Neutral Citation Number: [2018] EWHC 2389 (Comm)

Case No: CL-2016-000421

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 13/09/2018

Before :

MR. JUSTICE TEARE

- -

Between :

Classic Maritime Inc.	**Claimant**
- and -	
(1) Limbungan Makmur SDN BHD	**Defendants**
(2) Lion Diversified Holdings BHD	

- -

Richard Southern QC and Andrew Pearson (instructed by **Winter Scott LLP**) for the **Claimant**
Simon Rainey QC and Andrew Leung (instructed by **Hill Dickinson LLP**) for the **Defendants**

Hearing dates: 16-18, 23 and 25 July 2018

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Judgment Approved **Mr. Justice Teare :**

1. On 5 November 2015 the Fundao dam, in the industrial complex of Germano in Brazil where iron ore is mined, burst. According to one iron ore expert who knows this area well the slurry went right down to the ocean, villages were swamped and people lost their lives. The bursting of the dam also stopped production at the iron ore mine and it is that event which has fuelled this litigation between a shipowner and a charterer.

2. The shipowner, Classic Maritime Inc., a Marshall Islands company working out of offices in Monaco, and the Claimant in this action, entered into a long term contract of affreightment (the "COA") for the carriage of iron ore pellets from Brazil to Malaysia. A Malaysian company, Limbungan Makmur Sdn Bhd ("Limbungan"), was the charterer under the COA and is the Defendant in this action. Limbungan has relied upon the dam burst as a force majeure excusing it from liability for failing to provide cargoes of iron ore pellets for

shipment from Brazil to Malaysia. The shipowner does not accept that the charterer is entitled to rely upon the force majeure clause in the COA and has claimed damages for breach of the COA.

3. In this action damages are claimed in respect of seven shipments. Judgment has already been given in respect of two shipments which should have taken place between July and October 2015 (prior to the dam burst). This judgment therefore concerns the claim in respect of five shipments which should have taken place between November 2015 and June 2016 (after the dam burst). The sum claimed is about US$20m. in respect of three "scheduled shipments" which should have been performed at a freight rate of US$45.50 per mt. That freight rate is to be compared with the market freight rate in March to June 2016 which was less than US$7 per mt. The other two shipments, known as "index shipments" (because they were to be performed at the market rate) give rise to modest claims of just over US$400,000. (The agreement for "scheduled" and "index" shipments arose out of earlier litigation in this court between the shipowner and the charterer in 2009 following the fall in freight rates driven by the collapse in the demand for raw materials. I am told that there is a separate action in respect of 14 further shipments which should have been performed before December 2017.)

The charterer and its related companies

4. Limbungan, the charterer, is a wholly owned subsidiary of Lion DRI Sdn Bhd ("Lion DRI") which is, in turn, a wholly owned subsidiary of Lion Diversified Holdings BHD ("Lion Diversified"). Lion Diversified is the guarantor of the charterer and is sued as second defendant. If the charterer is liable so is Lion Diversified. There was evidence that Limbungan was a special purpose vehicle established in order to enter into and perform the COA.

5. Lion DRI is the owner and operator of a Hot Briquetted Iron plant in Port Kelang in Malaysia. Its entire production was sold to a company called Megasteel.

6. Antara Steel Mills Sdn Bhd ("Antara") is the owner and operator of another Hot Briquetted Iron plant in Labuan in Malaysia. It sold its production on the open market.

7. Antara is part of "the Lion Group" but is not a wholly owned subsidiary of Lion Diversified. It is ultimately owned by Lion Industries Corporation Bhd ("Lion Industries") which I understand to have some connection with Lion Diversified. The precise connection was not in evidence but I understood it to be in the form of some common shareholders. There was evidence that Lion Industries was a substantial shareholder of Lion Diversified. A footnote to the statement of a witness, Mr. Lu, who made it clear in his oral evidence that he was unfamiliar with the detail of corporate matters, stated that Lion Diversified and Lion Industries "are both publicly listed" and that any dealings between them must be at arm's length.

The mining companies in Brazil

8. Iron ore pellets from Brazilian the mining company, Samarco Mineracao SA, were shipped through Ponta Ubu in Brazil and iron pellets from another Brazilian mining company, Vale SA, were shipped through Tubarao, also in Brazil.

9. Lion DRI had a long term sales and purchase contract with Samarco dated 11 August 2006 for the sale and purchase of 1.2 million mt of DR-grade pellets per year between 2008 and

2018. Antara (by way of a novation) had a long term sales and purchase contract with Samarco dated 23 November 2004 for the sale and purchase of 640,000 mt of DR-grade pellets in 2005 and 800,000 mt of DR-grade pellets per year thereafter until, by an addendum, 2015. That contract expired on 31 March 2015. A replacement contract had almost been agreed when the dam burst in November 2015. DR-grade pellets are Direct Reduction pellets. They are to be contrasted with BF pellets, Blast Furnace Pellets. Both forms of pellets were contractual cargoes under the COA.

10. Lion DRI also had a long term supply contract with Vale dated 1 November 2006 which was scheduled to last, by an addendum, until 2018. That contract was "idle", in the sense of not being used, from 2011. Antara (by way of novation) had a long term supply contract with Vale dated 1 April 2004 which was also scheduled to last, by an addendum, until 2018. That also appears to have been "idle".

Previous shipments

11. The COA dated 29 June 2009 provided for 51 shipments. Between July 2009 and July 2015 Limbungan, the charterer, made cargoes available for 38 shipments. All but 8 shipments were loaded at Ponta Ubu, the others being loaded at Tubarao, the last shipment from Tubarao being in July 2011.

12. From August 2011 Samarco was the sole supplier of iron ore pellets shipped under the COA. Some shipments involved pellets bought by both Antara and Lion DRI. Thus some 16 shipments were discharged at both Port Kelang and Labuan. 2 shipments involved pellets bought by Antara and were discharged at Labuan. 3 shipments involved pellets bought by Lion DRI and were discharged at Port Kelang. From 2011 all shipments were of Samarco pellets ex Ponta Ubu.

Antara's COA

13. Antara also had a COA with PCL (Shipping) dated 31 January 2008 with the same loading and discharging ports as under the COA with Classic but with a different, and lower, freight rate.

The present claim

14. The claim in the present action arises under Addendum No.1 dated 30 June 2014 to the COA with Classic dated 29 June 2009. Limbungan, the charterer, had undertaken to ship further cargoes of iron ore pellets on tonnage provided by Classic, the shipowner, from Tubarao or Ponta Ubu in Brazil to Port Kelang or Labuan in Malaysia.

15. Clause 32 of the COA with Classic provided as follows:

> "Exceptions
>
> Neither the vessel, her master or Owners, nor the Charterers, Shippers or Receivers shall be Responsible for loss of or damage to, or failure to supply, load, discharge or deliver the cargo resulting from: Act of God,…floods….accidents at the mine or Production facility….or any other causes beyond the Owners' Charterers' Shippers' or Receivers' control; always provided that such events directly affect the performance of either party under this Charter Party…"

16. This clause was described during the hearing as a force majeure clause though that phrase is not used in it. It is in fact described as an exceptions clause. There is no dispute that the dam burst was an "accident at the mine". The mine was operated by Samarco. When the dam burst Samarco suspended its operations and subsequently ceased to be an available source of cargo.

17. Operations at Vale were unaffected by the collapse of the dam. But it is the case of Limbungan, the charterer, that Vale was unable or unwilling to supply iron ore pellets to the Lion Group and so, as a result of the dam burst, the charterer found itself unable to supply cargoes for shipment under the COA.

18. By contrast, it is the case of Classic, the shipowner, that the collapse of the dam had no causative effect on the charterer because the five shipments would not have been performed even if there had been no dam burst.

19. Notwithstanding that both counsel described the case as "straightforward" the true construction of clause 32 gave rise to considerable legal argument. But it is first necessary to recount some of the facts relevant to this dispute.

The position immediately before the collapse of the dam

20. In the light of the respective cases it is necessary to review the positions of the charterer, Lion DRI and Antara before the collapse of the dam on 5 November 2015.

21. The role of Limbungan, the charterer, within "the Lion Group" (a phrase used to describe both the corporate groups to which I have referred), was to load cargoes at Punta Ubu and Tubarao for Lion DRI and Antara. Mr. Dominic Lu was the senior commercial manager of Antara and was responsible for purchasing and arranging shipments of iron ore pellets for both Antara and Lion DRI.

22. Mr. Lu gave oral evidence. He was a good witness in that when he knew the answer to a question he answered it clearly and without hesitation. When he did not know he said so. When he had difficulty in remembering he said so. When he proffered an opinion as to what was likely to have happened he was anxious to emphasise that it was only an opinion and that he may be wrong. His demeanour, listening carefully and thinking about the questions put to him, suggested to me that he was an honest witness doing his best to assist the court. However, he was not a decision maker at a high level and so there were some limitations to the value of his evidence. Also, as is the case with many witness statements drafted by lawyers for use in litigation there were some passages in Mr. Lu's statement which contemporaneous documents indicated were not quite right. Although he confirmed that his statement was true in his examination in chief he accepted, when cross-examined, that there were errors in it. I nevertheless thought that he was an honest witness when giving oral evidence. It does not follow that his recollection was always reliable or that his knowledge of particular matters was complete. Further, part of his evidence concerned what would have happened had there been no bursting of the dam. When witnesses give "evidence" about hypothetical circumstances there is always a risk that their evidence is tainted by honest but wishful or optimistic thinking. It will be necessary to bear that in mind when considering Mr. Lu's "evidence" in this regard.

