s various logs over the same length of time. The absence of any mention of water leakage over the months leading up to the final failure is inconsistent, in Dr Casey’s view, with a scenario in which damage built-up/escalated over that same length of time.
8. Moreover, the vessel had made a number of long journeys in the hours prior to the seal failure, notably sailing from Redcliffe to Gladstone and from Gladstone to Heron Island in the days preceding that final failure. There were no mentions of any persistent symptoms (burning smells or water leakage) by the crew in the vessel’s various logs over the course of those voyages. In Dr Casey’s view, the absence of consistent symptoms is consistent with an absence of those conditions.
9. In support of the acute theory of the damage to the bearing and seal, the burning smell was noticed about 10 minutes after departing from Heron Island. The time scales involved are of the order of minutes. In his conservative calculations, Dr Casey estimated that an acute level of damage can occur within 16 minutes which is similar to the circumstances (10 minutes) if the bearing and seal are deprived of cooling water. Dr Casey opined that the similarity in these two timescales strongly supported a conclusion that the failure of the bearing and seal occurred because the bearing and seal had been deprived of cooling water, presumably because one (or both) of the cooling water valves had been left closed.
10. Furthermore, in Dr Casey’s opinion, the timescales were far too short for major damage to occur to the bearing and seal due to one of the cooling water valves to the bearing and seal being left closed prior to the vessel departing from Redcliffe. The vessel sailed for a number of hours after it departed Redcliffe and, in Dr Casey’s view, if the valve had been left closed prior to its departure from Redcliffe, then the damage to the seal and bearing ought to have occurred shortly after it departed from Redcliffe (just as it did occur shortly after departing Heron Island). It therefore follows that the cooling water valve(s) must have been left closed after the vessel departed from Heron Island, in Dr Casey’s opinion.
11. In summary, in Dr Casey’s opinion, the circumstances were far more consistent with a failure scenario in which the damage occurred to the seal and bearing rapidly after a cooling water valve(s) was/were left closed, shortly before the damage was detected.
12. Dr Casey added that after discussing the layout of the various pipes feeding the bearing with Mr Ainscough, Dr Casey was given the opportunity to see for the first time the overall pipe layout that Mr Ainscough had determined and drawn based on his inspection of the vessel in question. Based on that pipe layout, Dr Casey notes that there would be a significant pressure difference between the pipes feeding sea water to valve B compared with valve A with a consequential difference in flow rate. Notably, valve A is fed from pipes adjacent to the water outlet (where it discharges back to the ocean) and therefore, in Dr Casey’s opinion, there would be minimal pressure driving the sea water flow into the bearing from this valve, compared to the water flow from valve B. Moreover, in certain circumstances, the flow through valve A may in fact be out of the seal area of the overall bearing assembly. In order to know the exact flow from valves A and B more detailed pressure measurements would be needed.
13. I refer to the following exchange in the concurrent testimony, particularly with Dr Casey, which I do consider to be material:

MR COX: Just following up, Dr Casey, from that last answer, **after one notices the bearing heating up and some leaking, I presume the next stage in the investigation is to dismantle the entire unit to take an internal examination of the bearing?**

DR CASEY: To be honest, that **would fall outside my area of expertise**, as I don’t simply – **I don’t work with this specific type of bearing**. I can talk about these types of bearings in a general sense, **but in terms of what happens on a marine vessel, you would need a marine person to then reply as to what the normal procedure would be**

MR COX: Right.

DR CASEY: which is **outside my area of expertise**.

MR COX: Certainly. I will just ask **Mr Ainscough, are you able – is that within your expertise**?

MR AINSCOUGH: **Yes**.

MR COX: Now, are you able to answer that question?

MR AINSCOUGH: Yes. Stephen Ainscough here again. Yes. Like you – **you would, as you indicated, pull the bearing out and have a look**.

MR COX: And that **requires the vessel to be slipped and the entire seal and bearing to be dismantled**?

MR AINSCOUGH: Yes.

…

MS HARRIS: So am I right in understanding that **your position is that the problem started before 21 August 2014**?

PROF HARGREAVES: **Yes. Doug Hargreaves. Yes**.

MR AINSCOUGH: **Mr Ainscough. Yes**.

MS HARRIS: And are you assuming, in making these statements, that the normal performance of the EJ seal is that no water leakage should occur at all?

PROF HARGREAVES: Doug Hargreaves. All seals leak that are operating properly. To comments, if I may. I believe the seal is leaking excessively due to a problem in the bearing, and so there were adjustments made, I believe, to the seal because it was wearing. That means it had a problem. And so over that period of time there were several entries in the logbook that I haven’t got here which indicated adjustments to the seal, and that to me indicates a problem with the bearing.

MS HARRIS: Mr Ainscough.

MR AINSCOUGH: Concur 100 per cent with Professor Hargreaves, and just evidenced by the photo we spoke about previously with slight marks where you can see where there had been adjusting the seal.

MS HARRIS: Dr Casey.

DR CASEY: **The log book entries that I was given must be much more limited than my two colleagues here because** **I don’t have anything before about August of 2014. I don’t have those prior entries. I only have the entries that relate to August 2014 and then some very recent entries where the vessel was taken from Redcliffe to Gladstone to Heron Island**. In terms of the adjustment of the bearing, the seal, it’s normal to adjust the seal. In fact, the manual for that particular seal tells you how to make the adjustment. So even in normal operation if nothing is going wrong, you still have to adjust it from time to time. So that by itself to me doesn’t support or discount either theory. All it simply means is that it was just behaving normally.

MR AINSCOUGH: I disagree with that. If you – Steven Ainscough. If you look at it – I agree what Dr Casey is saying there. You do adjust them slightly. But if you look at the pictures, I don’t have the – there is a scale on there and we could work it out, but the **adjustment that I’m seeing on there looks like** – yes – yes – about – it’s quite a lot. What, **six millimetres**?

DR CASEY: Six or ..... six .....

MR AINSCOUGH: Anyway. It’s – it’s not little bits. **It’s quite a lot in terms – in – in terms of the – the seal**.

(emphasis added)

1. As I have indicated at the commencement of this section and for the reasons there stated, I did not consider that the expert evidence ultimately added much to the resolution of the dispute. There is logic in both points of view. There is the absence of a full background to the evidence of Dr Casey which is why I favour the conclusion that human intervention on the part of the plaintiff has not been established. This is also consistent with the views of Prof Hargreaves and Mr Ainscough.