23. Lion DRI had no need of iron ore pellets from the latter half of 2015. This appears to have been the result of a lack of demand from Megasteel who ceased production as a result of the dumping of cheap steel products by China. Lion Diversified's annual report for 2016 referred

to "Lion DRI's major customer …suffering losses for the past several years due to excessive dumping of steel products by foreign steel mills which has resulted in operating intermittently depending on market conditions." Mr. Lu said that that was a reference to imports from China. Although he said in his statement that the shutting down of Lion DRI's plant was caused both by the shutting down of Megasteel's plant and by the dam burst it is clear that the dam burst was not causative of Megasteel's and hence of Lion DRI's difficulties. Mr. Lu had no difficulty in accepting that nobody asked him in 2015 to get pellets for Lion DRI. Records describe Lion DRI's plant as having been shut down from time to time in July-September 2015, for almost the whole of October 2015, for the whole of November 2015, from time to time in December 2015 and January 2016 and for the whole of February 2016 and thereafter. It appears to be common ground that the Lion DRI plant was permanently shut down in February 2016; see Classic's Closing Submissions at paragraph 12 and Limbungan's Closing Submissions at paragraph 43.

24. Antara's plant was also shut down for part of 2015. Records indicate that in August and September it was shut down for maintenance and in October it was shut down because of "unfavourable market for HBI" (the briquettes produced from the iron ore pellets). The plant commenced operation again on 7 November 2015. Mr. Lu did not know but his opinion was that that had nothing to do with the dam burst on 5 November 2015.

25. The lack of demand by Lion DRI and Antara for iron ore pellets in mid-2015 is also apparent from the statement of Jacob Fentz, the President of Classic Maritime. He said that during 2015 the charterer was seeking deferment or rescheduling of shipments. This was not only because of the reduced demand from Lion DRI but also because of shut downs at Antara's plant. The charterer sought reductions in the freight rate and in the amount of cargo to be loaded. The charterer was unable to give a definite shipping schedule. Reference was made to the poor steel market.

26. That was the context in which the two shipments between July and October 2015 were missed and in respect of which the shipowner has obtained judgment against the charterer. Mr. Lu said that Antara had no requirement for a cargo at that time, "therefore we defaulted". The decision to default was not his own but also that of Anthony Pang to whom he reported and perhaps others to whom Mr. Pang reported. He described it as a collective decision.

Mr. Lu's actions after the dam collapse

27. Notwithstanding the lack of demand from Antara leading up to November 2015, by late 2015 Antara's demand for iron ore pellets had recovered. Mr. Lu said that Antara continued to require substantial volumes of iron ore pellets. On 5 November 2015, just hours before the dam burst, Mr. Lu had proposed the purchase of iron ore pellets from Vale's facility in Oman. But, as seems likely, Bahrain Steel was cheaper, at least initially. Antara purchased some 851,917 mt of iron ore pellets between December 2015 and October 2016 of which 786,425 mt were consumed by Antara. Five cargoes were obtained from Bahrain Steel and six from Vale's Oman plant. Mr. Lu described the Lion Group as needing up to 100,000 mt. of iron ore pellets per month. Mr. Lu accepted that these were spot contracts. The shipping contracts, which were made by Antara, were not negotiated by Mr. Lu but by Patrick Yee who worked under him.

28. On 6 November 2015 Samarco suspended all deliveries of iron ore and gave notice of a force majeure on account of the dam burst. In the evening Mr. Lu spoke to Samarco by telephone. He was told that it was very unlikely that he would get any supplies from Samarco for quite

some time. It was clear to Mr. Lu at that stage that iron ore pellet cargo would be hard to come by because "the closure of Samarco would take away a very large proportion of the worldwide sea borne trade." This view is echoed by Mr. Maith, the charterer's expert, who said more than once that the effect of the dam burst was to reduce global pellet supply by over 20%, some 25 million mt. For Mr. Lu "the most pressing question" was to know when Samarco would resume operations. He did not receive any clear answer to that question. It is likely that he spoke to Samarco several times. An email from Mr. Lo of Samarco dated 11 November 2015 refers to a telephone conversation and attaches Samarco's notice of a force majeure.

29. At the same time Mr. Lu was seeking iron ore pellets elsewhere on behalf of Antara. By 12 November 2015 he had entered into a contract with Bahrain Steel from whom both Lion DRI and Antara had bought pellets before.

30. Mr. Lu gave oral evidence that after the dam burst he also had a number of calls with Vale. In his witness statement dated 27 January 2017 Mr. Lu said as follows:

> "At the time the Samarco dam burst, none of the Lion Group companies had an extant long term contract with Vale for the sale and purchase of iron ore pellets ex-Tubarao. I sent Vale International numerous enquiries and spoke to them over the phone several times to find out whether they had any iron ore pellets available ex Tubarao which would enable Limbungan to perform the COA. Those enquiries came to naught. I was informed on four occasions that Vale did not have any DR-grade pellets ex Tubarao and on 4 February 2016 it was similarly confirmed that Vale did not have any BF-grade pellets ex Tubarao."

31. In his witness statement he then referred to emails on 23 November 2015, 4 February 2016, 26 May 2016 and 12 June 2016 when, he says, he was informed by Vale that they were unable to supply DR pellets from Tubarao. It was suggested to me by counsel that those were "the four occasions" to which Mr. Lu referred in his witness statement. That seems likely.

32. The first email to note is one dated 17 November 2015 addressed by Mr. Lu to Mr. Reinisch of Vale in which he said:

> "As discussed the other day, please let us have your both FOB and CFR price idea.
>
> Alternatively, is there any DR grade cargo available ex-Tubarao?"

33. That shows that there was a telephone call, possibly the week before, between Mr. Lu and Vale. Mr. Lu said when cross-examined that there was at least one call. "If you ask me whether it's two or three or four or five, I've no answer, honestly no answer, but it's at least once."

34. The reference to FOB and CFR prices is a reference to an offer made by Mr. Lu on 5 November 2015 (just before the dam burst) to accept iron ore pellets from Vale's facility in Oman.

35. It was suggested to Mr. Lu that the reference in the email to a request for DR pellets from Tubarao was the first time that that request had been made. Certainly the email is open to that

interpretation but Mr. Lu said that the email could not have been the first time. "There must be some verbal enquiry before that." It was suggested to Mr. Lu that there was no such verbal enquiry (a) because of the way the email dated 17 November is phrased and (b) because Mr. Lu had obtained two cargoes for November and December from Bahrain Steel. The suggestion has some force and Mr. Lu's witness statement does not say in terms that there was a request before 17 November 2015. But in the predicament facing Mr. Lu it seems to me in accordance with the probabilities that he would seek to speak to Vale about shipments from Tubarao before 17 November, notwithstanding that he had fixed shipments for November and December from Bahrain Steel. I therefore accept that it is more likely than not that an enquiry had been made of Vale by telephone before 17 November as to the possibility of supplies of pellets from Tubarao.

36. On 23 November 2015 Mr. Reinisch replied to Mr. Lu by email. The email commences with the phrase "as per our conversations" which suggests, though not conclusively, there had been more than one conversation by telephone. He then referred to the "much valued relationship between our companies and our strong interest to re-start a long business and mutual partnership." He then made two offers to supply pellets from Oman by a Panamax vessel, one CFR and the other FOB. The final part of the email concerned Capesize vessels and implicitly referred to potential shipments from Tubarao. However, it was prefaced as follows:

> "kindly note the below option number 3 is just a price indication, since we do not have RM20 pellets availability especially after the accident and railroad stoppage in Brazil"

37. The price indication which followed stated, under the heading "Volume", "No availability confirmed yet".

38. This email was the subject of debate. It was suggested to Mr. Lu that Mr. Reinisch was leaving the door open for Mr. Lu to follow up if he wanted to press for a cargo from Tubarao. Mr. Lu did not accept that. He read the email as saying there was no cargo from Tubarao and that he was given the price indication so that he could compare Oman with Tubarao. He placed more emphasis on the statement that "we do not have RM20 pellets availability" than on the phrase "no availability confirmed yet" as to which he said "I don't know what he means to be honest." Counsel suggested that that phrase was a "strong hint" that Vale was looking for a long-term contract. Mr. Lu said he did not read it in that way. He added: "Because all along I chased them several times after the accident. No, no cargo for you in Tubarao. Take it from Oman."

39. The objective meaning of this email is a matter for the court to assess. However, it seemed to me that I should be slow to reject Mr. Lu's understanding of it unless it was plainly wrong. I do not consider that his understanding was plainly wrong. On the contrary I agree with him that the statement "we do not have RM20 pellets availability" is clear and indicates that Vale had no pellets to supply to the charterer. It would be unrealistically hopeful and optimistic to read the phrase "no availability confirmed yet" as saying that Vale might in fact be able to supply pellets to the charterer if the charterer made an appropriate long term offer. This matter was also debated with the charterer's expert, Mr. Maith. I am not sure that the intended meaning of the email was strictly a matter for expert evidence but he was asked about it and his answer confirmed my understanding of the email. His understanding of the letter was that Vale were saying "quite categorically that they haven't got pellets of that grade." The most he was prepared to accept was that the phrase "no availability confirmed yet" indicated that

Vale had not yet decided how they were to handle the catastrophe to the benefit of Vale. It was suggested to him that Vale were leaving the door open to see what opportunities they could generate. Mr. Maith replied that people in the steel trade are "pretty blunt people" and that if Vale wished to supply to a particular customer they would make that intention "much clearer". He added: "they wouldn't sort of put an open-ended statement like this. If they wanted to supply to the Lion Group they would have said under what terms and price and conditions they were prepared to supply."

40. In 1 December 2015 Mr. Lu, who had been engaged on "out-station" work, apologised for his late reply and asked for the validity of the offer to be extended. He gave evidence that that was a reference to the offer to supply cargo from Oman for shipment on a Panamax vessel. That appears to me to be likely to be the case.

41. The next conversation between Mr. Lu and Mr. Reinisch appears to have been on or shortly before 4 February 2016. On that date Mr. Reinisch emailed Mr. Lu and said: "As explained on the phone, due to the accident of Samarco, several clients asked more cargo from our Tubarao port to full fill. In this way we do not have any availability of DR grade (also not BF grade) from Tubarao to either Labuan or Port Kelang." He said there was still some cargo available from Oman. It was suggested to Mr. Lu that this email had been obtained for the purpose of showing it to Classic. Mr. Lu denied that suggestion. I accept that denial. The email does not appear to be anything other than an honest and true statement by Mr. Reinisch in response to request from Mr. Lu that Vale was unable to offer any iron ore pellets to Mr. Lu from Tubarao.

42. There appears to have been a further conversation late on 16 February 2016 though the email referring to this conversation has been so redacted that it is difficult to be sure what it was about. It appears to have concerned a comparison between prices ex-Oman and prices ex-Bahrain.

43. Between 7 and 18 April 2016 there were further exchanges concerning the supply of pellets from Oman. An email of 11 April 2016 appears to contain another price comparison for supply from Tubarao "subject to pellets availability".

44. On 4 May 2016 Mr. Fentz of Classic approached Vale enquiring about the availability of pellets from Tubarao. It is unlikely that Classic was interested in purchasing iron ore pellets. It is more likely that Mr. Fentz wished to obtain information from Vale which he intended to use in his dispute with Limbungan. On 9 May 2016 Vale informed him that they were unable to offer any "given tight availability and the need to supply material to existing long term contracts." That was consistent with what Vale had told Limbungan.

45. On 24 May 2016, after Mr.Lu on behalf of Antara had purchased two shipments of pellets from Vale ex-Oman, he asked about further shipments and was told that Vale could not respond "due to the pellet overbooking we are facing and low/no stock in Sohar [Oman]". Mr. Lu then asked on 26 May 2016 whether there were any Capesize cargoes available ex-Tubarao and was told "there is not". It was suggested to Mr. Lu that he was not pressing this request because he knew what the answer was going to be. Mr. Lu replied that he still had to try his luck. He thought that there might be "some cancellations so that we can fulfil COA". He accepted that he had not proposed a long term contract from Tubarao but, he said, Vale had no interest in such a contract because Vale wished to supply from Oman.

46. On 10 June 2016 Mr. Lu made a further enquiry in relation to quarters 3 and 4 and was told

on 12 June 2016 that there was no availability from Tubarao for quarters 3 and 4.

47. Although Mr. Lu's enquiries of Vale were criticised on the grounds that he did not approach them promptly, that he never proposed a long term contract (which it was common ground was the only way in which a company such as Vale would do business), that he only ever asked for DR pellets and did not ask about BF (blast furnace) pellets, that negotiations were not opened at a higher level than Mr. Lu, that he never sought to explain Limbungan's predicament under the COA, and that he never sought to exploit the two long term contracts which Antara and Lion DRI had with Vale, the contemporaneous communications from Vale in the period from 23 November 2015 to 12 June 2016 are evidence that Vale were unable or unwilling to supply iron ore pellets to Antara for shipment from Tubarao after the bursting of the mine. It was submitted that such evidence was not reliable evidence of what Vale would have been willing to do had a concerted effort been made by Mr. Lu for a long term contract with Vale. I will have to return to this issue but Vale's consistent expression of inability or unwillingness to supply iron ore pellets from Tubarao to Mr. Lu after the dam burst appears to me to be cogent evidence that, whatever Mr. Lu may have done differently, Vale would have remained unable to or unwilling to supply Antara with iron ore pellets from Tubarao.

The issues in the case

48. There were three broad issues relating to liability which were debated by counsel. The first issue was described as the "no relevant arrangements" issue. It was introduced by Mr. Richard Southern QC on behalf of the shipowner, Classic, as a reason why Limbungan's reliance on clause 32 must fail. It was, I think, an issue of mixed law and fact. It was countered by Mr. Simon Rainey QC on behalf of the charterer, Limbungan, by reliance on the "alternative modes of performance" principle. I will explain this dispute further, below. The second issue was the "but for" issue. Mr. Southern said that to rely upon clause 32 Limbungan had to show that but for the dam burst Limbungan would have supplied cargoes for the 5 shipments in question and that it could not. Mr. Rainey did not accept that the "but for" test of causation had any application but that if it applied Limbungan could prove that which it was required to prove. This was, again, an issue of mixed law and fact. The third issue was the "Vale" issue. This was a question of fact. It was common ground that in order to rely upon clause 32 Limbungan had to show that it could not have obtained cargoes from Vale. The issue of fact was whether Limbungan could discharge that burden.

49. With regard to damages there was an issue as to whether the shipowner was entitled to recover substantial damages and two issues of detail concerning the assessment of substantial damages, if any were recoverable.

"No relevant arrangements"

50. Mr. Southern submitted that Limbungan, who undertook an absolute and non-delegable obligation to provide cargo, made no arrangements to do so. It had no arrangements with Samarco or with Vale. All that could be said was that it hoped to perform its obligations by receiving nominations from Lion DRI or Antara who had in the past provided such nominations. When the time came for performance, between November 2015 and June 2016, there was only one supplier, Vale, and that supplier was not willing to supply cargo to Limbungan. The bursting of the dam was said to be not legally relevant, because, although it explains why Limbungan could not obtain a cargo from Samarco, the reason Limbungan could not perform its obligation was that the (now sole) supplier, Vale, refused to supply to it.

Such arrangements as Limbungan had did not enable it to fulfil its obligations under the COA to provide cargo. It was said to be irrelevant that Lion and Antara were prevented by the dam burst from nominating cargoes under COA for carriage from Punta Ubu because Limbungan had no relevant arrangements with them that could be affected by that prevention.

51. Mr. Simon Rainey QC submitted that Limbungan had alternative modes of performance available to it. It could ship either from Ponta Ubu or from Tubarao. Where its intention, arrangements and settled practice were to perform its obligation by shipping out of Ponta Ubu, and where that intention and practice were prevented by a force majeure, the dam burst, Limbungan could rely upon the force majeure clause so long as, after the dam burst, it had taken all reasonable steps to ship out of Tubarao instead of Ponta Ubu. If it did so but failed to ship out of Tubarao then the force majeure was correctly to be regarded as the cause of Limbungan's failure to perform its obligation.

52. Both counsel relied upon a number of authorities to support their case. I propose to address these authorities chronologically.

53. The first is *Cowden v Corn Products* (1919) 1 Lloyd's List Reports 424 and 533 and (1920) 1 Lloyd's List Reports 344. This was a case in which a buyer sued a seller for non-delivery of goods, pearl starch from the USA, and the defence relied upon was force majeure, namely, a prohibition on transport by rail within the USA of commercial freight, as opposed to foodstuffs for Government; see p.346 of the latter report per Lord Sterndale MR. The contract had simply provided: "Free from non-delivery caused by force majeure as recognised in this country or in the United States." The Court of Appeal held that the defence succeeded, allowing an appeal from Bailhache J. Lord Sterndale described the issue as in substance one of fact (see p.344) although the case was something in the nature of a test case (see p.534 of the earlier report and p.345 of the later report). The appeal was allowed because the judge had considered that the issue with regard to the railways was one of congestion. He did not appear to have considered the question of prohibition; see pp.345-6 of the later report. The only passage in the judgment of the Master of the Rolls which can be said to concern a matter of principle is where the Master of the Rolls sets out a passage from the judgment of Bailhache J. The judge had said that a defendant who wished to rely upon force majeure had to show three matters:

> "First of all, the defendants must show that they had manufactured and had available for this contract starch flour in sufficient quantities to fulfil this contract."

54. The Master of the Rolls thought that it was sufficient if the defendants could show that they could have had it manufactured in time for shipment.

55. Bailhache J. described the second and third matters in these terms:

> "Secondly, they must show that they had made, or were prepared to make, all necessary and proper arrangements with the Railway Companies for transporting this starch flour from their manufactories or wheat belt to the seaboard. Thirdly, they must show that they had received in good time shipping space sufficient to cover the space that was required to send these particular parcels of goods from the seaboard to this country. If they can show all these things, and then if they can show that they were prevented from sending these goods

> forward by some action of the duly constituted Authorities in America, then they will show a case of force majeure which will excuse them from the performance of this contract."