# DEFENDANTS’ CONTENTIONS

1. In light of the findings I have reached, it is necessary to examine what impact they have on the pleaded issues. Also, in light of the findings, it is convenient to commence with the defendants’ submissions, both in the plaintiff’s case and the defendants’ case. The defendants’ defence and cross-claim rely on the view of Dr Casey who opined that the bearing failure was acute. The defendants contend that the factual evidence does not support the plaintiff’s experts’ case that the failure occurred over time.
2. In support of the acute failure theory, the defendants challenge the plaintiff’s evidence and specifically point out that:
   1. as to what actually took place on the afternoon in question, the real question is: did anyone in the crew turn the tap/valve off? But the question is, of course, not as simple as that. The deckhand, Mr Crow, smelt burning and notified Mr Ryan and Mr Snaith in the wheelhouse. An investigation occurred in the starboard engine room. Mr Crow, Mr Ryan and Mr Snaith observed water leaking from the EJ Seal;
   2. the logbook shows that the vessel departed Heron Island with 34 passengers and four crew members at 1450 hours on 7 February 2015. The defendants point to the fact that Mr Crow’s evidence was that only he and Mr Snaith were in the engine room looking for oil leaks. Mr Snaith said Mr Crow and Mr Harvey were in the engine room whilst he stood at the top of the stairs, all talking to each other despite the noise in the engine room. Mr Harvey said it would not be possible to hear someone speak in the engine room from the top of the stairs of the engine room because of the noise and also because they were wearing earmuffs. Mr Snaith originally said he could see the canister from which the oil was dripping, but when challenged conceded that he could not see the canister;
   3. Mr Snaith said that Mr Crow and Mr Harvey found oil leaking into the gearbox. Mr Snaith conceded that the gearbox had to be too hot for the oil to burn and yet that did not perplex him. Mr Harvey said there was no oil burning, the gearbox was not hot and there was patch of oil about 12 centimetres in diameter. Mr Harvey said Mr Snaith went into the engine room and then he and Mr Crow came down soon after. Mr Harvey could not recall whether it was the starboard or the port engine. Mr Harvey said they were wearing earmuffs because of the noise in the engine room. He said that there was no oil dripping, but he saw water leaking from the SSTA. Mr Harvey said that he checked the SSTA because he had observed three failed stern seals in the few years he had been a deckhand on the “Heron Islander”;
   4. this seems to have triggered Mr Harvey, the deckhand, but not, Mr Snaith, the engineer, to check the SSTA; and
   5. during this time, Mr Ryan, said he remained in the wheelhouse, he did not enter the engine room and the vessel remained steaming. The logbook then records the SSTA failing at 1500 hours. It was a contemporaneous record written by Mr Ryan. The other contemporaneous record was Marine Incident Report (**MIR**) GSG40871 (as reported to MSQ by Mr Ryan on 11 February 2015, after the issue of the prohibition notice) which also recorded that the failure occurred at 1500 hours.
3. The defendants say that the significance of the contemporaneous recording of 1500 hours in the log and the MIR is that in Mr Ryan’s affidavit he deposed to the fact that the timing of the failure was actually 1525 hours not 1500 hours. In cross-examination Mr Ryan said that he thought the time was 1520 hours. It was put to Mr Ryan that he was speculating and he agreed. The defendants submit that the contemporaneous record should prevail as the more accurate record of when the failure occurred.
4. Mr Snaith deposed that shortly after leaving Heron Island a burning smell was noted. There is an entry of 1454 hours in the engineer’s log.
5. The defendants contend that this was the time the burning smell was discovered. The defendants submit that Mr Snaith’s evidence about this timing should not be accepted. Mr Snaith’s evidence was that it was his practice to enter the time the vessel passed each island so he knew where he was, this being “his little quirk”. However, there is no such entry for 8 February 2015 and there was no re-examination, the defendants argue, involving the production of logs for the “Heron Islander” to substantiate his practice. (Nor, I should add, would it be expected.) The defendants contend that this is a fabrication of evidence by Mr Snaith made up following drinks with Mr Ryan, having admitted to discussing the 1454 hours entry in the engineer’s log whilst under cross-examination. The defendants contend that a “little quirk” is quite different to someone remembering something by writing on his or her hand, as he next suggested. The time was written, the defendants say, so that Mr Snaith would remember when the burning smell was reported. A prudent engineer would do that and report the detail of the burning smell, the investigations undertaken and what remedial steps were taken, successful or otherwise, in the logs. Mr Snaith accepted that the logs were legal documents and needed to be accurate before further admitting that his log entries were deficient.
6. In Mr Ryan’s cross-examination concerning the burning smell, the defendants say that four different versions of what Mr Crow had said to him were provided. First, “I could smell something”; second, “he could smell something burning from the back deck”, but Mr Crow did not describe what he could smell; third, “I can smell something coming from the rear of the vessel”; and fourthly, “the deckhand, [Mr Crow], came to the bridge to advise of a burning smell coming from the starboard engine room”.
7. The evidence of Mr Ryan was that Mr Crow had to be just outside the saloon area for him to be able to smell the “something”. Mr Crow’s evidence was that he was inside the vessel and the smell was coming through the ventilation system.
8. Mr Ryan then said that “we” went out to the deck, but later said the he did not leave the wheelhouse. In any event, Mr Ryan said he did not go into the engine room.
9. On the other hand, according to Mr Ryan, Mr Snaith went to the engine room and reported back to Mr Ryan. Mr Ryan agreed that he could only be guided by what Mr Snaith told him. Mr Ryan was said to have been told by Mr Snaith that there was oil dripping onto the gearbox. The defendants say that Mr Ryan agreed that for oil to burn on the gearbox it would have to be quite hot and that would be significant because engine problems could occur. The defendants note that Mr Ryan, having conceded a potential engine crisis might occur, but that oil temperatures were normal, then said he did not remember Mr Snaith saying the oil was dripping into the gearbox, but rather that there was oil dripping from one canister onto another canister. The engineer’s log at 1520 hours and 1630 hours recorded the starboard gearbox oil temperatures as being 60 degrees and 61 degrees, which were consistent with its temperature throughout the day and similar to the port gearbox temperature during the same time (61 degrees and 62 degrees). Later in his evidence, the defendants say, Mr Ryan gave another version of what Mr Snaith was said to have told Mr Ryan, namely, that the oil was dripping on to the engine. The defendants argue that whilst oil might burn on the surface of the gearbox emitting a burning smell, oil dripping from one canister to another canister would not. Mr Crow said he did not know what time he smelt the burning smell. Mr Snaith was back in the wheelhouse at 1520 hours to report the various engine parameters showing on the computer screens, evidenced by the engine log. Mr Ryan agreed that Mr Snaith would have to be on deck to take those readings.
10. As to the source of the burning smell, the defendants note that Mr Snaith informed Ms Lopez during a telephone call on the evening of 8 February 2015 that he thought it was the rubber boot burning. The defendants note that this was a contemporaneous conversation occurring before the prohibition notice was issued, before the MSQ undertook an investigation and before the plaintiff engaged solicitors. The defendants contend that the explanation given by Ms Lopez as to how the conversation came to be recorded was plausible.
11. Mr Snaith told Ms Lopez during the recorded conversation that he thought the burning smell was tar, which might have been the rubber boot. He deposed by affidavit that Mr Crow (who was in the engine room) told Mr Snaith (who was at the top of the stairs) that the source of the burning was oil dripping onto the gearbox. Mr Snaith did not verify that but rather returned to the wheelhouse and told Mr Ryan that the source of the burning was oil dripping onto the gearbox, that is, a leak onto the transmission.
12. The defendants make the point that despite the deployment of two or three crew members to the engine room to investigate the burning smell, and the deviation of the vessel’s course to further investigate the cause of the burning, Mr Ryan did not log the burning smell. Further, Mr Ryan also did not log that there was an investigation of it behind the lee of the Polmaise Reef. He had no answer about why he did not log the burning incident despite acknowledging it was a significant event. The defendants note that it was only after that concession did Mr Ryan link the burning incident to the SSTA.
13. During this time, the decision was made to divert the vessel’s course by less than one nautical mile and sail around the lee of the Polmaise Reef where the waters were calmer. The starboard engine was not shut down, the RPM of the synchronised engines was reduced and the burning smell investigated. Mr Ryan said the problem with the SSTA was not realised at that point.
14. The defendants contend that this cannot be correct. The log reported the SSTA having failed at 1500 hours. Mr Ryan had already described the voyage route as being 10 minutes from arriving at the lee of Wistari Reef, arriving at 1500 hours, where it was calm and a further 10 minutes of rough weather, taking the time to 1510 hours, and then on to the lee of Erskine Island, then Masthead Island and then Polmaise Reef, with no sail time given between the islands, however, the defendants say that the sail time to Wistari Island seems to be about 20 minutes, according to Mr Crow, and Polmaise Reef is nearby. It is possible, the defendants say, that by the time the vessel was near Polmaise Reef, Mr Ryan decided it was necessary to slow the vessel down to see what could be done about the leak from the seal. That would put the sail time at around 1525 hours as deposed to by Mr Ryan. The defendants say that the log time at 1454 hours and 1500 hours are likely to be accurate, having been made at or near the time of the report.
15. While it is unclear exactly what occurred while the vessel idled, the defendants say it was clearly more than just simply looking at the EJ Seal. The vessel did not need to idle in order to do that.
16. The defendants submit that the events were likely to have occurred once the burning smell and leaking seals occurred which, when reported to Mr Ryan, was the reason Mr Ryan decided to deviate the vessel and to idle her. From the transcript of the telephone conversation, Mr Snaith told Ms Lopez that the following occurred on 7 February 2015:
    1. there was enough water in the bilge that the alarms went off. They are set quite high at two “prongs”. Ms Lopez says that equates to a few hundred litres of water. Mr Harvey said there was about 70 litres of water in the engine room. (The defendants submit that this was more than a “manageable drip” as logged by Mr Snaith);
    2. valve B was observed to be off; and
    3. the grub screws on the collar were adjusted as observed by Mr Benn on the morning of 8 February 2015. Although Mr Snaith denied adjusting the collar on three occasions when asked by Mr Benn, Mr Snaith told Ms Lopez on the evening of 8 February 2015 that “we loosened off the collar”.
17. It was put to Mr Snaith in cross-examination that he loosened the collar while the vessel idled at Polmaise Reef and with that the water flooded out from the EJ Seal in the engine room. His denial should be rejected, the defendants submit. Mr Snaith expressed the view that the leakage was just a spurt. Mr Harvey’s view, having witnessed at least two or three failed stern seals on the “Heron Islander”, was that there was a problem. The defendants submit that the flow was more likely to be “excessive”. In those circumstances, the defendants submit that Mr Snaith should have referred to the manual, which contains a flowchart for solving a problem involving seawater leakage and further touches on the question of whether there is a need for the engineer to compress the seal.
18. The defendants note that in order to adjust the seal, the shaft must be static. Otherwise the shaft continues to operate. Valve B had to be turned off so that the EJ Seal could be adjusted. If the collar is loosened and the engine is still running, then water will flood out. Mr Harvey described about 70 litres of water being in the engine room. The collar needed to be refitted to stop the water coming into the engine room. To do that the grub screws were tightened.
19. Mr Harvey says that when the vessel was docked at Gladstone on 7 February 2015, he, Mr Ryan and Mr Snaith worked on the SSTA for about two hours. The defendants say that this is one possibility as to when the grub screws were moved. However, Mr Crow’s evidence was that he and Mr Harvey left together at 1730 hours and went home. Mr Ryan and Mr Snaith did not indicate they stayed on after the vessel was docked. They spoke by telephone with Ms Lopez on the evening of 8 February 2015 and did not mention that any works had been undertaken on the evening of 7 February 2015. In his statement to MSQ, Mr Snaith made no reference to such works on 7 February 2015. Mr Harvey was called after Mr Ryan and Mr Snaith to give evidence.
20. The defendants noted that it was common ground that by the time the vessel docked at Gladstone in the afternoon of 7 February 2015, Messrs Ryan, Snaith and Harvey had been awake or had had little quality of sleep since about 0500 hours on 6 February 2015. They had sailed through rough conditions as they had to be in Gladstone to sail a wedding party to Heron Island. The defendants say that in those circumstances it is difficult to see that Messrs Ryan, Snaith and Harvey would have wanted to spend another two hours working on the SSTA.
21. The defendants say that the vessel could not have sailed from Redcliffe to Gladstone at 24 knots in 3 metre waves and 30 kilometres winds if valve B was closed. The defendants rely on the fact that Ms Lopez stated that valve B was open at the time of delivery and that Mr Simmonds, an AMSA accredited surveyor who undertook the on-hire survey, stated that he observed it being partly open.
22. While the defendants stress various minor inconsistencies and omissions, I do not consider they add up to be sufficient to displace the sworn evidence I accept from the plaintiff’s relatively objective witnesses that they did not turn off the relevant valve. Despite extensive and detailed cross-examination they were not shaken on that evidence. I found no reason to doubt their evidence on that point. That stood in contrast with the defendants’ main witness, Ms Lopez, and, to a lesser extent, Mr Simmonds.
23. The defendants’ stress that Ms Lopez should be accepted as an honest witness, whose livelihood is the operation of the vessel. She repeatedly expressed her approach was one of safety of the passengers, the crew and the whales. She had a vested interest in ensuring that the vessel was well maintained and operated. The defendants point to the fact that the AMSA’s history of the vessel shows that despite the random and planned inspection over the years, no mechanical work was ever identified to be rectified. That history, the defendants submit, independently corroborates the contention that Ms Lopez was a careful owner.
24. The defendants also stress that Mr Simmonds is an experienced AMSA accredited surveyor and has worked as a marine surveyor since 2007. His evidence was that he would not risk his accreditation or his livelihood by incorrectly reporting the situation. The defendants say that Mr Simmonds spent “hours” undertaking the survey, noting that during that time he took over 900 photographs. He engaged in dialogue with Ms Lopez about the vessel. It was the first time he had surveyed the vessel, so he took particular care while doing so.
25. Valve B was seen as being turned off by Mr Snaith on 7 February 2015 and turned off by Mr Benn on 8 February 2015. If valve B was on at delivery and off on 7 February, if not 8 February, 2015, then the defendants contend that it must have been turned off by someone who had access to the engine room. The evidence was that Messrs Snaith, Harvey and Crow all accessed the engine room on 7 February 2015. All denied turning valve B off. The defendants submit that it need not prove who turned valve B off, but rather, that once in the plaintiff’s control under charter, valve B was turned off. They say it was more probable than not that it was turned off by one of the plaintiff’s crew. The defendants also supports this submission with the exchange that occurred between Ms Lopez and Mr Snaith on 8 February 2015, when Ms Lopez said “but one of the valves – see if one of those valves has been accidently bumped or moved or there’s a blockage in the actual water flow then that will cause overheating”, to which Mr Snaith said “yeah and I think that’s what’s happened”. (This, I note, is certainly not a concession that whilst on the voyage, he or another person for the plaintiff bumped or moved the valve.)
26. The defendants, in any event, contend that even if valve B was not turned off until after the bearing had failed, sailing with valve B off on 8 February 2015, as the evidence suggests, would mean depriving whatever remained of the bearing of water, escalating the extent of the burned bearing. Therefore, whilst nothing could be done to improve the situation, depriving the bearing of water by operating the vessel with valve B off would cause more intense damage. The defendants submit that the “completely melted bearing” shows how intense the heat must have been for all the grooves in the bearing to melt away. Again, this assumes someone for the plaintiff turned it off. I do not accept this is so.
27. In relation to the expert analysis, the defendants press the views of Dr Casey, who opined that there was a difference in pressure between the water feeding through valve A and valve B. The pressure from valve B being ten times greater than through valve A. According to Dr Casey, as a fundamental principle of the law of thermodynamics, that would have affected the flow rate. This pressure difference arose because of the height of the two pipes feeding in to the SSTA (being at different points). The pressure differential was reflected in the engineering logs with the raw water pressure being recorded as being 2 bar. Dr Casey assumed that was for the valve B pressure, the valve A pressure being at 0.2 bar. Mr Ainscough disagreed and thought the pressure would be the same in valve A and B, further explaining why he held that view. Professor Hargreaves said that was beyond his expertise. Dr Casey disagreed with Mr Ainscough’s reasoning relying on the fundamental law of fluid mechanics that to drive any flow there must be a pressure difference. Therefore, to drive a flow across a gearbox there needed to be more pressure on the inlet than the outlet. The differential between 0.2 and 2 bar would mean there would be a large flow. Dr Casey also considered the half speed whirl was relevant after he read Mr Snaith’s statement that said that the starboard engine RPM were dropping and they struggled to maintain RPM. The logs of the afternoon of 8 February 2015 showed a continuous decrease in RPM and, in Dr Casey’s opinion, the only mechanism that would cause that sort of loss of power was whirling which occurs after catastrophic failure. All experts agreed that if the bearing failed on the afternoon of 7 February 2015, there was not a sufficient imbalance between the resistance of the shaft and the power of the engine to cause the half speed whirl, but things progressed on 8 February 2015 because the SSTA was past catastrophic failure.
28. In concluding that the failure of the SSTA was acute, Dr Casey considered this was consistent with the contemporaneous evidence. Additionally, the lay evidence, such as the observations made by Mr Simmonds, was that sand and coral was found in the strainers when the SSTA was dismantled. The defendants note that Mr Ryan said there was a chance that sand could be sucked up into the propulsion system when manoeuvring in the waters around Heron Island, even at mid-tide. This view was shared with Ms Lopez and Messrs Simmonds, Benn and Snaith. Mr Benn had only seen sand in the strainer following a grounding. The defendants submit that an inference could be drawn that the vessel was manoeuvred into shallow waters whilst coming along side at Heron Island despite it being mid-tide.
29. Although the experts were not asked in their expert reports to consider whether sand and/or coral could have caused the failure of the SSTA, the defendants say that issue was raised in their conclave. Dr Casey said he had seen many cases of bearing failure caused by debris or grit making its way into the film of water that keeps the bearing separate from the shaft, causing damage to the bearing. The defendants note that the vessel had been operated without incident for 1.5 days of the 14 day charter. It was only around the shallow waters of Heron Island that the sand and coral could have been sucked into the vessel. The defendants further say that the lay witnesses who have sailed in and around those waters said that was possible.
30. The defendants note that the vessel left Heron Island at 1450 hours, and at 1454 hours the engine log reports water leakage. By 1500 hours, the SSTA had failed. With the engines running at 1800 RPM and the vessel sailing at 24 knots, the defendants submit that it is possible and probable that the sand and the coral made its way into the bearing and caused it to fail on an acute basis. The defendants say that this proposition is supported by the fact that no water leakage, burning smell or other evidence of the SSTA being hot was observed by the plaintiff’s crew until minutes after the vessel left Heron Island. Mr Snaith said he had been making hourly inspections of the engine room, including the SSTA, as Ms Lopez had said during the induction prior to delivery. Whilst that appeared not to be possible due to weather conditions on the delivery voyage, it was possible on 7 February 2015. The defendants contend that there is a real possibility that sand and coral were sucked up into the propulsion system in the shallow waters and this was the trigger for the bearing to overheat. The defendants say this was conceded by Mr Snaith in the telephone conversation with Ms Lopez.
31. The defendants point to what they consider are deficiencies in the evidence of the plaintiff’s expert witnesses who concluded that the failure of the SSTA was caused by chronic bearing failure. The two initial reasons for that, as given by Prof Hargreaves, with Mr Ainscough agreeing, were that:
    1. for a substantial amount of time the shaft and the bearing were touching, which generated friction, heat and wear. The defendants complain that no scientific reason provided explained why the shaft and the bearing in the vessel would be touching more frequently than other vessels; and
    2. the bearing was running hot on 21 August 2014. As to this, the defendants say the only reason the bearing would run hot on that day was if there was too much friction or excessive friction in the bearing. These bearings do not generally fail catastrophically at a point but rather at the end after progressive wear over time, which would take months not days or minutes.
32. Mr Ainscough said that the vessel’s shaft should have been pulled (for servicing) in June 2014 or before delivery when the compliance survey was issued by the AMSA certified marine surveyor Mr Earp.
33. The defendants put two assumptions to Prof Hargreaves and Mr Ainscough and asked whether these would alter their view. These assumptions were that on 21 August 2014:
    1. a component fitted to the valve had collapsed and was replaced; and
    2. the EJ Seal was adjusted.

In response to those assumptions, Prof Hargreaves replied:

I would have to rethink that. Yes, you’re right. Especially if there was no evidence subsequent to that that there was heat for example or leakage of the seal, I’d have to reconsider that. But I also believe that there was some heat generated at all times because of the – I believe, in terms of the bearer – sorry, the shaft touching the bearing. But if you’ve got a good water supply then that is meant to keep the temperature down. And so if the temperatures weren’t increasing and you’re under the assumption or the scenario you are providing then I would have to change my view on that.

1. Mr Ainscough said, in effect, that it would not make any difference. In pressing Dr Casey’s views, the defendants argue that his expert evidence was logical and based on identifiable scientific principles. He did not speculate or give a best guess and that his conclusion that there was an acute failure was supported by the contemporaneous lay evidence.
2. As a result, the primary damage to the vessel was to the bearing in the EJ Seal, but not in the shaft. The defendants claim under the cross-claim is for the repairs, and include the man hours, and parts and equipment. Ms Lopez said that she supervised the works to be undertaken as she believed that in the absence of the defendants the works tended to take longer. That meant that a MIPEC supervisor was not required on a day to day basis to project manage the whole of the repairs. That did not mean that no supervision was required by MIPEC, but it was limited to the specific works identified in their invoices, which in turn were attached to a letter by the defendants’ solicitors dated 10 December 2015.
3. Ms Lopez said that she flew back and forth from Brisbane to collect parts to ensure MIPEC could seamlessly work on the vessel. This, the defendants say, was appropriate to mitigate the loss as each day at the dock by MIPEC meant another day of port charges, but also another day of compensation claimed. For every day saved by Ms Lopez flying back and forth and supervising to ensure the work continued without delay, defendants say the loss was mitigated.