56. The Master of the Rolls did not dissent from this approach. I do not consider that the passage does anything more than describe what the defendant had to do in the particular case to establish that he had been prevented by force majeure from performing his contract. The passage does not require the defendant to have made all necessary arrangements for the carriage of the starch by rail. It was sufficient that he was "prepared" to make them.

57. The second case is *Brightman v Bunge Y Born* [1924] 2 KB 619. This was a demurrage case and concerned the true construction of an exception from demurrage. In the course of his judgment Scrutton LJ referred to the absolute duty upon a charterer to provide a cargo. An exception in relation to loading would not, in the absence of clear words, extend to the duty to provide a cargo; see p.632. In the present case it is accepted that the force majeure clause extended to the obligation to provide a cargo because it expressly extended to a failure to supply as well as to a failure to load cargo. Scrutton LJ also made clear, as did Bankes and Atkin LJJ, that where a charterer is obliged to load a cargo of wheat, maize or rye and he is prevented from loading one such cargo, he is obliged to load a full cargo by loading one of the other products though he is allowed a reasonable time to effect the change; see pp.630-631, 628 and 637.

58. In the light of this decision it was accepted by Mr. Southern that where a charterer is obliged to ship from one or two or more ports it is sufficient that he has made arrangements to ship from one of those ports. It is not incumbent upon him to make alternative arrangements in advance on the mere off-chance that the first chosen source may fail. If the arrangements which the charterers has made break down as a result of an excepted peril, the charterer will be relieved of liability provided that he acts with reasonable promptness in obtaining cargo by alternative means; see paragraph 25 of Mr. Southern's opening submissions.

59. In the light of this acceptance it would appear that the relevance of there being "arrangements" in place is that if they are not in place the charterer will or may have difficulty in establishing that the force majeure event has prevented him from performing his obligation. It goes to the question of causation. This is indeed accepted by Mr. Southern in the very next paragraph of his opening submission; see paragraph 26. I have therefore had difficulty in discerning the difference between Mr. Southern's submissions on the question of "alternative arrangements" and the "but for" question.

60. *Brightman v Bunge Y Born* and others cases were considered by Mocatta J. in *European Grain & Shipping v J.H.Rayner* [1970] 2 Lloyd's Reports 239. At p. 244 he said:

> "The general principle exemplified in these cases is not altogether easy to define in that if a party has a period of time within which at his option to perform, the principle does not seem to require that in order to escape liability for non-performance he must show prevention by means of the operation of the exception throughout the whole period. If he arranged to perform at the end of his optional period or could have performed and the inhibiting occurs, he can it would seem escape liability for non-performance on showing that nothing he could do, or perhaps reasonably do, after the occurrence of the inhibiting event would have enabled him to perform within the contract period.

> This shows that even when the principle applies regard is permissible to the intentions or arrangements made by the party seeking relief. ”

61. The general principle was further stated by Kerr J. in *The Furness Bridge* [1977] 2 Lloyd’s Reports 367 at p.375 in these terms:

> “The general principle is clear and was accepted by both parties. If a contract provides for alternative methods of performance, and one such method comes to be prevented by an excepted peril, then the party affected must generally perform or seek to perform by one of the alternative methods. ”

62. Later, at p.377 Kerr J. said:

> “If it is established that due to a restraint of princes no cargo could be shipped from Libya, the country from which both parties expected the cargo to be shipped, and that no alternative cargo could be procured from any other contractual source, has there been “a failure in performing ….arising or resulting from …..restraint of princes” ? There appears to be no authority in point. I think that a reasonable and realistic businessman would answer this question in the affirmative. He would say that in these circumstances the effective cause of the non-performance was the restraint of princes. But for this the cargo would have been shipped, but due to it was not. ”

63. Not long after *The Furness Bridge* the case of *Warinco v Fritz Mauthner* [1978] 1 Lloyd’s Reports 151 was decided in the Court of Appeal. Megaw LJ said, at 153:

> “It is clear law, based on many decided cases, that, in general, where the seller has undertaken to supply goods shipped from one or other of a number of ports, he cannot rely on an event included in an exceptions clause, if that event happens but affects only one of the ports, unless, at any rate, he can show , the burden being on him, that, despite reasonable efforts ……..he could not have shipped goods complying with the contract description, and within the permitted time for shipment, from any one of the other ports.”

64. These statements of the general principle which applies where there are alternative modes of performance seem clear. Nevertheless Mr Southern drew my attention to *The Kriti Rex* [1996] 2 Lloyd’s Reports 171 at p.196 where Moore-Bick J. observed that an event “beyond the control of the parties” cannot extend to aspects of performance of the contract for which a party is directly or indirectly responsible, such as an f.o.b. buyer’s obligation to make arrangements necessary to ensure that a ship arrived at the right time and place. I do not understand that observation to detract in any way from the general principle that applies where there are alternative modes of performance. Mr. Southern also referred me to *The Nikmary* [2004] 1 Lloyd’s Reports 55 as authority for the proposition that a voyage charterer owes an absolute and non-delegable duty to provide a cargo for loading and that exceptions for breach of that duty must be clearly and distinctly expressed. Again, that proposition does not detract from the alternative modes of performance principle relied upon by Mr. Rainey. Mr. Southern also referred me to *The Mary Nour* [2008] 2 Lloyd’s Reports at p.526 which involved the question whether a seller of goods could rely upon the refusal of his supplier to

supply the goods as a frustrating event. Moore-Bick LJ (as he had become) held that the seller could not.

> "The reason for that is not far to seek: it is implicit in a contract of this kind that the seller will either supply the goods himself or (more likely) will make arrangements, directly or indirectly, for the goods to be supplied by others. In other words, he undertakes a personal obligation to procure the delivery of contractual goods and thereby takes the risk of his supplier's failure to perform. That obligation will be discharged by frustration if a supervening event not contemplated by the contract renders that performance impossible or fundamentally different from what was originally envisaged, but most events which result in the failure of a supplier to provide the goods will not fall into that category. A few, however, such as a prohibition of export rendering the shipment of the goods unlawful, usually, will.

65. Mr. Southern said that a charterer's obligation to provide a cargo was in the same category of duty. It is; but nothing in *The Mary Nour* challenges the settled general principle concerning alternative modes of performance. However, *The Kriti Rex* and *The Mary Nour* support the proposition that if a charterer, who has a non-delegable duty to provide a cargo, is unable to do so because his chosen supplier fails to supply a cargo, that event will rarely amount to a frustrating event or to an event beyond the control of the charterer.

66. Having considered the authorities and counsel's submissions I have reached four conclusions. First, I accept Mr. Rainey's submission that the general principle regarding alternative modes of performance is capable of applying in this case to Limbungan's entitlement to ship either from Ponta Ubu or from Tubarao. If Limbungan is to be regarded as having made "arrangements" to ship from Ponta Ubu then, following the dam burst, it was obliged to make all reasonable efforts to ship from Tubarao. If, despite its efforts to ship from Tubarao, that was not possible then the dam burst can be regarded as the cause of Limbungan's failure to supply cargoes for the 5 shipments in question. Second, my understanding is that Mr. Southern does not challenge the alternative modes of performance principle but submits that it has no application to the present case because Limbungan in truth had made no arrangements to perform by either of the routes open to it. Lion DRI and Antara had made arrangements but Limbungan cannot properly be regarded as having made any arrangements. Whether Limbungan is to be regarded as having made arrangements is, it appears, the important point. For Mr. Southern accepted in his oral closing submissions that if Limbungan is to be treated "as having a relevant relationship because of history, then that would answer the point." Third, my understanding of Mr. Southern's argument, in the event that, as he submitted, Limbungan had made no relevant arrangements, is that, when Vale chose not to supply iron ore pellets to Limbungan after the dam burst (for its own reasons, not because of the dam burst), Limbungan was in no better position that any charterer who had hoped to provide a cargo from a particular source but in the event that particular source let him down. The charterer has a non-delegable duty to provide a cargo and its supplier's failure or refusal to do so provides it with no defence. Fourth, the question of Limbungan's arrangements is also very much part of the causation point which is encompassed within the "but for" point. If, as a matter of fact, Limbungan had made no arrangements to provide cargo at Punta Ubu or Tubarao that circumstance may make it more difficult for Limbungan to establish that its failure to supply cargoes for the disputed 5 voyages resulted from the dam burst. Thus the "no relevant arrangements" point, the "alternative modes of performance" point and the "but for" point are bound up together in a factual dispute. Before considering that factual question it is

necessary to address the second issue of law, namely, the relevance of the "but for" test.

The "but for" test

67. Mr. Southern submitted that the effect of clause 32 was to impose a "but for" test of causation. Since the clause requires Limbungan's failure to supply a cargo to "result from" the force majeure, in this case the dam burst, and also for that event to "directly affect" the performance of Limbungan's obligation he submitted that Limbungan was required to prove that, but for the dam burst, it could and would have performed the COA in accordance with its terms.

68. Mr.Rainey did not accept this submission. He submitted that whilst clause 32 imposed a causation requirement in the sense that it had to be shown that the dam burst rendered performance of Limbungan's obligations impossible it was not necessary for Limbungan to show that but for the dam burst it would have performed its obligations.

69. Once again, reference was made to several authorities. The first was, again, *Cowden v Corn Products* (1919) 1 Lloyd's List Reports 424 and 533 and (1920) 1 Lloyd's List Reports 344. The "but for" point was not addressed in terms. However, the Master of the Rolls, having found that there was a prohibition on commercial freight traffic on the railways, said (at p.346 of the later report) that he had not overlooked the point that the embargo occurred at a time when it would not have been possible for the defendants, even if there had been no embargo, to get their goods down in time, because they ought to have made earlier application to the railway companies. He said that he was not satisfied that that was so. If he had been satisfied it would appear that the "but for" point would have been addressed. The most that can be said is that the Master of the Rolls did not say that the "but for" test was inapplicable. It is also be observed that in argument he put the following to Mr. Wright KC who appeared for the claimants: "Does it, in fact, come to this, he must show he could have performed his contract but for the interference of force majeure, and the question of making arrangements only arises in this way, that if he had not made the arrangements, force majeure or no force majeure he could not have performed his contract." Mr. Wright replied that he did not object to that at all; see p.426 of the earlier report. One always has to be careful with questions asked by a judge during argument because they do not necessarily represent the judge's opinion. The question may have only been put to test the argument. But I cannot avoid the impression that the Master of the Rolls would not have seen anything amiss with Mr. Southern's submission.

70. In *Brightman v Bunge Y Born* [1924] 2 KB 619 the "but for" point was again not addressed in terms. However, Scrutton LJ, when explaining the alternative modes of performance principle said, at p.631: "This must be on the assumption that they had the first kind of cargo ready for shipment but for the excepted cause." Again, it would appear that Scrutton LJ would not have been troubled by Mr. Southern's submission.

71. All must depend upon the wording of the particular clause. In this case clause 32 imports a causation requirement by the use of the words "resulting from" and by the requirement that the force majeure must "directly affect" the performance of Limbungan's obligations.

72. In another case concerning force majeure, *Seadrill v Tullow* [2018] EWHC 1640, I said this, at paragraph 69:

> "Questions of causation are sensitive to the legal context in which the question arises; see *ENE Kos v Petroleo Brasileiro* [2012] 2 AC 164

> at paragraph 12 per Lord Sumption and at paragraph 76 per Lord Clarke. They are to be resolved by reference to common sense; see *The Eurus* [1998] 1 Lloyd's Reports 351 at p.361-2 per Staughton LJ and also *ENE Kos v Petroleo Brasileiro* at paragraph 74 where Lord Clarke approved a statement in an earlier case that causation was to be determined by a "broad common sense view of the whole position".

73. If one uses Kerr J's "reasonable and realistic businessman" (see *The Furness Bridge* above) I consider that such a businessman would see the broad common sense of saying that if, but for the dam burst, Limbungan would not have performed its obligations, its failure to perform cannot fairly be said to have "resulted from" the dam burst and the dam burst cannot fairly be said to have "directly affected" the performance of Limbungan's obligations.

74. However, Mr. Rainey submitted that this approach to the causation requirement in clause 32 ignores "a line of authority, long settled", that establishes that it is not necessary for the party seeking to rely on force majeure to show that it would have performed its obligations but for the force majeure. It is therefore necessary to consider that line of authority.

75. The starting point is the decision of the House of Lords in *Bremer Handelsgesellshaft v Vanden Avenne* [1978] 2 Lloyd's Reports 109. That case concerned GAFTA contract 100 and, in particular, clause 21 which stated, "in case of prohibition of export ……..preventing fulfilment, this contract or any unfulfilled portion thereof so affected shall be cancelled." The clause was described by Lord Wilberforce as a contractual frustration clause; see p.112. One of the issues which the House of Lords had to decide was a question of causation which Lord Wilberforce described and answered at p.114 in these terms:

> "The clause applies "in case of prohibition of export …..preventing fulfilment" so that a question may arise of causation. Was it the prohibition that prevented fulfilment or something else ? This question may be phrased more specifically by asking whether the seller must prove that he had the goods ready to ship within the contract period, and a ship to carry them. The answer to it, in my clear opinion, is in the negative. The occurrence of a frustrating event – in this case the prohibition of export – immediately and automatically cancels the contract, or the portion of it affected by the prohibition."

76. This decision was followed by Robert Goff J. in *Continental Grain v STM Grain* [1979] 2 Lloyd's Reports 460. The case concerned the FOSFA 24 form of contract and in particular clause 23 which could not be distinguished from clause 21 of GAFTA 100. It is clear from the judge's analysis at pp.470-471 of the decision of the House of Lords in *Bremer Handelsgesellshaft v Vanden Avenne* that he considered that the clause in that case and hence the clause in the case before him did not require the "but for" test to be satisfied. Thus he concluded:

> "The test to be applied is similar to that applied in cases of frustration, in which a party may rely upon a frustrating event as excusing further performance of his obligations, even though he would in fact have been unable to perform his obligations under the contract: see *Avery v Bowden* (1855) 5 E&B 714."

77. GAFTA 100, clause 21, came before the courts again in *Bremer Handelsgesellschaft v Westzucker* [1981] 2 Lloyd's Reports 130. Donaldson LJ took the opportunity to explain, at pp.133-136 that in this "rather esoteric area of the law" it had once been thought that a seller seeking to rely upon clause 21 had to show that "but for" the embargo he could and possibly would have performed the contract. However, when *Bremer Handelsgesellshaft v Vanden Avenne* reached the Court of Appeal Megaw LJ "totally rejected the "but for" argument". Donaldson LJ said that the "but for" argument was also rejected by the House of Lords save for Viscount Dilhorne. He concluded by saying:

> "It might be thought, and I once did think, that the result of the House of Lords decision was, in effect, to rewrite clause 21 so as to eliminate the words "preventing fulfilment" and "so affected". But this is not so. If shippers or other sellers wish to take the benefit of the clause, they must still prove that the embargo would have prevented fulfilment of the contract on the assumption that they would otherwise have been in a position to fulfil it."

78. There can be no doubt, therefore, that in a case of a "contractual frustration" clause which is indistinguishable from GAFTA 100, clause 21, the "but for" test does not have to be satisfied.

79. The question which arises for decision in this case is whether the "but for" test has to be satisfied in a force majeure or exceptions clause which does not cancel the contract for the future, like frustration, but provides a defence to a claim in damages for breach of the contract. Mr. Southern submitted that the "but for" test must be satisfied in such a case. Mr Rainey submitted that it did not.

80. Mr. Rainey's argument derives support from the circumstance that the words to be construed in a contractual frustration case are in essence the same as the words to be construed in an exceptions clause. Thus, in the present case the court must construe the words "resulting from" and "directly affect". If those words appeared in a contractual frustration the court would give them the effect explained by Donaldson LJ in *Bremer Handelsgesellschaft v Westzucker*. If those words appear in an exceptions clause, as they do in clause 32 in the present case, Mr. Rainey submitted that they should be given the same effect. Thus Limbungan must show that the dam burst made performance of its obligations impossible so that its failure to perform "resulted from" or was "directly affected" by the dam burst but need not show that but for the dam burst it would have performed its obligations.

81. I find myself unable to accept Mr. Rainey's argument. There appears to me to be an important difference between a contractual frustration clause and an exceptions clause. A contractual frustration clause, like the doctrine of frustration, is concerned with the effect of an event upon a contract for the future. It operates to bring the contract, or what remains of it, to an end so that thereafter the parties have no obligations to perform. An exceptions clause is concerned with whether or not a party is exempted from liability for a breach of contract at a time when the contract remained in existence and was the source of contractual obligations. It is understandable that a contractual frustration clause should be construed as not requiring satisfaction of the "but for" test because that is not required in a case of frustration. Thus in *Bremer Handelsgesellshaft v Vanden Avenne* Lord Salmon said at p.128:

> "The clause is concerned with writing into the contract what is to occur should it be frustrated at common law. No doubt the contract supersedes the common law but it cannot, in my view, be construed as

> taking away from the sellers what would have been their protection at common law unless it does so in plain terms."

82. The context of an exceptions clause is different. It is not concerned with writing into a contract what is to happen in the event of a frustrating event. It is concerned with excusing a party from liability for a breach which has occurred. In such a context it would be a surprise that a party could be excused from liability where, although an event within the clause had occurred which made performance impossible, the party would not have performed in any event for different reasons. That is why, in *Brightman v Bunge Y Born* , a case concerned with an exception from liability to pay demurrage, Scrutton LJ said at p.631:

> "This must be on the assumption that they had the first kind of cargo ready for shipment but for the excepted cause."

83. It is also why, in *The Furness Bridge*, a case concerned with an exception from liability under a voyage charter, Kerr J. said at p.377

> "a reasonable and realistic businessman would ……say that in these circumstances the effective cause of the non-performance was the restraint of princes. But for this the cargo would have been shipped, but due to it was not. "

84. There can be few judges with greater knowledge of exemption clauses than Scrutton LJ and Kerr J.

85. Thus, in my judgment, the words used by the parties in clause 32 of the COA must be construed not in the context of a contractual frustration clause but in the context of an exceptions clause. In that context, to paraphrase Kerr J, they require Limbungan to show that but for the dam burst the cargo would have been supplied but due to the dam burst it was not.