## Clause 2 of the charter: due diligence and latent defect

1. As discussed, the defendants deny the plaintiff’s claim that the defendants breached cl 2 of the charter by failing to exercise due diligence to make the vessel seaworthy before and at the time of delivery.
2. In considering the construction of cl 2, the defendants refer to *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 (at [22]) where the following statement by Lord Wilberforce in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 3 All ER 570 (at 574) was stated to correctly reflect the law in Australia:

In a commercial contract, it is certainly right that the Court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

1. The commercial purpose of the charter was to enable the plaintiff to employ the vessel with its own crew for exclusive use for the charter period of 14 days (or such further period as agreed) to carry its guests to and from Heron Island from Gladstone whilst their own vessel underwent maintenance and also to provide the defendants with an income in the off-season.
2. Clause 2 of the charter dealt with delivery of the vessel as has been said. It comprised five paragraphs, the first dealing with the port of delivery, namely, Redcliffe on 6 February 2015; the second dealt with the defendants’ due diligence at the time of delivery to make the vessel seaworthy and in respect of her hull, machinery and her appurtenances and her documentation.
3. As to seaworthiness, the defendants stress that the obligation is not an absolute undertaking, but one of exercising due diligence, which requires exercise of a duty of care which is non-delegable. The defendants submit that the test for seaworthiness is a question of fact. The legal test is set out by Scrutton LJ in *FC Bradley & Sons v Federal Steam Navigation Co Ltd* (1926) 24 Lloyds Rep 446(at 454) as being:

The ship must have a degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it. Would a prudent owner have required that it should be made good before sending his ship to sea, had he known of it?

1. The defendants say that in the exercise of their due diligence to ensure the vessel was seaworthy before and at the time of delivery, it met the regulatory requirements as a shipowner, carried out maintenance on the SSTA when required and used the services of a reputable marine engineering company, Rogers & Lough, to carry out its annual maintenance and at such other times as may have been required.
2. As discussed previously, in relation to the regulatory requirements, the defendants stress that the vessel is a passenger ferry operating under a certificate of operation in Queensland waters, but not a certificate of survey. This was permissible under the national law as it was “not in survey (scheme NS) existing vessel”. The consequence of not operating under a certificate of survey was that there was no regulatory requirement to pull the shafts every four years.
3. Prior to delivery, the vessel shafts were last pulled in May 2011. At the time of delivery the four year mark had not passed in any event. The 14-day charter period concluded within the four year period cycle. The defendants say that February 2015 is close enough to May 2015 to have pulled the shafts. The defendants argue that if they were to pull the shafts three months in advance of every four year period, they would short change themselves one year, attracting unnecessary costs. A certificate of compliance survey SUR35740 was issued on 16 June 2014. The defendants say it is of note that if the SSTA passed the bump test in June 2014 without any maintenance or repairs. Although Mr Ainscough expressed the view that the bump test was crude, the defendants submit that this view should not be accepted. Professor Hargreaves made no comment about the bump test and Dr Casey supported it. I accept the defendants’ submission that there is no evidential basis on which I should reject the bump test, adopted by the AMSA as the national regulator, by adopting the criticism of the test as espoused by Mr Ainscough in circumstances which were distinguishable from the present. It has assumed little significance in the entirety of the evidence.
4. As to maintenance and repairs, the defendants rely upon the Rogers & Lough invoice numbered A14246 which recorded that the stern tube seal bearing was replaced in May 2011. Although the invoice does not identify whether it was starboard or port, the defendants say “the uncontroverted evidence” of Ms Lopez was that the starboard bearing was replaced in 2010. However, this was also the vessel that was originally fitted with an EL Seal in 2002, but was replaced with an EJ Seal in 2004 due to regulatory requirements. The EJ Seal at the time of the incident had been installed by Rogers & Lough on 25 March 2010. The EJ Seal was only five years old and had an operational life of 10 years as per the EJ Technical Manual. The vessel was maintained annually Roger & Lough, who had also carried out the annual maintenance work on the vessel prior to delivery (as described in their tax invoices). Other work would also be carried out by them as needed.
5. The defendants say that the bearing was installed in the SSTA in May 2011. The position of the valves to the SSTA was fixed by Roger & Lough to ensure the correct pressure. The vessel’s engineer, on 21 August 2014, reported the SSTA as being “hot”, although no temperature of the SSTA was recorded in the engineer’s log. Whilst it was moored at Tangalooma, repairs were undertaken. The cause of the SSTA becoming hot on 21 August 2014 was determined by Ms Lopez and her engineer as being the collapse of a tube. Those parts were said to be replaced on 21 August 2014. Professional advice had been sought from Rogers & Lough about what additional steps, if any, beyond the maintenance already undertaken on 21 and 22 August 2014 were required to be undertaken before the defendants took the vessel to sea themselves.
6. On an important topic, the defendants say the fact that Mr Lough did not recall Ms Lopez calling him on 8 August 2014 under cross-examination does not mean that the call was not made. The defendants contend that nothing Ms Lopez told Mr Lough gave him reason to recall that particular phone call. His evidence on cross-examination was that he received calls from her about the stern tubes. Ms Lopez said that if she had concerns about anything relating to the operation of the vessel, she would make calls to get a second or third opinion, including the manufacturer, to the “point of being annoying”. The defendants contend that the phone call to Mr Lough on 21 August 2014 was an example of that line of inquiry. The following day, Ms Lopez replaced parts to ensure the SSTA was fully operational. The valve to the SSTA was turned on after that maintenance work and the vessel sailed for a further two months for that season. The last time the defendants adjusted the SSTA was on 21 August 2014. The valve was reopened after that adjustment. Since then, the defendants say there was no maintenance work or operational requirements causing the valve to be closed. The vessel continued to be operated for the maintenance of the whale watching season without any further record of the SSTA being hot. That season ended on 25 October 2014. Ms Lopez contended that the SSTA being hot as occurred on 21 August 2014 was different from the SSTA being “overheated” on 7 February 2015.
7. The defendants relied on Ms Lopez’s evidence on the maintenance logs kept by the defendants, including the manner on which the logs were kept. In re-examination the maintenance logs were exhibited, however, not as to the fact that the particular work recorded in the maintenance was done, but rather that the logs were kept. Until this time, those logs had not been produced, which was the subject of criticism in cross-examination.
8. The position of the defendants on this potentially crucial issue is that it “made good” the SSTA on 22 August 2014 when it became hot. Each sailing date of the vessel from 23 August 2014 until the end of the whale watching season on 25 October 2014 occurred without any further incident. The repeated evidence of Ms Lopez in chief and under cross-examination was the safety and wellbeing of her passengers, crew and the whales were her priority and to achieve that she needed to ensure the vessel was properly maintained. She gave evidence about the events of her directions to her engineer on 21 August 2014, her inspection of the SSTA on 22 August 2014 and the works that were undertaken on those two dates when she was present.
9. The defendants submit that there is no obligation on their part to call evidence from the engineers to corroborate Ms Lopez’s credibility as to the collateral fact about what remedial actions were undertaken on 21-22 August 2014. The defendants rely on *Goldsmith v Sandilands* (2002) 190 ALR 370 contending that the evidence from the engineer would be a collateral fact because the plaintiff’s case is that the SSTA being hot on 14 August 2014 was evidence going to causation. The defendants submit that it was not put in issue that no remedial works were undertaken on 21 August 2014, rather that the sole incident of the SSTA being “hot” should have put the defendants on notice that the vessel needed to be slipped under and the SSTA’s EJ Seal and/or bearing should have been replaced. In anticipation, the defendants say that no *Jones v Dunkel* (1959) 101 CLR 298 inference can be drawn by the defendants not having called the relevant engineer. The defendants submit:

the Court in fact said in response to Counsel for defendants informing the Court that it would reserve its decision to call the engineer until after the experts gave their evidence **that the engineer was irrelevant**.

(emphasis added)

1. This submission, with respect, overstates the position. The transcript makes it clear that the question asked of counsel at trial, when the topic was raised on counsel’s opening of the case, was as to the relevance of the particular evidence of the engineer as foreshadowed by Counsel. Counsel then explained it. Following the explanation, the response was “yes”.
2. In fact, the following exchange on Day 1 of the trial made it clear that the defendants did intend to call the engineer as a witness:

HIS HONOUR: But I don’t need a better copy of every document. But I think that probably is – well, I can’t be specific. I think I would be speculating.

MS HARRIS: Well, we will ask the engineer in due course.

HIS HONOUR: I think that’s a good idea. Is that a convenient time, Ms Harris?

1. The evidence to be led is for a party to decide, not the Court. The Court will rule on admissibility of the evidence when the evidence is led. But, in the end, in this case, little turns on the point. No *Jones v Dunkel* inference was drawn from the failure to call the engineer.
2. The defendants also contend that the cl 2 due diligence obligation does not extend to the defendants being obliged to induct the plaintiff’s crew as to the operation of the vessel. The defendants also contend the induction process as to machinery and documentation demonstrates the conduct of a careful and prudent owner. Although the plaintiff pleads that its crew were not asked to sign any induction form, the defendants submit that is irrelevant to the matters in issue.
3. In terms of readiness, again, the defendants submit that the readiness of the vessel is to be judged against the significance of the defect in a commercial sense, relying on *Atheman Tankers Management SA v Pyrena Shipping Inc (The Arianna)* [1987] 2 Lloyds Rep 376. The defendants submit that the vessel was clearly ready for a 14 day charter, with the valves regulating water flow to the SSTA being open or partially open as observed by Ms Lopez and by Mr Simmonds on 6 February 2015 immediately before delivery. The defendants submit that they delivered the vessel in the same condition that the vessel had been deployed in the knowledge that the isolated “heating” event had occurred and had been rectified. They had taken the vessel to sea with the knowledge that the annual maintenance had been undertaken by Rogers & Lough since 2010 and from 2007 to 2010 (by another entity) and complied with the regulatory requirements as was evidenced by the certificate of operation and the certificates of compliance.
4. A logical alternative, the defendants say, is that, on the plaintiff’s case, the defendants would be required to have had the vessel slipped, the SSTA pulled and the EJ Seal and bearing replaced prior to delivery for the defendants to have the vessel ready. That was neither practical nor necessary as the 21 August 2014 event was an isolated incident of the SSTA being “hot” which was resolved by the remedial work undertaken on the SSTA on 21 and 22 August 2014. No evidence has been produced of any entry in the logs on the vessel indicating that the SSTA was hot on any other day subsequent to those repairs.
5. The third and fourth paragraphs of cl 2 relevantly state that the delivery to the plaintiff of the vessel and its taking delivery shall constitute a full performance by the defendants of all the obligations under cl 2 and thereafter the plaintiff shall not be entitled to make or assert any claim against the defendants on account of:

Any conditions, representations or warranties expressed or implied in respect of the vessel but the defendants shall be responsible for repairs or renewals occasioned by independently verified latent defects in the vessel, her machinery or appurtenances existing at the time of delivery of the charter. Further, upon delivery of the vessel, the [plaintiff] accepts the vessel in its “as is-where is” condition.

1. The defendants submit that the objective intention of the parties of the amended charter cl 2 was to create two components to the operation of the exception clause. The first component being that the standard Barecon 89 term that, in effect, the plaintiff would not be entitled to recovery against the defendants on account of any conditions, representations or warranties, save for any latent defect and the second component being a specific amendment that the plaintiff accepted the vessel “as is, where is”.
2. The defendants say that would give a reasonable commercial construction to the exception because:
   1. if the defendants did not provide to the plaintiff with any reasonable opportunity to discover by ordinary physical inspection of the chartered vessel, the “standard term” would apply, that is, the defendants would be exempt from liability upon delivery, save for any latent defect; and
   2. where the defendants did provide a reasonable opportunity to discover by ordinary physical inspection of the vessel, then the vessel was accepted unreservedly by the plaintiff, including latent defects in the condition she was in at delivery. The question of reasonable opportunity to inspect would be a question of fact.
3. Where there is a specific amendment to a standard form of contract, the defendants argue, the usual construction principles of contract would require that the specific amendment should prevail over the generic standard terms, should there be any tension between the two.
4. The defendants contend that the 8 to 10 hours to inspect the vessel before they took delivery at about 1745 hours on 6 February 2015 provided the plaintiff with ample time to inspect. The defendants say that any defects were not latent because ordinary physical inspection of the vessel during that period would have enabled observation of:
   1. the state of lamination of the SSTA;
   2. the apparent age of the EJ Seal;
   3. the wear between the EJ Seal and the rubber body, including how many millimetres the EJ Seal was already compressed, the Technical Manual (which was onboard at delivery) identifying what the distance of three to six millimetres meant in terms of age and replacement; and
   4. the logs, and specifically that there had been one incident on 21 August 2014 of the SSTA being hot.
5. The defendants also point to the fact that Mr Ryan accepted that he could see the exterior condition of the casing and the rubber collar on the EJ Seal. He did not say to Ms Lopez during the induction of the starboard engine of the vessel that he did not like the look of the condition of the casing and the rubber collar, that it looked hot or that the metal shaft looked blue. He also said that he saw the exterior appearance of the SSTA and was not concerned with the appearance of the SSTA, as did Mr Snaith. These observations being consistent with the evidence of Ms Lopez and Mr Simmonds. As to the apparent age of the EJ Seal, no evidence was given for the plaintiff as to the apparent age of the EJ Seal, nor as to the wear between the seal and the rubber body.
6. The events entered into the logs on 21 and 22 August 2014 were therefore readily observable by the plaintiff before taking delivery. Mr Ryan asked questions about operation of the vessel, but not about the logs. Mr Ryan admitted that if he had seen any entries in the logs in the preceding months that made reference to the stern seal being hot and being repaired, it would have caused him to keep an eye on them, but he was not sufficiently concerned to ask Ms Lopez any questions about the entries. Mr Snaith’s evidence was similar.
7. The defendants stress that it is the physical inspection of logs by masters and engineers that informs them how the vessel has been performing and what problems, if any, the vessel has had. The extent of the historical review of the performance of the vessel by logs was a decision for the master and/or the engineer. The review should be as far back as it takes for the master and/or the engineer to satisfy themselves of the performance history of the vessel. The defendants note that during the 10 hour time period, Mr Ryan and Mr Snaith, as they agreed, each had unrestricted access to the vessel, her logs, her documents and her manuals and could have asked any questions of Ms Lopez. In fact, the defendants contend, Mr Ryan did spend time in the wheelhouse mainly inspecting the running log, the daily running log and the SMS Manual.
8. In those circumstances, the defendants submit that even if there was a defect, it was not latent. A latent defect, the defendants say, is an error in design or material, even if it was a “concealed flaw”: *Baxall Securities Ltd v Sheard Walshaw Partnership* (2002) 83 Con LR 164 (at [46]-[48]) and as stated by Lord Keith of Avonholm in *Riverstone Meat Co Pty Ltd v Lancashire Shipping Ltd* [1961] AC 807 (at 872):

He will be protected against latent defects, in the strict sense, in work done on his ship, that is to say, defects not due to any negligent workmanship of repairers or others employed by the repairers and, as I see it, against defects making for unseaworthiness in the ship, however caused, before it became his ship, if these could not be discovered by him, or competent experts employed by him, by the exercise of due diligence.

The defendants also note that a similar approach is adopted in the insurance field*: Prudent Tankers Ltd SA v Dominion Insurance Co Ltd (The Caribbean Sea)* [1980] Lloyd’s Rep 338.

1. The defendants stress that there was no defect, but in any event, any of the alleged defects was properly ascertainable by reasonable inspection or could have been revealed by reference to the log.
2. It is clear, the defendants argue, that the defendants have exercised due diligence. There has been no latent defect and, in any event, the plaintiff accepted the vessel “as is, where is”, such that it should be liable for damage suffered by the vessel by reason of cl 9 of the charter, which provided as follows:

…

[The plaintiff] will take immediate steps to have any necessary repairs done within a reasonable time failing which the Owner shall have the right of withdrawing the vessel … and without prejudice to any claim the Owner may otherwise have against [the plaintiff] under the charter.

## Defendants’ cross-claim

### Clause 14 of the charter: delay damages

1. On delay damages, the defendants press the contractual figure of $10,000 a day. Considerable time was spent on the topic of whether the sum of $10,000 could be justified as a reasonable pre-estimate of loss pursuant to cl 14 of the charter, which is in the following terms:

In the event that the vessel is not redelivered by the date specified in Box 20 … or if it [is] necessary for repairs to be carried out to the vessel to restore the vessel to the condition which it was in prior to departure for the charter … as detailed following surveys detailed in clause 6 above, [the plaintiff] agrees to pay the Owner/charter [sic] (as applicable) a **penalty** of $10,000 (including GST) for each and every day that the vessel is delayed or is undergoing such repairs.

The parties to this agreement agree that this amount **represents a fair estimate of the loss and damage** which will be suffered owing [to] the delay/vessel undergoing repairs.

(emphasis added)

1. The defendants stress that the plaintiff has to prove that cl 14 is unenforceable due to it being a penalty clause, rather than a genuine pre-estimate as to damage: see *Multiplex Constructions Pty Ltd v Abgarus Pty Ltd* (1992) 33 NSWLR 504 (at 527). The defendants also rely upon *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 (at 86), where Lord Dunedin said that the use of the expression penalty was not conclusive, rather it is for the Court to determine whether the payment stipulation was in truth a penalty or liquidated damages. The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party, whereas the essence of a liquidated damage is that it is a genuine covenant to a pre-estimate of damage. Overall it is a question of construction on the terms and inherent circumstances of each particular contract charged at the time of making the contract, not at the time of the breach. The relevant tests will include whether the sum stipulated is extravagant and unconscionable in comparison with the greatest loss that could conceivably be proved to have followed from the breach. The relevant consideration is the substance of the matter, rather than the form of words used: see *Clydebank Engineering*. The mere possibility that the amount recoverable under the clause might in some circumstances exceed the claimant’s actual loss does not prevent the clause from being valid: *Esanda Finance Corporation Ltd v Plessing* (1989) 166 CLR 131 (at 142). Relevant considerations were set out in *Multiplex Constructions* (at 513) and include: the relationship between the parties; the geneses of the clause; discussions concerning it; the bargaining position of the parties; whether they were fully advised; and whether in all the circumstances the party claiming the ineffectiveness of the clause appreciated the likely imposition were its application to arise.
2. The defendants say there can be no possibility of unconscionability as $10,000 is a reasonable commercial figure, to which Ms Lopez had regard at the time of entering into the contract. In particular, the defendants say the compensation payment was not triggered by a trivial event. The failure to redeliver the vessel on time at the specified port of delivery and in the same condition as delivery would prevent the defendants from generating income and profit from the vessel whilst incurring holding costs and expenses for the vessel. The defendants noted that the charter was a short term contract directly related to the operation of an existing earning asset, the vessel. The timing and terms for the use of the vessel at the time of entering into the charter were not fixed. There was commercial interest in the vessel, as there had been each off-season. It was a question of timing as to the fixture to be taken and on what terms. The duration of a charter impacted on the hire to be charged. A long term charter generally reduced the daily rate, but short term charters attracted higher rates. Certain charters had higher daily rates for those days when the vessel operated, but a lower daily rate for days when not in use by a plaintiff. Ms Lopez gave evidence that the vessel was chartered for single occasions, such as weddings, corporate events and social functions. On the other hand, there could be a two week charter, such as that to the plaintiff which would prevent the vessel being made available for short term charters. The defendants say there were other charters in mind also at the time of entering into the contract.
3. Holding costs of the vessel were incurred throughout this period, including expenses for staff, officers, maintenance, insurance, port charges and mortgage payments. Furthermore, in this case, where the trigger for cl 14 involved repair works of some substance, the vessel was prevented from being redelivered on time for a 14-day charter and incurred an array of further costs, such as the costs associated with the laying up of the vessel for some time, the regional location of the port (which meant delays in parts arriving from Brisbane or elsewhere) and the cost of reinstating the vessel to comply with the national law which required marine surveyors to be involved. The defendants say that these were matters entirely foreseeable to the plaintiff at the time of entry into the charter. The plaintiff was experienced in the charter business and well aware of the nature of such costs. For those reasons, the defendants contend that the compensatory fee of $10,000 per day was a genuine pre-estimate of the owner’s actual costs and not a “penalty”.
4. In relation to breach of the charter cross-claim, the plaintiff issued its certificate of redelivery on the same day as the prohibition notice was issued. The defendants say no steps were taken by the plaintiff to repair the vessel despite the obligation imposed by cl 9, which is in the following terms:

[The plaintiff] will take immediate steps to have any necessary repairs done within a reasonable time failing which the Owner will have the right of withdrawing the vessel …and without prejudice to any claim the Owner may have against [the plaintiff] under the charter.

1. The defendants point to the fact that at delivery there was a heat gun that was not present at the time of the off hire survey and noted that accordingly. The EJ Manual was removed from the vessel by Mr Ainscough, as sighted by Mr Snaith in the plaintiff’s offices on 13 February 2015. It was subsequently returned to the defendants. At delivery there was 9750 litres of fuel on board, as recorded in the on-hire survey and later in the off hire survey. When the off hire survey was undertaken on 15 March 2015, there was approximately 4,500 litres of fuel on board. This accorded with the engine logs. The costs of the repairs, the replacement of equipment and fuel and the cost of wages paid to Mr Egan are claimed by the defendants.

### Negligence

1. In relation to the negligence cross-claim by the defendants against the plaintiff, it is common ground that the plaintiff, through Mr Ryan had ultimate responsibility for the vessel on each of the three voyages to be made under the charter. The defendants rely on the matters previously discussed, as well as the following, in support of their claim that the plaintiff breached its duty of care by failing to employ a competent crew and navigate and operate the vessel safely.
2. The defendants note that Mr Snaith said in cross-examination that as far as he was aware he had never sailed on a vessel fitted with an EJ Seal. He never had an overheating problem with a stern seal before, but had experienced water spraying problems with sterns seals. Mr Snaith admitted that at taking delivery he did not check whether the valves to the SSTA were open as he knew they ought to be. Mr Snaith said in hindsight he ought to have checked. Mr Simmonds said that checking the position of the valve was “101” engineering.
3. The defendants also note that on delivery, Mr Snaith as engineer failed to undertake a pre-departure checklist as set out in p 45 of the SMS Manual. The defendants say the inference to draw from this was that Mr Snaith was either satisfied with the operational function of each and every item of machinery and appurtenance as relevant to the engineering that he had been shown, or presumably, that he was incompetent, in that:
   1. he failed to verify the SSTA valves were open;
   2. he failed to check on a daily basis that the valves were in the correct position;
   3. he failed to check that the temperature of the SSTA each hour by use of either the supplied heat gun or his hand;
   4. he failed to refer to the EJ Manual to determine the cause of the burning and/or water leakage from the SSTA;
   5. he failed to appreciate the significance of the purported “manageable” water leak, when in fact it was a water leak from a failed SSTA;
   6. on his version of events on 7 February 2015, he stood at the top of the stairs whilst the deckhands, Messrs Harvey and Crow, down in the engine room told him erroneously that the source of the burning smell was oil dripping onto the gearbox (which meant that the gearbox itself had to be hot and it ought not to have been) when the burning smell was actually the burning of the bearing and/or the EJ Seal. The defendants contend that he should have been in the engine room. By Mr Snaith’s own admission, the defendants say, Messrs Harvey and Crow were undertaking his engineering duties by doing that, even though neither was a qualified marine engineer driver;
   7. he failed to check whether the SSTA was hot when there was a burning smell coming from the engine room;
   8. he failed to know whether the relevant valve, as identified in the drawing discussed above, was open or closed on the afternoon of 7 February 2015;
   9. he failed to log any of these entries in the engineering log, despite agreeing that they were unusual events and ought to have been logged;
   10. he failed to inflate the boot of the EJ Seal as designed to get the vessel back to Gladstone; and
   11. he failed to call Ms Lopez on the afternoon of 7 February 2015, as a designated person ashore in the SMS Manual, to notify her of the events and to consult her as to the possible course of the water leakage.
4. The defendants also claim that the plaintiff’s crew also failed to navigate and operate the vessel safely, with particular regard to the shallow nature of the waters at Heron Island. The defendants say that when the vessel departed Heron Island it was mid-tide. As previously discussed, on inspection of the strainers by Mr Simmonds, after the prohibition order was issued, sand and other debris were found in the strainer. Mr Benn said that he has only known sand to be found in the strainer when a vessel had been grounded. It follows, the defendants say, that the vessel sailed into shallow waters for there to be sand and coral in the strainer. This was the first voyage of the vessel to the shallow islands of Heron Island. Mr Snaith told Ms Lopez on the evening of 8 February 2015 that there was possibility of sand getting through. The defendants say this was a known risk to the plaintiff and that a prudent engineer would be in the engine room to monitor the temperature of the SSTA during those early minutes of departing Heron Island. The defendants contend that this is a readily performed task consistent with the duties of engineer and a proportionate response to the known risk, particularly given the cost of undertaking repairs to stern seal tubes. If Mr Harvey’s evidence is accepted, the defendants say that the risk was also known to the plaintiff because its own vessel had undertaken repairs of that kind two or three times.
5. Mr Snaith said he inspected the SSTA each hour but did not recall using a heat gun, nor his hand to check how hot the temperature of the SSTA became. The defendants say at best he observed the SSTA. It is submitted for the defendants that it cannot be true that Mr Snaith inspected the engine every hour after delivery, with Mr Ryan’s evidence being that he did not allow anyone to go down to the engine room after leaving Moreton Bay, that is, one and a half hours into the delivery voyage due to the hazardous weather conditions. Further, Mr Snaith was on a “four hour on, four hour off” roster during the delivery voyage. Mr Snaith does not recall when he first realised that there was no inbuilt thermometer built into the SSTA. A prudent engineer would have noticed, the defendants submit, the absence of an inbuilt thermometer during the induction and turned his or her mind as to how he or she was going to measure the temperature. That was the obvious purpose of the heat gun, which, in turn, was there to ensure the SSTA did not overheat. Both the Operating Manual for the EJ and EL Seal identified that for the seal to operate within normal parameters, therefore the defendants say that regular checks needed to be made for leakage and signs of overheating. The defendants say that there was an obvious failure to refer to the Manual and that there was no evidence that Mr Snaith checked the flush water supply valves at any time during any voyage.

### Unjustified arrest/excessive security

1. The defendants abandoned their claim for unjustified arrest as pleaded in [50] of their cross-claim (or at all), but maintain their claim for damages for claiming excessive security.
2. As to their claim for excessive security, the defendants accept that they need to prove the plaintiff acted unreasonably and without good cause in the plaintiff’s demand for security of $316,000 on 26 November 2015 for the release of the vessel, excluding legal costs and interest. The defendants observe that the *Admiralty Act* and the ***Admiralty Rules*** *1988* (Cth) contain no express requirements that an applicant for an arrest of a ship must disclose any matters other than those expressly stated in the *Admiralty Rules*. They further note that there is no unqualified obligation to make full and frank disclosure of other material facts: *Atlasnavios Navegacao LDA v The Ship “Xin Tai Hai” (No 2)* (2012) 215 FCR 265 where Rares J said (at [78] and [92]):

78 The *Admiralty Act* and *Admiralty Rules* do not contain any express requirement that a person applying for the arrest of a ship or other property (which, for simplicity, I will call a “*ship*” in these reasons) must disclose any other matters than those expressly stated in the *Admiralty Rules*. Additionally, r 40(3) contemplates that the Registrar may become aware of one of three particular facts (the existence of a caveat against arrest, payment into court or the filing of a bail bond) that would prevent the issue of the arrest warrant, except with leave of the Court. If the plaintiff becomes aware of any of those matters and they have not been disclosed in the affidavit in Form 13 used to support its application for the issue of the arrest warrant, I am of opinion the plaintiff has a duty to disclose that matter fully and frankly to the Registrar. Such a duty complements and reinforces the evident purpose of r 40(3).

…

92 Accordingly, having regard to the subject matter, scope and purpose of the Act and Rules, it would not be appropriate to impose a duty on a plaintiff seeking the issue of an arrest warrant that comprises an unqualified obligation to make full and frank disclosure of other material facts beyond those specified in the Act and Rules as necessary to be established to invoke the exercise of the power to issue a warrant under r 40(1).