86. Mr. Rainey submitted that clause 32 of the COA was both a contractual frustration clause and an exceptions clause. This was the second of his seven points on this part of the case in his oral closing submissions. He said that Mr. Southern did not dispute that characterisation, relying upon what Mr. Southern said in his oral opening submissions. However, it is clear from Mr. Southern's oral closing submissions that he did dispute that characterisation; see Day 5 pp.136-137. I do not consider that clause 32 was a contractual frustration clause. No part of it states that the contract, or that which remains to be performed, is cancelled.

87. Mr. Rainey submitted that no case supports my approach to the construction of clause 32 but I disagree. *Brightman v Bunge Y Born* and *The Furness Bridge* do.

88. Mr. Rainey referred to *Frustration and Force Majeure* 3rd ed. by Sir Guenter Treitel at paragraph 12-039 in support of his submission. But the distinguished author refers only to the cases concerning contractual frustration clauses and does not consider the different context of exception clauses. Mr. Rainey also referred to *Chitty on Contracts* 32nd ed. Vol.1 at paragraph 15-156 but again reference is there made only to the cases concerning contractual frustration clauses.

89. Mr. Rainey also submitted that the compensatory principle underlying the assessment of damages supported his submission. If Limbungan would have performed but for the dam burst and did not perform because of the dam burst Classic could not obtain any damages from Limbungan. Mr. Rainey said that it is therefore inexplicable to suggest, as Classic do,

that substantial damages can be recovered by Classic in circumstances where Limbungan would not otherwise have performed when they could not have recovered damages if Limbungan would otherwise have been able and willing to perform. He submitted that this would be such an odd result that the suggested construction of clause 32, requiring satisfaction of the "but for" test, cannot be right. But, as it seems to me, in the one case there would be no liability and so no damages would be recoverable and in the other case there would be a liability and so damages would, in principle, be recoverable. The question of what, if any, substantial damages are recoverable applying the compensatory principle, is a separate question. I consider it appropriate not to conflate questions of construction with questions as to the recoverability of loss pursuant to the compensatory principle. I shall therefore return to the question raised as to the recoverability of substantial damages at a later stage in this judgment.

The factual issue

90. The important factual issue therefore is whether, but for the dam burst, Limbungan would have supplied cargo for the 5 voyages between November 2015 and June 2016 which are the subject of the present claim. This is bound up with the question whether Limbungan had made any "relevant arrangements".

91. I therefore return to the question of Limbungan's arrangements. Mr. Southern was correct to say that Limbungan, a corporate vehicle seemingly without assets or employees, had no contract with either Samarco or Vale and indeed had no contracts with either Lion DRI or Antara. It was thus in a vulnerable position, apparently unable to perform its obligations under the COA. However, that is not the whole picture. Limbungan was a wholly owned subsidiary of Lion DRI and Mr. Lu, an employee of Antara, appeared to act on behalf of Limbungan, Lion DRI and Antara though not with regard to all of the latter two companies' activities. In consequence Limbungan was in fact able to perform 38 shipments under the COA before the dam burst and the bulk of those shipments, some 22, were shipments split between Lion DRI and Antara so that part of the cargo was discharged at Port Kelang and part at Labuan. Lion DRI and Anatara paid their respective shares of the freight. Limbungan was in fact able, by reason of its position within the Lion group of companies, to supply cargoes, making use of Lion DRI's and Antara's contracts with Samarco and Vale. However, it is clear that when those companies had no wish for iron ore pellets Limbungan was forced to default on its obligations under the COA, as happened between July and October 2015. Limbungan was dependent upon them for its ability to supply cargoes.

92. Since 2011 Limbungan had supplied cargoes at Ponta Ubu from the Samarco mine. Mr. Lu gave evidence that Vale preferred to supply Lion DRI and Antara only from its facility in Oman. He appears to have concluded that from the fact that the Oman facility was a recent investment of Vale's from which Vale would expect a return, from the fact that in August 2011 Vale instructed a vessel to divert to Oman when it was en route to Tubarao and from the fact that when he sought pellets from Vale he was offered pellets from Oman, save when scheduled maintenance and a resulting reduction in iron pellets in Oman caused it to offer shipments from Tubarao. Mr. Lu's understanding was that Vale wished to supply Far Eastern customers with Oman pellets and US, South American and West Indian customers with Tubarao pellets.

93. Mr. Southern said that Mr. Lu's evidence in this regard was unreliable. He relied upon emails from Mr. Lu in 2011 which indicated that it was Limbungan, rather than Vale, which preferred to ship from Oman. Mr. Lu accepted that he preferred to accept pellets from Oman

provided that the quality was proven. (The first shipment from Oman in 2011 gave rise to a dispute as to quality.) Mr. Southern also relied upon the fact that a shipment was offered from Tubarao in 2011 (after the quality dispute had arisen) which Mr. Lu declined. In his oral evidence he described that as a "one-off" cargo.

94. The context in which those emails were sent was eventful. The Oman facility had recently come on stream, one vessel was directed by Vale to go to Oman and when the first shipment from Oman took place there was a quality dispute. In that context it is difficult to know what can be safely inferred from the correspondence at the time. It is true that there is no document emanating from Vale stating what its position was but Mr. Lu was in a position to know what Vale's preference was over the period from 2011 to 2015 and I accept his evidence in this regard. On 15 March 2013, after a conversation with Mr. Alqueres of Vale, he reported to Mr. Pang that "at Tubarao, they only produce DRP for nearby plants in Argentina, Trinidad, N. Africa and US". That is, in essence, the same as his evidence to this court. Since he had been discussing the matter with Vale his evidence is more likely to be correct than wrong.

95. Thus, from 2011 Limbungan supplied cargoes for both Lion DRI and Antara from Samarco. (There was only one shipment from Oman in September 2011 which gave rise to the dispute about defective quality and one more shipment in January 2014.) It is clear that of the two alternative methods of performance open to it under the COA Limbungan had, from 2011, chosen to use the Ponta Ubu method of performance. In that sense it had made "arrangements" though it could not compel Lion DRI or Antara to supply iron ore pellets from Samarco. In the light of Mocatta J.s statement in *European Grain & Shipping v J.H.Rayner* that it is permissible to have regard to "the intentions or arrangements" made by the party seeking relief there is, in my judgment, no requirement that the party seeking relief must itself have made legally binding arrangements to perform by one of two or more alternative modes of performance.

96. However, in the months before the dam burst Lion DRI and Antara had no demand for iron ore pellets and, inevitably, Limbungan defaulted upon its obligations under the COA by failing to make two shipments between July and October 2015.

97. There was evidence that in August 2015 Vale was willing to discuss a steady supply of pellets from Brazil and from Oman but Mr. Lu gave evidence that that concerned a "tolling arrangement" by which pellets would be provided, turned into briquettes (HBI) and Vale would purchase some of the HBI. Mr. Lu said nothing came of that arrangement because it was a "rather complicated arrangement".

98. By November 2015 Antara's demand for iron ore pellets had resumed. Indeed on the day before the dam burst Mr. Lu made an offer to purchase iron ore pellets from Vale's Oman facility.

99. I have asked myself whether, in the light of the two missed shipments from Ponta Ubu and Mr. Lu's offer to purchase iron ore pellets from Vale's Oman facility, Limbungan can still claim to have had, as at the date of the dam burst, a settled intention or arrangement to ship iron ore pellets from Ponta Ubu. Two matters suggest that it did. A new long term contract between Antara and Samarco was under negotiation and had almost been concluded and very shortly after the dam burst Mr. Lu was contacting Samarco to find out when supplies of iron ore pellets would resume. That was the "most pressing question". These matters suggest that on a long term basis Limbungan's intention remained to ship through Ponta Ubu via Samarco. However, in the short term it appears that Limbungan intended to ship cargoes of

iron pellets from Oman. Mr. Lu's proposal to Vale on 5 November 2015 makes that reasonably clear.

100. That factual context is rather different from the simple "no relevant arrangements" scenario postulated by Mr. Southern and also rather different from the simple "alternative modes of performance" scenario postulated by Mr. Rainey. Neither counsel made submissions as to how the principles on which they relied should be applied in the more complex circumstances of this case.

101. I therefore turn to the related question of fact, whether Limbungan would in fact have defaulted on the COA with Classic even in the absence of the dam burst, the "but for" question. Since Limbungan is seeking to rely upon an exceptions clause the burden lies on it to show that it is more likely than not that it would have performed its obligations under the COA with Classic.

102. At the time of the dam burst, or just after, Antara's demand for iron ore pellets had resumed. That is apparent from the cargoes it purchased from Bahrain Steel and Vale's Oman facility between November 2015 and June 2016. For the same reason it appears to be more likely than not that had the dam not burst Antara would have concluded a new long term contract with Samarco. The existing long term contract had come to an end in March 2015. However, by the time of the dam burst in November 2015, a new contract had almost been negotiated. The outstanding detail to be agreed concerned a penalty rate payable by Samarco. It appears to be more likely than not that had there been no dam burst a new long term contract would have been finalised because Antara needed a long term contract for its supplies of iron ore pellets.

103. Antara had its own COA with PCL Shipping and the applicable freight rate on that COA was less than the freight rate on the COA with Classic (as the result of a rather complicated formula, based in part on the spot rate, the details of which do not matter). There was an arrangement internal to the Lion Group whereby Lion DRI could use Antara's COA with PCL and Antara could use the COA with Classic. When Antara used the COA with Classic Antara issued a debit note to Lion DRI for the difference between the freight rate under the COA with PCL and the freight rate under the COA with PCL. Thus Antara was compensated by Lion DRI for the difference between the freight rates. As at November 2015 there were 7 or 8 shipments outstanding under the COA with PCL. They were due to be performed by August 2016. Thus the crucial question is whether Antara would continue to use the COA with Classic when Lion DRI had no further demand for iron ore pellets and so no need to compensate Antara for the difference between the rate under the COA with Classic and the rate under the COA with PCL.