1. Rule 39(3) of the *Admiralty Rules* requires the affidavit in support of the arrest to be:
   1. be made in accordance with Form 13;
   2. set out particulars of the claim; and
   3. any necessary facts that would entitle an action *in rem* to be brought, in accordance with the *Admiralty Act*, in respect of the claim.
2. The necessary facts to be entitled to an action *in rem* include the proof of the charter for the purpose of s 4(3)(f) of the *Admiralty Act*. That was duly exhibited to the affidavit of the arresting solicitor in support of the application for arrest. Other necessary facts, according to the defendants, included the correct identification of every invoice issued to the plaintiff and proof of the payment of such invoices by the plaintiff. These were known by the plaintiff at the time of the arrest and had been known since February or March 2015. Therefore the defendants contend that the damages sought for the alleged breach of the charter were ascertainable as a finite figure, being the sum of each of those invoices. That information was known to the plaintiff, but not known to the defendants.
3. On 31 December 2015, a letter of demand was sent to the defendants which asserted a latent defect which was independently verified. The defendants note that at trial no evidence was tendered by the plaintiff that there was any independent verification of the latent defect as at 31 October 2015 or as at 18 February 2015 when it was first asserted. The nature of the latent defect was also not identified. The defendants therefore say that they had no notice of the factual basis on which the latent defect was said to exist. The defendants have asserted that there is still no basis for the assertion of any latent defect. The defendants therefore submit that the demand was made without good cause both at the time it was made and now.
4. The demand was for $316,000 plus interest, but the basis for interest or interest rate was not identified. Furthermore, no threat of arrest was made. The defendants say that the usual inference from the term “commencement of proceedings” is *in personam* proceedings, rather than *in rem* proceedings. The letter of demand identified a series of costs in round figures, “the most staggering” of which, the defendants say, was the cost of a replacement vessel said to be $235,000 a day for the remaining 10 days of the 14 day charter. No invoices or charter were provided with that letter of demand, or at any previous time, that supported the assertion or any other assertion as to the alleged expenses. They say that those invoices were not provided until the defendants obtained the plaintiff’s consent on 5 February 2016 for the production of each document sought to be relied upon in support of the claim of $316,000. Despite the consent orders, the defendants noted that the plaintiff still failed to produce the documents on time.
5. The defendants noted that the sum of $316,000 plus $50,000 costs and $11,000 for interest was sought as security for the release of the vessel. The defendants contend that the affidavit in support claimed $316,000 as a bald assertion, unsupported by any documents scheduled to the affidavit. The non-disclosure of the invoices and proof of payments in support of the alleged debt and/or damages at the time of the affidavit, or any time prior, meant that the Court and the defendants had no information other than the assertion in the affidavit. The letter of demand that accompanied the documents made immediate capitulations as to quantum. The cost of the replacement vessel was said to be only $38,390, not $235,000, as deposed to in the solicitor’s affidavit. The cost was about a tenth of that claimed as security. The defendants say that on 25 November 2015, at the time of the arrest, it is clear that the plaintiff claimed excessive security. The best case, according to the plaintiff, was $120,379.61 (including GST, but excluding costs and interest) and according to the defendants, about $85,000 (including GST, but excluding costs and interest).
6. The defendants note the observations of Tamberlin J in *Lloyd Werft Bremerhaven GmbH v The Owners of the Ship "Zoya Kosmodemyanskaya"* [1997] FCA 379 (at 36) (***The Zoya***), where his Honour considered that had it been shown to him that there was credible relevant evidence known to the deponent but withheld from the Court in the application for arrest, there may have been a ground for release in that case.
7. His Honour further noted (at 36-37):

However, I have considered the testimony of the solicitor handling the matter both in chief and under cross-examination together with the material placed before me. Whilst the Lloyd’s Register entry relied on for the arrest was outdated, the evidence does not go so far as to satisfy me that either the solicitor or other persons acting on behalf of the plaintiff, or the plaintiff itself, was aware that the Lloyd’s Register relied on had been updated. Nor am I satisfied that the plaintiff or the solicitors withheld any relevant information from the Court in initiating the arrest proceedings. Should it subsequently become apparent that evidence placed before the Court on an arrest was incorrect then it is incumbent on the solicitors to correct it forthwith. In *The Nordglimt* [1988] QB 183 at 188 Hobhouse J observed:

"It is of the greatest importance to the administration of justice that courts should be able to rely upon the truthfulness and accuracy of affidavits sworn by solicitors or their employees. It is accordingly essential that such affidavits should be prepared with proper care and that mistakes of the kind which I have described should not occur. It is also essential that lawyers acting for parties and in particular the deponents of such affidavits, should attach the greatest importance to their oath and that when they find that they have made a false statement on oath they should be at pains to correct it. Happily what has occurred in the present case is in my experience most unusual but, having occurred, it must be made the subject of comment by the court."

I completely agree with the above remarks. The caution sounded in the above decisions must be carefully borne in mind by parties who institute proceedings for the arrest of a vessel, namely that **the arrest of a ship in trade is a drastic measure** and there should therefore be a thorough and careful investigation as to ownership before arrest proceedings begin.

For the above reasons I do not consider that any ground has been made out to justify release of the vessel on the ground of non-disclosure.

(emphasis added)

1. In relying on the above statements of Tamberlin J, the defendants submit that the vessel remained under arrest until such time as the sum of $366,000 was posted as security in circumstances where the plaintiff and its solicitors must have known that the best case was only ever going to be $120,379.61. Inevitably, an arrested vessel that is trading will be subject to an application for release while it is plying its trade. On 25 November 2015, the vessel was engaged in trade in Strahan, Tasmania, as the plaintiff was aware given that that information appeared on the face of the application for the arrest. It was not leaving Australian waters. Therefore, the defendants contend, the plaintiff not only claimed excessive security, but necessarily conceded that it had done so in its correspondence of 16 February. Therefore, the defendants say, once that concession was made, it was clear that the arrest was on an incorrect basis. The bald assertion (claimed in the affidavit) being wrong, it was incumbent on the plaintiff and its solicitors to correct the assertion immediately, but failed to do so, the defendants say.
2. The defendants also refer to *Transpac Express Ltd v Malaysian* *Airlines* [2005] 3 NZLR 709, contending that the absence of evidence as to knowledge held by the arresting solicitor at the time should be relied upon to support an inference under *Jones v Dunkel* that his evidence would not assist the plaintiff in establishing the *bona fides* and reasonableness of its conduct.
3. Specifically, the defendants say, it is difficult to see how two lawyers could institute legal proceedings, particularly admiralty proceedings, without having given some forensic analysis to the case, particularly in regards to quantum. The claim was and remains based on third party invoices rendered to the plaintiff only. The defendants note that the plaintiff had 6 to 7 months to collate the invoices and proof of payment. The defendants submit that they did not. The defendants say that had one or both done so, they ought to have realised that the security sought was grossly excessive. The defendants say that the damages they suffered was the loss of interest to Ms Lopez, who advanced the money from her account (as a director’s loan) when those funds were earning interest in that account.
4. As to the modified claimed $38,390, the defendants say this is still excessive. The defendants bareboat chartered the vessel to the plaintiff. The plaintiff was responsible for the supply of its own crew. Each of the invoices tendered by the plaintiff include crew costs for 9 to 15 February 2015. The bareboat rate was $2,200 per day for a total of 15 voyages plus one turn around on 11 February 2015, for which the plaintiff was charged $2,000. That figure includes a crew member. The adjusted figure for crew would be $650 less. The adjusted bareboat charter for “Seawatch" on 16 February 2015 should be $1,350. On a bareboat basis, the actual cost of the replacement vessel was $27,750 being:
   1. $21,150 for invoice 882; and
   2. $6,600 for invoice 885.

The defendants accept that the port charges of $543.64 for the vessel between 9 and 18 February 2015 were paid by the plaintiff.

# ANALYSIS

1. The defendants’ submissions and arguments were extensive. There were three main issues in my view:
2. Did the plaintiff’s crew turn off the valve?
3. Was the vessel seaworthy?
4. If yes to either of the above and, in any event, were the defendants entitled to succeed on any part of their cross-claim for delay, repairs and excessive security?

## Clause 2 of the charter: due diligence and latent defect

1. These two topics (both arising under cl 2 of the charter), may be considered together.
2. The vessel’s engineer’s evidence was relevant to whether the failure was acute or developed over time. On 21 August 2014 the vessel’s engineer recorded that the starboard shaft seal was “hot due to cooling water restriction”, which problem was repaired, at least temporarily, that day. Within a few days the vessel’s engineer recorded that the shaft seal was found to be leaking. However, the log for 27 August does not record any repairs nor confirms whether the problem was rectified. The maintenance log for the vessel records repair works on both 21 August and 27 August. Without evidence from the vessel’s engineer, whom Ms Lopez accepted was still available to give evidence, these records are indicative of a problem with the SSTA. The records indicate that there were water restrictions to the bearing (indicated by the seal running hot) and leaks from the seal indicating loss of flow to the bearing which in turn increases pressure in the seal. These symptoms are, at least, indicative of the early stage of bearing failure in the manner described by Prof Hargreaves and Mr Ainscough, with which Dr Casey did not disagree.
3. Ms Lopez said that on 21 August 2014 she contacted Mr Lough by telephone for advice and that he advised her not to be concerned. Mr Lough said he did not recall any such conversation in 2014. Further, Mr Lough stated that if a customer had rung for advice on a “hot” stern seal, he would have advised the customer that the vessel should be slipped and the shaft pulled for a proper inspection. Mr Lough’s evidence as to the advice he would have given is consistent with the approach he took on 8 February 2015, namely that he could not give advice over the phone or from looking at photos. Ms Lopez’s evidence that she sought expert advice in August 2014 is unsupported. I accept Mr Lough’s evidence.
4. The starboard stern bearing was overdue for replacement during the period from August 2014 - February 2015, having been in use since 2002. The evidence suggests only one bearing was replaced in 2011. In the absence of proper maintenance records being discovered by the defendants to identify which bearing was replaced in 2011, again, there is no corroboration that the replaced seal was the starboard seal.
5. Contrary to Ms Lopez’s evidence, there were further problems with the port stern tube seals on 6 and 22 October 2014. The vessel’s maintenance log for those dates records no work was undertaken to rectify the leaks or that further investigations of a potential problem were conducted. When the vessel was slipped for repairs in March 2015, the port stern seal was replaced. I accept the plaintiff’s submission that the need to replace the port seal and bearing indicates it was past, or very close to the end, of its operational life. After October 2014 the vessel was laid up until the charter to the plaintiff (except for a sea trial which is not recorded in the vessel’s log).
6. Putting this all to one side for the moment, I turn to the question of whether a material valve was on or off and/or partly so. It is not clear that valves were left open as the defendants assert. There is evidence that the defendants had intentionally arranged the valves to both the port and starboard stern tubes in a restricted position (partially or fully closed) at some stage prior to the commencement of the charter. On the port side arrangement, one of the valve handles had been completely removed whilst in a closed valve position. In respect of the starboard side there is some dispute, but even if one accepts Ms Lopez’s evidence, the valves were partly closed. I do not intend to speculate as to whether, as Ms Lopez’s asserts, the valve positions were set by Rogers & Lough in a partially closed position. But equally, I would not speculate that Mr Snaith had at some stage throttled the valves, or closed a valve completely, because the vessel was having excess water leakage from the stern tube seals. It is entirely possible (in the absence of evidence from the vessel’s engineer), that an approach of partially restricting supply was adopted as part of managing a known problem with the stern seals in August and October 2014.
7. The contention that the plaintiff’s crew turned off both valves to the SSTA has several difficulties, the plaintiff asserts:
   1. It is common ground (as the experts agreed) that all valves could not have been closed on the delivery voyage on 6 February, nor at Gladstone on the morning of 7 February nor on the voyage to Heron Island. Human intervention, on this would have had to occur shortly after the vessel left Heron Island.
   2. There is no suggestion that in the ordinary course of events the valves could have been accidently closed. There would have to be a sensible and rational reason for a member of the plaintiff’s crew to go below and adjust the SSTA arrangement and valves.
   3. The burning smell was the first indication of a problem.
   4. The expert evidence is clear that the burning smell is also the indication of a loss of water to the SSTA and thus complete catastrophic failure.
   5. Everything after the burning smell is immaterial in differentiating the acute and chronic failure theories. Once the bearing failed there is nothing that could have been done. It has failed.
   6. No one is shown to have “turned the valves off” prior to the burning smell. No reason to work on the SSTA has been identified.
8. The relatively new theory as to possible ingress of coral or sand was not properly developed in the expert evidence and is speculative. Nor was it explained in any depth in cross-examination at trial. There is no evidence, as the plaintiff submits, of when the strainers were last cleaned. Thus the presence of sand after 8 February indicated nothing about when the asserted grounding might have occurred. No crew acknowledged any grounding. Further, there is no other physical evidence of the vessel grounding, such as hull or paint damage to indicate the recent contact. One would expect the defendants to be relying upon such specific evidence of damage to the vessel if the sand or coral theory were to be plausible. In any event, the expert evidence said no more than that sand would cause damage or abrasion to the bearing and seal and not that it would result in a bearing failure. As the following exchange between the experts illustrates, no expert was asked, nor volunteered, sand as a sufficient cause for bearing failure:

MR COX: Perhaps I will go to Dr Casey first on the same subject. You don’t – do any of you suggest that there was evidence in the present case of sand or grit being a cause of the catastrophic failure rather than either the acute or chronic failures that are identified in your joint report?

DR CASEY: Up until – this is Rob Casey. Up until this particular point in time, this is the first I’m hearing of the sand and the grit aspect of it.

MR COX: Right.

PROF HARGREAVES: It’s Doug Hargreaves. I concur with that.

MR AINSCOUGH: Steve Ainscough. Same thing.

1. An additional difficulty with the defendants’ case is that on the port side arrangement a valve was found closed with the handle removed. That was not set by Rogers & Lough and is not the recommended arrangement.
2. Similarly, as noted, any suggestion that the SSTA valves might have been bumped off cannot be accepted. The evidence is that one could only access the valves by removing the engine room floor plate. Nor was it suggested to Mr Snaith in cross-examination that this might have occurred when he conducted his hourly checks. It should not be assumed that to conduct engine room checks Mr Snaith would be anywhere near the SSTA valves, or that he would be required to remove the floor plate.
3. As the plaintiff observes, ultimately the critical comparison of evidence is not between the credibility of Ms Lopez/Mr Simmonds (on whether the valve was on at delivery) and Mr Ryan/Mr Snaith (on whether they might have stopped to dismantle the SSTA prior to the burning smell). Rather, it is a comparison with objective written records of a pre-existing problem on 21 and 27 August 2014 and no evidence that the shaft had been pulled in the last five years. The delay in renewed malfunction between August 2014 and February 2015 can be adequately explained by the lay up after October 2014.
4. As to the cross-examination and submissions about the precise time of failure, the common fact on the expert evidence is that it was indicated by the burning smell. All the experts agreed that the time of failure was the time when the crew smelled a burning smell and shortly thereafter water was seen to be leaking from the seal.
5. As to the “bump test” in June 2014, there is no evidence that an actual bump test was performed or how it was performed. The AMSA Certificate produced did not record that a bump test had been performed. If the defendants wanted to prove that a bump test was actually performed and what that test actually entailed, they could have called the attending MSQ surveyor but chose not to do so.
6. The pre-existing defect in the SSTA was a latent defect. As the plaintiff contends, Mr Lough and Mr Ainscough were the only witnesses with the qualifications to comment on this issue. Both agreed the only way to further examine a SSTA bearing which had run hot and leaked, as described in August 2014, was to pull the shaft. Simply looking at the exterior of the seal and the manuals would tell you no more than further enquiries were needed when the vessel was slipped.
7. Messrs Ryan and Snaith could not have been expected to discern the need to slip the vessel to examine the bearing simply from the August 2014 entries. They did not, for example, know when the shaft had last been pulled or the extent of the problem and it was unreasonable to expect them to find a defect of that kind.
8. Mr Simmonds, who was specifically engaged to examine the vessel for defects at the on-hire survey, could not find the pre-existing SSTA problem nor did he notice the missing handle to the valve on the port side which valve was closed. Mr Simmonds had more time to complete his inspection than Mr Ryan/Mr Snaith. If Mr Simmonds could not reasonably identify the problem, it is not a fair argument to say that Messrs Ryan and Snaith ought reasonably to have done so.
9. In relation to the claimed breach of the due diligence obligation, there is no contemporaneous document which adequately supports what I conclude is the speculation, at best, on the part of Ms Lopez. The maintenance log of the vessel is the critical evidence as to the history of the vessel’s maintenance. On 21 August 2014, being the key date to which the plaintiff points, the evidence in the maintenance log falls well short of confirming Ms Lopez’s account. It is clear from the 21 August 2014 entry that the tube seal was seen to be running hot “due to cooling water restriction of supply”. The next entry is “seal reset” and an entry “problem fixed”. There was no description of how it was fixed. The only record of the problem being fixed is by way of an “adjustment”. The vessel’s records simply recall that the shaft seal was adjusted. There is no suggestion that any work beyond an adjustment was carried out, further, what the adjustment is will never be known because the engineer was deliberately not called by the defendants.
10. In those circumstances, I cannot infer that any adjustment was significant, as suggested by Ms Lopez and that the work carried out was sufficiently significant to solve the problem for the medium to long term. The difficulty is that within six days, the same part of the vessel’s machinery was found to be of sufficient concern to the engineer to require the making of a specific recording about it in the vessel’s log. He recorded, on 27 August 2014, six days after the problem was supposedly fixed, “adjust water flow to shaft seal”. This is more consistent with a persistent ongoing problem, than a problem which was solved on 21 August 2014. It is more consistent with an ongoing problem than the account Ms Lopez gave that she sought advice from Mr Lough and was told that there was no problem and that she did not need to do anything else. While Mr Lough did not recall that conversation, importantly he made clear that if a customer had such a problem, he would have recommended slipping the vessel and pulling the shaft, which is, of course, what the plaintiff says should have been done. Regardless of whether he recalled the particular conversation, that is his evidence of the advice he would have given. At the least, he would have advised, and I accept, that further investigation was required.
11. The evidence of Ms Lopez as to why she was telephoning Mr Lough was this:

MR COX: Thank you, your Honour.

Ms Lopez, I just want to start by asking you about the conversation you had with Mr Simmons [sic] on the morning of the 6th when you were in the engine, when he was doing his on-hire survey. Do you remember speaking to him? - - - Yes, I do.

Right. And whilst you were in the starboard engine room did you tell him that you had had problems with the starboard stern seals overheating and leaking? - - - No, I didn’t tell him I had problems.

Did you tell him that you had had a problem with leaking and the stern seals running hot in August of 2014? - - - I don’t recall that I told him about August 2014.

Right. Did you tell him about the problems you had had with the portside – starboard – portside stern seal in October of 2014? - - - No, because I didn’t have problems with the portside or the starboard side.

You didn’t have any problems? - - - Well, not what I would call a problem.

Right. I thought you said yesterday that in August of 2014, after the starboard stern seal was running hot and some water was leaking, you rang Justin Lough for some advice about what to do with that stern seal arrangement? - - - Yes. That’s correct. I did ring Justin.

Right. Now, there would be no reason to ring Justin if you didn’t have a problem, would there? - - - Well, I disagree.

Right. You would ring him for a chat? - - - **No. I rung him because it was liaised to me that the starboard stern seal was running hotter than normal and it – it was hotter than normal, is what I was told. I had two engineers on board that day**.

Yes? - - - And I waited – **I rung Justin in the event that, if it was hot, overheated, then I would need to get on the slipping**, get fixed so I could continue my whale-watching operation.

I suggest to you that if you had rung Justin, he would have told you that you should have got it slipped and pulled the shaft, wouldn’t he? - - - Well, the end result was that it was hotter than normal running temperature.

Right? - - - Not overheated.

Right. Well, so why did you need to ring him? - - - Well, it’s just what I do.

Right. So why wouldn’t you rely on your two engineers? - - - Didn’t you have confidence that they were competent engineers who could advise you about what needed to be done to the vessel? - - - Yes, I do have competent engineers and I always think five steps ahead.

…

Okay. I suggest to you that in paragraph 52 of your statement to Maritime Services Queensland, you said:

*The propeller shaft bearings were replaced in 2010 when the seals were fitted and the bearing ware was checked every year since. The bearings were replaced with no issues identified since then*.

Do you recall indicating that in your statement? - - - No, I told them that the seals were replaced, not the bearings so

The bearings? - - - perhaps that’s a typo. I – I

All right? - - - I don’t know.

The correct position is, assuming that’s a typo, that one of the bearings was replaced in 2011? - - - The correct position?

Yes? - - - That’s right.

Yes. And it was the portside that was replaced, wasn’t it? - - - No.

Right. Now, **do you have the survey records from 2011 from when that bearing was replaced**? - - - I have – when you say survey records

Yes? - - - there’s no COC that requires to be actually documented or – or – survey – what – what – sorry.

Do you have any records other than the Rogers & Lough invoice for the bearing that was put into one side of the vessel in the middle of 2011? - - - I have an invoice from an accredited marine surveyor.

Right. And does – an invoice indicating for work that he did to survey the vessel? - - - Yes, to attend the vessel to – **they don’t put each and every single thing down on their invoices or their reports**.

Right. Do you have his report? - - - I think there is an on-hire condition – a – a – a – well, report as such or

Well, perhaps I will put this way? - - - invoice? - - -

**Do you have any vessel records, surveyor record or any piece of paper that indicates which bearing was changed – the port or starboard – in 2011? - - - I have had a lot of documents that were lost in the 2011 floods**

(emphasis added)

1. As Mr Lough made clear in his cross-examination (consistently with the experts), it is not possible to tell anything about the state of the bearing from looking at the seal itself. Indeed, he said that on the occasions he did a visual inspection, Ms Lopez had not told him that she was having problems with the stern seal overheating. His view was that where a stern seal was found to be hot or overheating, and there is water leaking from the seal, that would be a cause for further investigation requiring more than a visual inspection of just the appearance of the rubber. The defendants’ acute failure theory arising within 16 minutes can only be explained on the basis of someone on the part of the plaintiff intentionally turning the valves off before one of the crew smelt the burning smell. No other reason has been advanced for why a crew member would go down to the engine room to start interfering with the stern tube and start turning the valves off. To do so, in order to get to one of the valves to the starboard stern tube, it is necessary to lift up one of the floor plates in the engine room, which is not something which can happen accidentally or is likely to happen accidently. As the plaintiff submits, there was no plausible evidence and it was not convincingly put in cross-examination that Mr Snaith or one of the members of the crew went into the engine room with a box of spanners and started pulling things apart and forgot to turn a valve back on or intentionally turned them both off. That is what the defendants’ human intervention theory really requires.
2. The plaintiff contends that the absence of evidence from the vessel’s engineer on a critical issue is most problematic for the defendants from a *Jones v Dunkel* perspective.
3. I do not consider I need draw any *Jones v Dunkel* inference about the vessel’s engineer, even though it may be open. The simple fact is that I have considered the account from Ms Lopez that the problem was repaired, and there is no confirmatory evidence that it was. The only evidence is that the problem continued. This is a relevant breach of cl 2. In my view, due diligence to make the vessel seaworthy required the defendants, after the problems with the stern seals were identified in August and October 2014, to consult an expert repairer and have the vessel slipped to pull the shafts so the bearing in the stern seal could be properly examined. The failure by the defendants to take that step, after they were on notice of a problem which had not been properly rectified, is a breach of cl 2 of the charter.
4. The consequence of the breach of cl 2 was that when the SSTA failed on 7 February 2015, the vessel could not be operated by the plaintiff for the purpose for which she had been chartered or any purpose. The plaintiff hired replacement vessels to complete the voyages for which the vessel had been chartered at a cost of $34,900 (excluding GST) during the charter period. The vessel remained idle moored at Gladstone Marina incurring mooring charges at $543.36 excluding GST per day (a total of $5,436.30 for the period 9-18 February 2015 inclusive). The plaintiff paid these charges.
5. I also consider the alternative claim of the plaintiff is established. I do not consider the plaintiff took the vessel “as is – where is” without exception. Independent of the due diligence conclusion, the evidence demonstrates that the plaintiff could not realistically have ascertained at delivery that the stern tube bearing was significantly worn and had their valves restricted to manage an existing problem. The only realistic means of ascertaining the problem with the stern tube bearing was to slip the vessel and pull the shaft, which was not practical at delivery. If it is necessary to substantially pull something apart to discover the defect, it is, by definition, latent.
6. It follows that the defendants were responsible for the repair of the latent defect, and responsible for the consequences of it. As cl 2 of the charter provides:

… **the Owner shall be responsible for repairs** or renewals **occasioned by independently verified latent defects** in the vessel, her machinery or appurtenances existing at the time of delivery of the charter. …

(emphasis added)

1. It follows, clearly in my opinion, that the plaintiff has no obligation to pay for repairs of the vessel’s stern tube assemblies under either cl 9 or cl 12 in respect of a latent defect (independent of whether there was a failure to exercise due diligence). Clause 2 and cl 12 expressly prescribe that repair of a latent defect at delivery is the defendants’ responsibility.
2. Although I have expressly accepted the relevant evidence of the plaintiff’s witnesses, the whole human interference theory is logically problematic. There was no evidence that anyone at all entered the engine room at Heron Island, or shortly thereafter, on 7 February. Nor is there any evidence or theory why anyone would have had any reason to turn both valves off. There was a theory advanced by the defendants to suggest that Mr Snaith dismantled the stern tube after the vessel departed Heron Island whilst the vessel was drifting near Polmaise Reef and Erskine Island. As the plaintiff observes, such a sequence of events could only occur with the knowledge of all the plaintiff’s crew, and requires the defendants to establish complicity in giving false evidence to the Court by all four witnesses. While I can accept there are concerns about Mr Snaith’s evidence, I accept the credit of the other witnesses and relevantly to this issue, Mr Snaith. None of the plaintiff’s witnesses is still an employee and, unlike Ms Lopez, they have no direct financial interest in the litigation.
3. The significance of this is that there is, as I observed from the outset, no middle ground between the positions of Prof Hargreaves/Mr Ainscough’s chronic theory and Dr Casey’s acute theory. The acute theory can only be relevant if there was human intervention shortly after departing at Heron Island on 7 February 2015. (All experts agreed that it is impossible to differentiate between the competing theories by examining the failed components.)
4. When the human intervention theory is discarded, the only alternate theory arises is an existing latent defect in the stern tube bearing on 6 February and prior to delivery. The pre-existing stern tube bearing wear was entirely unknown to the plaintiff and to the on-hire surveyor. As such, it can only be described as a latent defect. The only question is whether the stern tube problem should have been the subject of further maintenance prior to 6 February 2015.

## Negligence

1. The negligence case turns on a contention that the plaintiff’s crew turned off both valves. This has not been proven.
2. The various other criticisms of the plaintiff’s crew are not causative of the agreed loss of water to the SSTA bearing shortly at about 1520 hours on 7 February 2015 and there is no utility in pursuing them further. The suggested negligence is irrelevant to any causative loss and involves speculation.