104. Mr. Southern submitted that Antara would have continued to force Limbungan to default on the COA with Classic. Mr. Rainey submitted that Antara would have provided cargoes for shipment under the COA with Classic.

105. Mr. Southern relied upon three matters. First, it was in Antara's commercial interest not to use the COA with Classic. The rate under the COA with Classic was $43.50 per mt whereas the rate under the COA with PCL would have been about $23 per mt. So on each of the three scheduled shipments there would have been a difference of $3.9 million. In addition Antara would be exposed to a damages claim from PCL. Second, as stated by Mr. Lu in his witness statement, dealings between Lion Industries which owned Antara and Lion Diversified which owned Limbungan had to be at arm's length. Choosing to perform Limbungan's obligations

under the COA with Classic would confer a benefit on Limbungan at the expense of Antara. Third, whilst that expense was recovered from Lion DRI under an "internal arrangement", that arrangement stopped once Lion DRI had no further need for iron ore pellets. In any event that internal arrangement did not take account of the further reduction in the freight rate payable under the COA with PCL agreed by means of Addendum No.9. Mr. Lu accepted that that was the case when cross-examined. He said another arrangement would have to be worked out.

106. In his oral closing submissions Mr. Southern said that the answer to this question is revealed by the proposal on 5 November 2015, prior to the dam burst, to ship from Oman. "They are not interested in trying to perform the COA, they are interested, understandably, in looking after Antara's own commercial interests."

107. Mr. Rainey relied on three matters. First, the historical reality was that Antara had regularly used the COA with Classic. Second, Mr. Lu gave evidence that PCL was a friendly party and did not raise any claim against Antara. Following the submission of a force majeure notice PCL had agreed to perform 2 Panamax shipments ex-Bahrain at the spot rate. Performing the COA with Classic would have been, said Mr. Rainey, "a no-brainer for companies belonging to the Lion Group". Mr. Lu described the matter as "clear cut". Third, following the agreement of Addendum No.9 with PCL a new internal arrangement was required but that would have been worked out had Antara loaded cargoes under the COA with Classic.

108. With regard to the 5 November 2015 proposal Mr. Rainey said that Mr. Lu did not propose a shipment from Samarco because there was no extant long term contract with Samarco and that the proposal was only for a short term spot supply from Vale in Oman.

109. The burden of proof on this issue lies on Limbungan. Whilst I do not doubt the sincerity of Mr. Lu's belief that Antara would have used the COA with Classic I am left in real doubt as to whether this would have happened. First, it is not at all clear that the decision on this matter would have been taken by Mr. Lu. Whilst he said he was party to the decision to default on the two voyages before the dam burst it seems clear that those above him in the corporate hierarchy took the actual decision. Yet the only evidence was from Mr. Lu. Second, it is clear that Antara preferred not to spend more money than was necessary. Its decisions whether to buy from Samarco in Brazil, or from Vale in Oman or from Bahrain Steel in November 2015 appear to have been based on matters of cost. This is not surprising. Antara is a commercial entity and concerned to increase its profits and reduce its losses. Third, Antara and Limbungan may have been in the "Lion group" by reason of common or, as they were described to me, overlapping shareholdings, but they were owned by companies in separate group structures. Thus, if Antara were to use the COA with Classic it is to be expected that it would require compensation for paying a higher freight rate than it would pay under the COA with PCL. It had had such an "internal arrangement" in the past. But a new one was required in the light of Addendum no.9 to the COA with PCL as Mr. Lu accepted. In circumstances where Lion DRI had no further need for iron ore pellets there must be real doubt as to whether Lion DRI would have agreed to enter a further "internal arrangement". There was no evidence from Lion DRI saying that the required compensation would have been paid by Lion DRI between November 2015 and June 2016.

110. For these reasons I doubt whether, but for the dam burst, Limbungan would have been able and willing to supply cargoes for shipment pursuant to the Classic COA. Indeed, when one factors in the fact that Limbungan proposed to buy from Vale in Oman rather than from Samarco in Brazil on 5 November 2015 before the dam burst, I think it is more likely than

not that Limbungan would not have been able and willing to supply cargoes for shipment pursuant to the Classic COA in the months between November 2015 and June 2016. Had there been a willingness and an ability to perform the COA with Classic I would have expected Limbungan to have requested a shipment from Samarco on 5 November 2015, notwithstanding that the new long term contract being negotiated had not been completely agreed, in order that it would be able to perform the COA with Classic. Mr. Lu's opinion was to the contrary effect but I think there was some wishful, albeit honest, thinking on his part.

111. It must follow, having regard to my understanding of the effect of clause 32 of the COA, that Limbungan is unable to rely upon that clause to excuse its failure to supply cargoes for the 5 shipments in question.

The Vale issue

112. The next factual issue is whether Limbungan took all reasonable steps, following the dam burst, to ship iron ore pellets from Tubarao via Vale. This issue gave rise to much expert evidence which, after other possibilities had been discarded, concerned the question whether the Lion Group, in effect Antara, could have obtained iron ore pellets from Vale pursuant to a new long term contract.

113. During the course of the trial it was also suggested that cargoes of iron ore pellets could have been obtained from Vale pursuant to existing long term contracts which Lion DRI and Antara had with Vale. This latter argument was objected to by Mr. Rainey on the grounds that it had been raised far too late. It had not been pleaded, even in the Re-Amended Reply served just before the trial, and gave rise to a number of factual issues which had not been investigated. I agree that this new point was raised too late and cannot, in fairness to Limbungan, be regarded as "in play". In any event there was evidence that the existing long term contracts had not been used since 2011. In such circumstances it appears to me most unlikely that Vale could have been persuaded to operate them, promptly after the dam burst, in order to perform the 5 voyages in question between November 2015 and June 2016.

114. Mr. Southern also submitted that the fact that Vale provided some 609,899 mt of iron ore pellets in the first 6 months of 2016 to a US company, Nucor Louisiana, which, in 2015, had taken most of its pellets from Samarco, showed that such pellets could have been made available to Antara in 2016. It was submitted that Limbungan could not rely upon Vale's commercial decision to make the pellets available to Nucor as excusing Limbungan's failure to supply cargoes under the COA with Classic. It was said that that commercial decision broke the chain of causation running from the force majeure, namely, the dam burst.

115. I do not accept this submission. As a result of the dam burst it was impossible for Limbungan to perform its obligations by shipping cargoes through Ponta Ubu via Samarco. Limbungan was then bound to take reasonable steps to perform its obligations by shipping cargoes through Tubarao via Vale. If, despite taking such steps, it could not do so then the dam burst can properly and as a matter of common sense be regarded as being the cause of Limbungan's failure to perform; see the approach of Kerr J. in *The Furness Bridge*. There is no break in the chain of causation if Vale has iron ore pellets available but decides to supply them to another customer in preference to Limbungan. (Of course, this reasoning assumes that, contrary to my decision, Limbungan either did not need to satisfy the "but for" test or, if it did, that it discharged that burden.)

116. So there remains the question whether Limbungan has shown that, following the dam burst, it

was unable to ship cargoes though Tubarao via Vale. It was common ground that if this was to be done it would be by Vale agreeing a long term supply contract with either Antara or Lion DRI. The latter had no interest in doing so and so the contract would have to have been with Antara. This question was the subject of extensive expert evidence. Dr. Poveromo, Classic's expert, was of the opinion that had a long term contract been proposed Vale would have agreed. He considered that other steel producers who had sourced pellets from Samarco were able to obtain pellets from Tubarao after the dam burst. Mr. Maith, Limbungan's expert, was of the opinion that, since Vale's export of pellets did not increase until the fourth quarter of 2016, any spare capacity Vale had would have been allocated to existing customers of Vale. This issue led to 10 pages of detailed closing submissions on the factual and expert evidence from Mr. Southern and to 30 pages of detailed closing submissions on the factual and expert evidence from Mr. Rainey. I shall deal with the matter as shortly as I can.

117. The first aspect of this matter to be considered is whether Mr. Lu made any attempt to negotiate a long term supply contract with Vale following the dam burst. It was common ground that Vale would only supply pellets pursuant to a long term contract. It appears clear that Mr. Lu made no such attempt. He gave no evidence that he did and the contemporaneous emails do not suggest that he did. Indeed, he accepted that he did not. He simply asked, probably by telephone before 17 November 2015 and then by email dated 17 November 2015, whether there was any prospect of supplies of iron ore pellets from Tubarao via Vale. He was told that there was not by email on 23 November 2015. He made further requests in February 2016, May 2016 and June 2016, on each occasion being told there was not.

118. The second aspect of the matter to be considered is whether, if Mr. Lu had attempted to negotiate a long term supply contract with Vale following the dam burst, it is more likely than not that it would have been unsuccessful.