## Damages issues

1. In relation to redelivery and delay, I accept the plaintiff’s submission that the vessel was redelivered on 18 February 2015 and that the notice of the reasons for redelivery were set out in the letter sent the same day. At that time, possession of the vessel passed from the plaintiff to defendants, and accordingly the vessel was redelivered to the defendants. There was therefore no relevant delay in redelivery and the question of whether the plaintiff is liable for $10,000 per day for delayed redelivery does not arise. The only question is whether the variation in the place of redelivery was a breach of cl 14, and if so, what the consequences of that breach was.
2. In my view, as discussed, the defendants were in breach of the due diligence obligation to make the vessel seaworthy in cl 2 and, therefore, there was not a breach of cl 14 to redeliver at the place where the vessel was subject to the AMSA prohibition notice. I accept that the plaintiff was simply unable to physically or legally navigate the vessel back to Redcliffe and the defendants were required to remedy the latent defect by arranging the repairs. The plaintiff can hardly breach the charter by complying with a statutory notice arising from the defendants’ charter breach. The vessel could not be moved and the plaintiff had to make other arrangements for its charters. The defendants were not entitled to damages for any purported breach of the charter by the plaintiff as there was no breach. It is unnecessary to assess the defendants’ claim for crew and fuel, but I note they were agreed at $8,430.65.
3. In any event, as discussed (at [105]), I consider that the penalty aspect of cl 14 as argued by the defendants (see above at [46] and [218]-[221]) of $10,000 per day is unenforceable (even if it did apply). $10,000 per day was not a genuine pre-estimate of the loss the defendants would suffer if the vessel were delayed. The evidence suggests the hire rate for the vessel was more likely between $3,100 - $3,500 (with only the charter to the plaintiff at the higher rate of $4,200), and at other times $2,100.45. Ms Lopez’s evidence on the costs beyond hire of delayed redelivery to the defendants was completely unsupported and equally unconvincing. Ms Lopez said allowance must be made for repair costs even if the vessel was redelivered one day late and did not require any repairs. The same analysis applies to the legal and cyclone costs referred to. Overall, I accept the plaintiff’s submissions that the rate of $10,000 is a penalty and is unenforceable. (Whilst not determinative of the issue, even the charter itself describes $10,000 as a “penalty”). There is no evidence that the charter agreed between the defendants and a subsequent charterer could have started any earlier. There was no evidence of loss by reference to that charter.
4. On other minor heads of loss claimed in the cross-claim, I have found in favour of the plaintiff and against the defendants, so that these do not arise, but I record the following findings on those claims.
   1. GST
      1. The parties have agreed, and I accept, that no allowance should be made in respect of the GST components of any of the invoices.
   2. Fuel costs (items 2.4 & 2.5 of Schedule 1 to the cross-claim: see below)
      1. It has been agreed between the parties that if the plaintiff’s redelivery obligation was met at Gladstone as contended by the plaintiff, and as I find it was, then the amount payable by the plaintiff to the defendants for fuel is $4,462.25. If the plaintiff’s obligation was to redeliver at Redcliffe, it is argued that the amount payable by the plaintiff to the defendants for fuel is $12,892.90.
   3. Repair Costs at Gladstone.
      1. There is no liability for repair costs. If there were, I accept that the MIPEC invoice relates to both the port and starboard stern tube seals and bearings. I accept the plaintiff’s submission that if the defendants are entitled to recover any loss they can only claim in respect of the starboard side. There was no evidence of the breakup of costs, and in the circumstances, it is half the amount claimed to determine the cost of repairing the starboard stern tube should be fixed.
   4. Using the numbering of Schedule 1 to the cross-claim, I note that the plaintiff makes the following submissions, which I also accept:

|  |  |  |
| --- | --- | --- |
| **Schedule 1 to Cross Claim No.** | **Submissions** | |
| 1.1 Repairs | Amount of invoice excl GST is $163.62 – There is no evidence as to how this item (oil sample kits) can be the plaintiff’s responsibility even if liability is established. | |
| 1.2 | Amount of invoice excl GST is $41.05 (re brackets for fire box), liability not proved. | |
| 1.3 | Amount of invoice excl GST is $19,264.28 – this and items 1.4 to 1.8 inclusive concerns repair work at Gladstone in March 2015. Items 1.3 and 1.4 are MIPEC’s charges and items 1.5-1.8 are Rogers & Lough charges in respect of supply items. See submissions at (c) above. | |
| 1.4 | Amount of invoice excl GST is $4,529.09 – see note to item 1.3 and submissions at (c) above. | |
| 1.5 | | Amount of invoice excl GST is $8,245.77 – see note to item 1.3 and submissions at (c) above. |
| 1.6 | | Amount of invoice excl GST is $1,516.00 – see note to item 1.3 and submissions at (c) above. |
| 1.7 | | Amount of invoice excl GST is $30.32 – see note to item 1.3 and submissions at (c) above. |
| 1.8 | | Amount of invoice excl GST is $164.91 – see note to item 1.3 and submissions at (c) above. |
| 2.1 Associated repair costs | | This item no longer pressed by defendants, having been paid by plaintiff. |
| 2.2 (survey costs) | | Amount of invoice excl GST is $3,395.75. |
| 2.3 (incidental expenses) | | |
| (a) airfares | | Amount claimed $3,459.50 but supporting documents only support $621.01 excl GST (138.82 + 138.82 + 238.82 + 104.55). This head of loss not shown to have been necessary. |
| (b) accommodation | | Amount claimed $1,737.80 but supporting documents only support $1,580.01 excl GST (615.45 + 614.46 + 159.09 + 191.01). It was unnecessary for Ms Lopez to attend the repairs, MIPEC charged for supervision separately (this submission also applies to 2.3 (c), (d), (e), (f). |
| (c) sustenance | | Amount claimed $1,568.17 but supporting documents (that can be read) only support $699.78 excl GST (97.28 + 141.18 + 143.09 + 195.45 + 15.90 + 66.59 + 12.00 + 28.29).  Number of items would seem to be excessive in any event including claims for wine, liqueurs. Plaintiff submits that amount that should be allowed should be $600.00. |
| (d) taxi | | Amount claimed $411.40 but supporting documents only support $122.80 excl GST (18.18 + 15.90 + 23.63 + 65.09). |
| (e) car hire | | Amount claimed $598.35 but supporting documents only support $476.70 excl GST (202.71 + 273.91). |
| (f) fuel for hire car | | Amount claimed $86.39 but supporting documents only support $62.62 excl GST (20.20 + 42.42). |
| (g) DPA wages | | Amount claimed $8,400.00. No supporting documents nor evidence to support the claim. |
| (h) Port charges | | This item no longer pressed by defendants, having been paid by plaintiff. |
| 2.4 & 2.5 Fuel | | Agreed that if Plaintiff’s redelivery obligation was met at Gladstone as contended by the plaintiff, then amount payable by the plaintiff to the defendants for fuel is $4,462.25. But if the plaintiff’s obligation was to redeliver at Redcliffe as contended by the defendants then amount payable by the plaintiff to the defendants for fuel is $12,892.90. (See (c) above). |
| 2.6 Lost equipment (fire box) | | Amount of invoice excl GST is $193.16. Replacement of new for old and should be discounted accordingly. Plaintiff submits that amount that should be allowed should be 50% or $96.58. |
| 2.7 Lost equipment (heat gun) | | Amount of invoice excl GST is $125.47. Replacement of new for old and should be discounted accordingly. Plaintiff submits that amount that should be allowed should be 50% or 62.74. |
| 2.8 Charts | | Amount of invoice excl GST is $95.45 – These charts remained on the vessel and are still able to be used by the defendants, there is no loss proved. |
| 2.9 Wages (Mr Egan) | | Amount claimed $1,000 – no evidence to support defendants’ claim that plaintiff agreed to pay this item. There is no contractual basis for payment of this head of loss under the charterparty. Mr. Egan’s evidence was that he was NOT part of the crew, the defendants remain responsible for his wages. |
| 2.10 Lost opportunity | | Amount claimed $124,740.00 being 27 days @ $4,200 per day (excl GST). – No evidence that opportunity was actually lost. |

## Damages for excessive security

1. The claim under s 34(1)(a)(ii) of the *Admiralty Act* (unjustified arrest) by the defendants was abandoned on day four of the trial, but the claim under s 34(1)(a)(i) (excessive security) is maintained.
2. Section 34 of the *Admiralty Act* provides:

**34 Damages for unjustified arrest etc.**

(1) Where, in relation to a proceeding commenced under this Act:

(a) a party unreasonably and without good cause:

(i) demands excessive security in relation to the proceeding; or

(ii) obtains the arrest of a ship or other property under this Act; or

(b) a party or other person unreasonably and without good cause fails to give a consent required under this Act for the release from arrest of a ship or other property;

the party or person is liable in damages to a party to the proceeding, or to a person who has an interest in the ship or property, being a party or person who has suffered loss or damage as a direct result.

(2) The jurisdiction of a court in which a proceeding was commenced under this Act extends to determining a claim arising under subsection (1) in relation to the proceeding.

1. Although it is in relation to the abandoned claim for unjustified arrest, it is helpful background to review the defendants claim (at [50]) of their cross-claim:

50. The [plaintiff] unreasonably and without good cause obtained the Arrest of the vessel by reason that at the time of the arrest:

(a) The [plaintiff] was aware that there was no risk of the vessel departing from Australian waters in circumstances where the vessel was:

i. An Australian flagged vessel;

ii. Lawfully permitted to operate only in the coastal waters of Australia by reason of its Certificate of Operation; and

* + 1. Was on charter in Tasmania operating as a passenger ferry in Tasmanian waters (Third Party Charter).

**PARTICULARS**

The [plaintiff] was aware of the flag of the vessel and the limitations of its commercial operations arising from its Certificate of Operation by reason of the charter.

The [plaintiff] was aware of the vessel being on charter by reason it instructed the Marshal as to the whereabouts of the vessel to effect the Arrest.

(b) The [plaintiff] had from February 2015 until the Arrest, asserted that the Damage was due the vessel being unseaworthy at delivery to a verifiable latent defect but has failed and/or refused to provide any evidence to support such an allegation to date (Latent Defect Claim).

**PARTICULARS**

The assertions were made in correspondence and/or conversations between the solicitors for the plaintiff. Further particulars may be provided prior to trial.

(c) The [plaintiff] relied solely upon a marine survey report from a person who was not accredited with AMSA or MSQ as a marine surveyor (Ainscough), as the basis for the claim of a verifiable Latent Defect Claim.

**PARTICULARS**

The person was Ken Ainscough, who ceased to be accredited by AMSA or MSQ by QCAT Order of 17 January 2011: [2011] QCAT 22.

(d) Ainscough was not an independent expert by reason of him being held out by plaintiff’s solicitors as being a staff member of Aus Ship.

**PARTICULARS**

At www.auship.com.au, Aus Ship represented that "Our professional staff comprises ... surveyors ... and Ainscough is listed as one of their marine surveyors.

(e) [The defendants] had requested the [plaintiff] agree to the nomination of a sole arbitrator in Queensland to arbitrate the dispute relating to the Damage pursuant to Clause 21 of the charter (Request to Arbitrate).

**PARTICULARS**

The Request to Arbitrate was written. In so far as it was written is by an email from [defendants’] solicitors to [plaintiff’s] solicitors dated 14 August 2015.

(f) The [plaintiff] had failed or refused to reply to the Request to Arbitrate.

(g) [The defendants] had filed and served legal proceedings in the District Court of Queensland in relation to the matters pleaded in paragraphs 20 to 66 of this Cross-Claim (Queensland Proceedings) pursuant to Clause 21 of the Charter.

**PARTICULARS**

The Queensland Proceedings were District Court Proceedings 4447 of 2015, which were served on the [plaintiff] by email and post on 13 November 2015.

(h) [The plaintiff], by its solicitors, represented to [defendants] that the solicitors were unable to obtain instructions to agree to fast track the Queensland Proceedings until sometime before 14 December 2015 due to the [plaintiff] being an overseas based company. (Representation).

**PARTICULARS**

The Representation was made James Neill of Ausship by emails to the solicitors for the [defendants] on 17 November 2015.

(i) At no time did the [plaintiff] provide any notice to the [defendants] of any intention to Arrest the vessel.

(j) At no time did the [plaintiff] request any security from the [defendants] in lieu of arresting of the vessel.

(k) On 31 October 2015, the [plaintiff] made an unsubstantiated demand for payment of $316,000 for alleged loss and damage suffered by the [plaintiff] for the Damage (Letter of Demand).

**PARTICULARS**

The Letter of Demand was written. In so far as it was written it was from [the plaintiff’s] lawyers to the [defendants’] former law firms of John Cavanagh [sic], and Warlow Scott Lawyers.

(l) In its application for the Arrest, the [plaintiff] represented to the Court that the vessel sustained a mechanical [sic] whilst en route to Gladstone, Queensland on 9 February 2015, when in fact the vessel did not sail at all on 9 February 2015 (Arrest Representation).

**PARTICULARS**

The Arrest Representation was made by Drew James, solicitor, in paragraph 10 of his affidavit sworn 25 November 2015 (DJ Affidavit).

(m) In the DJ Affidavit, the [plaintiff] further represented to the Court that the Damage was due to a latent defect, but no such allegation of latent defect is pleaded in the Statement of Claim dated 21 December 2015 (Latent Defect Representation).

**PARTICULARS**

The Latent Defect Representations were made in paragraph 12 and 14 of the DJ Affidavit.

1. By [51]-[54] of its cross-claim the defendants pleaded:

51 Further or alternatively, the [plaintiff] unreasonably and without good cause demanded excessive Security by reason that the [plaintiff] has.

a. Failed to provide the [defendants] with any documents to support the claim of $315,000 [sic] as security for the release of the Vessel, before the Arrest, at the time of the Arrest or since the Arrest;

**PARTICULARS**

The [defendants] refer to and repeat the sub-paragraph 69(j) [sic-50(j)] and the subjoined Particulars above.

* 1. Failed or refused to pay the Gladstone Port for port charges incurred by the [plaintiff] for the Charter Period, which amount forms part of the claim sought by the [plaintiff] as Security as “insurance, marina, ship keeping”.

**PARTICULARS**

Gladstone Port is owed $10,764 being 18 days at $598.00 per total for the period 14 February 2015 to 4 March 2015.

* 1. Improperly claimed AU$5,000 for positioning of the Vessel from Redcliffe to Gladstone as part of the Security, which costs were incurred by the [plaintiff] on 6 February 2015 as part of the Charter, and before the Seal Incident;
  2. Has duplicated its claim for the period of time during which the Vessel was out of service (which period is denied to have been caused by the [defendants]) by reason of seeking the recovery of hire of $48,000 and the cost of a replacement vessel at AU$235,000;
  3. The claim for AU$235,000 as the cost of a replacement vessel for a period of 11 days is excessive and unreasonable.

52 At the time of the Arrest, each of the [defendants] had an interest in the Vessel by reason of being were [sic] the owner and disponent owner to the Third Party Charter.

**PARTICULARS**

The Third Party Charter was written. It was an amended Barecon 89 charter dated 29 September 2015 between [TKL Holdings] as the registered owner and [Moreton Bay Whale Watching Tours] as the disponent owner on the one part and World Heritage Cruises as the bareboat charterer.

53 As a direct result of the Arrest, the [defendants] suffered loss and damage

**PARTICULARS**

The costs of the Arrest estimated $10,000.00

Claim by Third Party Charter arising from

loss of use of the Vessel by reason of the Arrest AU$20,000.00

Loss of opportunity for use of Security TBA

Further particulars to be provided prior to trial

54 By reason of these matters, the [plaintiff] was unjustified in the Arrest of the Vessel pursuant to sub-section 31(1)(a) and/or sub-section34(1)(b) [sic] of the [*Admiralty Act*]

…

**THE [DEFENDANTS] CLAIM THE FOLLOWING RELIEF BY WAY OF CROSS-CLAIM**

1. The amount of $271,120.00 as a debt due and owing to the [defendants] for damages and costs from the [plaintiff].

2. Further, or in the alternative, damages for breach of the charterparty dated 6 February 2015.

3. Further, or in the alternative, damages for negligence.

4. Further, or in the alternative, damages for the unjustified arrest pursuant to sub-section 34(1)(a) and/or subsection 34(1)(b) [sic] of the [*Admiralty Act*].

5. Interest pursuant to the *Federal Court of Australia Act* 1976 (Cth)*.*

1. The defendants contend that:
   1. an extraordinary amount of legal costs has been incurred by the defendants in defence of this claim, that started at $316,000.00, but now is reduced to $40,336.30. It was a Magistrates Court debt claim at best;
   2. it is an abuse of the *Admiralty Act* to have so recklessly embarked upon an *in rem* proceeding, when *in personam* was adequate and proportionate to the claim, particularly where a Court of competent jurisdiction was already seized of the matter, Queensland District Court. In doing so, the plaintiff has had no regard to the impact on the defendants’ financial position to defend an arrest proceeding or the difficulties it has caused defendants and their charterers; and
   3. although [50] of the cross-claim was abandoned at trial, the defendants cannot be silent in submissions about this issue. It is an outrageous misuse of the *Admiralty Act* and the plaintiff’s overarching obligations under s 37N of the *Federal Court of Australia Act 1976* (Cth). In those circumstances, it will come as no surprise that should the defendants succeed in this case, that they will seek indemnity costs.
2. Counsel for the plaintiff responded in oral closing submissions:

MR COX: In paragraph 35 and also in the primary submissions there is about four pages on the same subject the defendants persists with an abuse of process argument that it has abandoned. That is an allegation that, in my submission, ought not be made. The claim has been abandoned. There is a valid statutory right *in rem* to arrest the vessel and this submission should not be put in reply when it has been abandoned on day 4 of the trial. There is no amount by which *in rem* claims must exceed before there’s a valid statutory right *in rem*.

And the suggestion that that makes the arrest an abuse of the Court’s process, which is a serious allegation, that should not be advanced, in my submission, after it has been abandoned. …

1. Counsel for the defendants said in reply:

MS HARRIS: … And I just wish to make one final point in relation to the unlawful arrest issue, your Honour. The amount – in relation to paragraph 35 of the reply submissions by the defendants that paragraph is directed towards the amount of security that was sought.

The defendants – and, whilst my learned friend is correct that there is no monetary jurisdiction in relation to the *Admiralty Act*, nonetheless, the *Admiralty Act* does not stand in isolation from the parties’ obligations under the *Federal Court Act* and that’s section 37M and 37N of the Act. I’m sure your Honour is very familiar with the obligation.

HIS HONOUR: Yes.

MS HARRIS: And the point is that the overarching purpose is to resolve the disputes as quickly, inexpensively and efficiently as possible. Now, the overstatement of the claim at the time of arrest, not by a marginal amount but by a significant amount, all of which was capable of being identified by, A, reference to each of the invoices which ought to have supported [the solicitor’s] affidavit given that formed part of the cause of action.

And, secondly, at having a look at those matters, whether the security of $316,000 was excessive. Now, I appreciate counsel has now come into this matter and, having reviewed the situation, the claim has been reduced now to the replacement costs of the vessel and the port charges. The other matters have fallen away. Now, there is an obligation on parties, we say, under section 37N which must translate into an obligation in the admiralty space.

It cannot operate entirely independently – admiralty law cannot operate entirely independently of these obligations.

1. Although the claim for unjustified arrest has since been abandoned, the claim for excessive security still enlivens consideration of s 34 of the *Admiralty Act*.

### Historical background

1. The Australian Law Reform Commission Report 33, Civil Admiralty Jurisdiction, 1986 (**ALRC Report**), which led to the *Admiralty Act*, considered the position in relation to excessive security as follows (at [303]-[304]) (footnotes omitted):

303. ***Excessive Security*; *Refusal to Release***. Unjustified arrest does not exhaust the possibilities for excessive behaviour on the part of a plaintiff in an action *in rem*. For example, the threat of what might otherwise be a justifiable arrest might be used to extract excessive security, or demands for excessive security might be made after a justified arrest in order to delay or prevent release. Release might also be unreasonably delayed through the entry of an unwarranted caveat against release by a third party. The latter situation is currently provided for in most rules by a provision for damages for the delay unless there was a “good and sufficient” reason for the entry of the caveat. Demands for excessive security on the other hand are not generally provided for by a specific provision in the rules. It seems clear that, where the amount of security (in whatever form) has not yet been agreed between the parties or where security has actually been provided in the form of bail, an application can be made for moderation of the amount demanded as part of an application for release. In the case of bail that has already been provided (either to prevent arrest or secure release) such an application can also be brought separately. If security has already been provided in a form other than bail, on the other hand, the courts lack jurisdiction to moderate the amount or substitute alternative security, since the security is regarded as having been provided pursuant to a private agreement between the parties. A plaintiff demanding excessive bail is liable for the cost of providing the excess bail, though the plaintiffs liability in the case of excessive security provided in a form not sanctioned by the court is less clear. **Security is not regarded as excessive if it simply turns out to exceed the sum recovered: it must have been an unreasonable amount at the time of the demand**.

304. ***Conclusion****.* There is no good reason to differentiate between an unjustified arrest and an unjustified refusal to release. They have the same effect from the point of view of the defendants. The entry of a caveat against release unreasonably and without good cause should be treated in the same manner as an unreasonable arrest. This will in effect simply maintain the liability to damages prevailing in most Australian rules, though it will define more clearly who is entitled to claim damages from the caveator. The same approach should be adopted for an unreasonable refusal to release by the arresting party. The legislation should also spell out the liability to damages of a party demanding excessive security. The present law provides some safeguards against abuse, but in the light of the expanded right of arrest recommended for the proposed legislation, the responsibility of the arresting party to act in a reasonable manner should be expressly stated in the Act. **Excessive demands for security (that is, demands that are unreasonable and without good cause at the time of the demand) should result in a liability for damages in the same manner as for an unreasonable arrest or caveat against release**. This approach will also cater for the considerable overlap in practice between unreasonable demands for security and unreasonable arrests or refusals to release. However, excessive demands should only incur liability where the demand takes place after the commencement of proceedings. This will avoid the more speculative claims; the commencement of proceedings is a fixed time known to the plaintiff, and is thus a suitable point from which the obligation under the proposed provision can operate. The power of the court to modify bail should be spelt out in the proposed rules rather than being left to inference or to general court powers as at present. That power should not however be extended to non-court sanctioned agreements: private security arrangements should continue to remain a matter for the parties except to the extent that excessive demands give rise to a right to damages.

(emphasis added)

### Consideration

1. On the excessive security claim, the defendants/cross-claimants bear the onus of demonstrating that the plaintiff “unreasonably and without good cause demand[ed] excessive security” under s 34(1)(a)(i) of the *Admiralty Act*.
2. The plaintiff says that the first difficulty that arises under the defendants claim is that there is no evidence that the plaintiff made an express demand for security. The letter of demand and the writ are not a demand for security.
3. The plaintiff says that the vessel was arrested and on the defendants’ application for release, the Court fixed the amount of security, no demand is proved and there is no evidence that the amount of security fixed by the Court (assuming that was a demand) was unreasonable and without good cause. The plaintiff relies on the comments made in the ALRC Report that the mere fact that the claim was later reduced does not demonstrate it was unreasonable or without good cause. Proof of both elements is required under s 34 of the *Admiralty Act*. The plaintiff suggests that some guidance on what “reasonably and without good cause” can be seen from cases on the caveat legislation, for example, s 74P(1) of the *Real Property Act 1990* (NSW) (as the current NSW provision uses the term “without reasonable cause”). The plaintiff refers to *Bedford Property Pty Ltd v Surgo Pty Ltd* (1981) 1 NSWLR 106 (at 108) and *Lee v Ross (No 2)* [2003] NSWSC 507, where “reasonable cause” was held to mean an honest belief in a caveatable interest.
4. The plaintiff submits that the only loss arising from the excessive security claim could be the loss of use of money, for example, interest on the security provided between the time of release from arrest (27 November 2015) up until the Court determined the defendants’ application for the security to be reduced (1 April 2016). The vessel was arrested on 26 November 2015. That evening, upon the defendants’ application, the Court ordered that the vessel be released from arrest upon the defendants posting security of $366,000. That security was posted by way of cash paid into Court the following day, 27 November 2015, and the vessel was released from arrest later on that day.
5. On 1 April 2016, pursuant to the defendants’ application, the Court ordered that $100,000 of the security paid into Court be returned to the defendants thereby reducing the amount of security to $266,000. Further, on 4 April 2016, the Court ordered that the balance of the security be paid into an interest-bearing account. On 20 April 2016, the security of $266,000 was paid into an interest bearing account. Accordingly, if the security posted on 27 November 2015 was excessive, the plaintiff says it was so in the amount of $100,000.
6. The plaintiff submits that the defendants have not shown how the initial security was both “unreasonable and without good cause”. As discussed in Cremean DJ, *Admiralty Jurisdiction: Law and Practice in Australia and New Zealand* (Federation Press, 2015) (at 113 – 114), the phrase “unreasonable” and “without good cause” is to be read conjunctively, that is there are two requirements: “acting unreasonably” and “acting without good cause” (see also Woodford, M "Damages for Wrongful Arrest: Section 34 of the Admiralty Act 1988" (2005) 19 *Australian and New Zealand Maritime Law Journal* 115 (at 144 -146)). As to the first requirement, acting “unreasonably” looks to assess a person’s conduct to see whether it is unreasonable. The second requirement, acting “without good cause”, looks to the grounds on which a person has acted to see whether such grounds constitute acting without good cause.
7. The plaintiff’s suggestion that the Court, not the plaintiff, fixed the amount of security is unrealistic. Clearly, the Court was guided by the evidence of the plaintiff. As previously discussed, the letter of demand identified a series of costs in round figures. No invoices or charter were provided with that letter of demand, or at any previous time, that supported the assertion or any other assertion as to the alleged expenses. Those invoices were not provided until the defendants obtained the plaintiff’s consent on 5 February 2016 for the production of each document sought to be relied upon in support of the claim of $316,000. The sum of $316,000 plus $50,000 costs and $11,000 for interest was also sought as security for the release of the vessel. I accept the defendant’s contention that the affidavit in support claimed $316,000 as a bald assertion, unsupported by any documents scheduled to the affidavit. The non-disclosure of the invoices and proof of payments in support of the alleged debt and/or damages at the time of the affidavit, or any time prior, meant that the Court and the defendants had no information other than the assertion in the affidavit.
8. I accept the submission that it is difficult to see how the plaintiff, through its lawyers, could institute legal proceedings, particularly admiralty proceedings, without having given some forensic analysis to the case, particularly in regards to quantum. As noted by the defendants, the claim was based on third party invoices only rendered to the plaintiff. The plaintiff had 6 to 7 months to collate the invoices and proof of payment. In doing so, the plaintiff ought to have realised that the security sought was excessive.
9. Clearly, the sum sought at the instance of the plaintiff was at least $100,000 too much and was therefore excessive. No argument or evidence is now provided to explain why the position was thought to be otherwise. The assertion made in the affidavit in support and the security that was obtained on the basis of it, was unreasonable and without good cause.
10. As to damages, the defendants say that the damages they suffered was the loss of interest to Ms Lopez, who advanced the money from her account (as a director’s loan) when those funds were earning interest in that account. The plaintiff’s suggestion that there is no evidence of liability from the company to Ms Lopez is also unrealistic. There is no suggestion it was a gift. However, contrary to the defendants’ claim, there is no evidence the rate of interest was as high as suggested by Ms Lopez, or indeed, the rate at which, undocumented, the loan should carry interest to Ms Lopez.
11. For the period 20 April 2016 to 30 August 2016, the security monies earned in the interest bearing account the equivalent of 1.342% per annum. The interest payable on Ms Lopez’s personal account from which the security monies was funded was 2.5% per annum.
12. The plaintiff contends that if it is found to be liable for the lost interest, it calculates that loss by way of the following:
    1. the difference between the 2.5% p.a. payable on Ms Lopez’s account and the 1.342% p.a. payable in the Court’s account is 1.158% p.a; and
    2. interest at 1.158% on the $100,000 “excessive” security for the period 27 November 2015 until 1 April 2016, totals **$401.81** (being $100,000 x 1.158% x 127/366).
13. The more appropriate basis for computation, I consider, is a commercial rate of interest that the company should pay Ms Lopez for this 127 days, less any interest actually received. However, I accept the computation would produce the same result. Other than that, it is not apparent to me that the defendants have proven other elements of damage in this part of the cross-claim, nor does it appear from the closing written submissions that further amounts are claimed.

# DISPOSITION

1. I consider that on the cross-claim, the proper award is a figure of $1200 to take into account the computation as articulated above, plus other inevitable incidental expenses.
2. Finally, the defendants note that by writ dated 25 November 2015, the plaintiff named the “relevant person” as the owner, TKL Holdings, under s 17 of the *Admiralty Act*. Whilst TKL Holdings is the owner of the vessel, Moreton Bay Whale Watching Tours was the disponent owner in possession of the vessel at the time of the charter. Therefore, both parties entered into the charter with the plaintiff, and as such were proper defendants, and each entered an appearance. In the event of any judgment for the plaintiff, by the operation of s 31(2) of the *Admiralty Act*, the defendants contend that Moreton Bay Whale Watching Tours, having entered an appearance, but was not a “relevant person” named in the writ, should not be personally liable for judgment. The defendants contend that no case has been pleaded by the plaintiff against Moreton Bay Whale Watching Tours. It is not apparent to me that the plaintiff has addressed the issue. It should do so, if it challenges these contentions.
3. Each party should prepare a minute of the relief to which it contends it is entitled as a result of these reasons and any submissions and affidavits in support not exceeding three pages. Those submissions should be filed within 28 days. The opposing party will have 28 days to respond, subject to the same conditions. If either party requests, I will hear the parties orally, failing which those remaining issues will be determined on the papers.

|  |
| --- |
| I certify that the preceding three hundred-two (302) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice McKerracher. |

Associate:

Dated: 23 June 2017