119. The circumstances in which such a contract would have to be negotiated were not conducive to success. In order to enable the shipments at issue in this action to be made from Tubarao the contract would have to have been negotiated before the end of December 2015 or possibly a little later but not much. It was accepted by Dr. Poveromo, Classic's expert, that Vale, to the extent that it had supplies of additional quantities of iron ore pellets available, would have preferred existing long term customers over a new applicant. Although Lion DRI and Antara had had long term contracts with Vale which may strictly have remained legally extant those contracts had not been used for the supply of pellets from Tubarao since 2011. Limbungan, or rather Lion DRI and Anatara, were therefore somewhere between a new applicant and an existing long term customer. It is significant, as it seems to me, that in its email of 23 November 2015, although Vale referred to the "much valued relationship between our companies and our strong interest to re-start a long business and mutual partnership" Vale did not offer to supply any pellets from Tubarao. On the contrary Vale said in terms that it did not have "RM20 pellets availability especially after the accident and railroad stoppage in Brazil." That remained its position when asked again in February, May and June 2016.

120. It is however known that Vale was able to supply a new customer, Nucor, in 2016. Thus the question is whether, if Mr. Lu had suggested a long term contract in November 2015, Vale would have preferred to supply to Mr. Lu rather than to Nucor. This appears unlikely. Nucor was a large US consumer. Mr. Lu represented the Lion Group which Dr. Poveromo accepted was a less attractive customer to Vale. Moreover, Vale preferred to supply the Lion Group from its Oman facility.

121. The remaining question is whether Vale would have had sufficient quantities of pellets to supply both Nucor and the Lion Group. It was on this issue that Dr. Poveromo and Mr. Maith gave much evidence.

122. Mr. Maith, the expert witness called by Limbungan, had a particular knowledge of iron ore mining in Brazil, having spent 9 years as Vice President of Samarco's global marketing division. He expressed himself clearly, and perhaps "bluntly". He fairly accepted some matters put to him (though becoming somewhat argumentative in the nature of an advocate as his cross-examination progressed) but would not depart from his basic opinion that it was not likely that Vale would have supplied iron ore pellets to Antara. Dr. Poveromo, the expert witness called by Classic, relied upon figures which proved not to be robust. More significantly, when cross-examined it appeared that his approach to the presentation of figures in his report lacked that degree of rigour which is to be expected of an expert witness before this court. He was also much more argumentative than Mr. Maith.

123. It appeared to me that Mr. Maith was to be preferred as an expert witness. Indeed, it was significant that Mr. Southern's closing submissions made little mention of Dr. Poveromo's evidence, recognising that Dr. Poveromo's "Table 1" had been subject to a degree of criticism and might have to be disregarded entirely.

124. One element of Table 1 which did survive cross-examination was the evidence that certain existing customers of Vale in Egypt and Libya received additional supplies from Tubarao. However, that did not assist Classic's case because they were existing long term customers. These additional supplies appeared to be made possible by supplies to Saudi Arabia being diverted to Oman from Tubarao. This, said Mr. Southern, indicated a degree of flexibility on Vale's part. But that said little, if anything, about the quantity of pellets available for new customers.

125. Evidence from Vale's published data, as explained by Mr. Maith, was to the effect that production of iron ore pellets did not increase until the fourth quarter of 2016, which period is not relevant to the particular issue in the present case. There was also some evidence that Vale had increased its production of DR pellets as a proportion of its overall production. Whether this was in response to the dam burst or was a resumption of historical levels of DR pellets production is not known. There was some historical evidence that it was the latter. Also, Vale's quarterly production reports suggest that the proposals under consideration to increase production to offset the supply shortage resulting from the dam burst were long term proposals. For these reasons it appears more likely than not that there was no overall increase in production by Vale in the short period relevant to this claim. It is however possible that Vale's production of DR pellets as a proportion of its overall production increased.

126. In circumstances where (a) Mr. Lu never sought a long term contract from Vale after the dam burst and (b) neither party adduced evidence from Vale itself as to whether it would have been able and willing to enter into such a contract with the Lion Group to supply iron ore pellets from Tubarao (and if so on what terms) it is difficult to be sure whether Vale would or would not have been able and willing to enter such a contract. Dr. Poveromo could only say that there was a "finite possibility" with the likelihood not being "high".

127. Mr. Southern submitted that the answer must be that the court "does not know". Mr. Rainey submitted that the burden of proof lay on Classic and that it could not show that Vale would have entered into a long term contract with the Lion Group. If the burden lay on Limbungan then, said Mr. Rainey, on the balance of probabilities the Lion Group could not have secured

such a contract.

128. I consider that the legal burden of proof lay on Limbungan to establish that it could not have secured a long term contract with Vale. That is clear from all the authorities to which I was referred. It may be that the evidential burden at a particular stage rested with Classic but once a long term contract had been identified as the only means by which Vale would do business the legal burden was on Limbungan to show that it would not have secured such a contract from Vale. I have considered the authorities referred to by Mr. Rainey at paragraph 57 of his opening submissions, namely, *Owners of The Matheos v Louis Dreyfus and Company* [1925] AC 654 at pp. 666 and 662 and *The Furness Bridge* at pp.377-378. I consider that where reference is made in such authorities to the burden of proof shifting that is a reference to the evidential burden shifting, not to the legal burden of proof shifting. The legal burden remains on Limbungan throughout.

129. In my judgment the evidence addressed by the parties does not leave me unable to reach a conclusion as to what would have happened on the balance of probabilities. It appears to me to be more likely than not that Vale, if it had been approached soon after the dam burst for a new long term contract with the Lion Group, would not have agreed to such a contract within the narrow period of time necessary to enable the five shipments to which this claim relates to be made by Limbungan.

130. I have reached that conclusion for three reasons. First, although, as accepted by Mr. Lu, Vale had a good relationship with the Lion Group, Vale was likely to take time to consider how it proposed to respond to the dramatic reduction in the supply of pellets caused by the dam burst. Whilst it considered what to do its priority was to service the needs of its existing long term customers. Vale had not supplied iron ore pellets to the Lion Group from Vale since 2011. There were, as I have already related, discussions between Mr. Lu and Vale in August 2015 and just before the dam burst but they were not, I think, sufficient to make Vale willing to give priority to the Lion Group over and above established customers. Second, Vale preferred to supply iron pellets to the Lion Group from its Oman facility. That was Mr. Lu's clear and repeated evidence. Again, the evidence that in August 2015 Vale was willing to discuss a steady supply of pellets from Brazil and from Oman does not persuade me that Vale's long established preference no longer held sway. Mr. Lu gave evidence that the discussions concerned a "tolling arrangement" by which pellets would be provided, turned into briquettes (HBI) and Vale would purchase some of the HBI. Nothing came of it because it was a "rather complicated arrangement". On 23 November 2015 Mr. Reinisch (of Vale) referred in his email to Mr. Lu to the "much valued relationship between our companies and our strong interest to re-start a long business and mutual partnership." Yet what was proposed was the provision of iron ore pellets from Oman, not from Tubarao. Third, only one new customer was identified as having received pellets from Vale in 2016 and that was Nucor, which, it was common ground, was a much more attractive long term customer than the Lion Group.

131. Mr. Southern submitted that the Lion Group could not rely upon its personal characteristics in that way because, as between it and Classic, they were not beyond the Lion Group's control. In this regard reliance was placed on *NZ Shipping v Societe des Ateliers et Chantiers de France* [1919] AC 1 at p.6. I do not accept this submission. When, in the context of a question of causation, it is necessary to investigate whether Vale would have made a long term contract with Limbungan in preference to Nucor there appears to me be no reason why general characteristics of Limbungan cannot be relevant. Were Limbungan relying upon some deliberate act of its own different considerations might apply for, as explained in the

case relied upon, no man can take advantage of his own wrong or of an event brought about by his own act or omission. But there is nothing of that sort in the present case.

132. I have therefore concluded that it is more likely than not Vale would not have agreed to supply iron ore pellets to Antara (and hence Limbungan) to enable the five shipments in question to have taken place.

A discrete point of construction

133. There is a further issue between the parties, namely, whether the dam burst was beyond the control of the shippers. Classic maintains that Samarco could have prevented the dam burst and since Samarco were the shippers the dam burst was not beyond the control of the shippers and so Limbungan cannot claim that the dam burst excused it from liability. This raises not only a question of fact regarding the design, construction and maintenance of the dam and whether the burst was beyond the control of Samarco (which will, if necessary, be determined at a later hearing) but also an anterior question of construction of clause 32, namely, whether it is sufficient for Limbungan's purposes that the dam burst was beyond its control as charterer when supplying or loading cargoes of iron ore pellets. The parties require this issue of construction to be determined in this hearing.

134. Clause 32 seeks to protect not only the charterers but also the shippers and receivers. The shippers and receivers are not party to the COA; only the charterers are. What then is the purpose of extending the protection of the clause to the shippers and receivers ? The answer lies in the circumstance that the charterer may delegate performance of (though not responsibility for) its obligations under the COA to supply and load a cargo to the shippers; cf *The Crude Sky* [2014] 1 Lloyd's Reports 1 at paragraph 33. When the charterer does so clause 32 makes clear that the charterer will not be responsible for the shippers' failure to supply or load cargo when the failure results from one of the named events such as an "accident at mine".

135. However, the design, construction and maintenance of the mine, including the dam, are not elements of the charterer's obligations to supply and load a cargo which were delegated to Samarco. Therefore any fault of Samarco with regard to the design, construction and maintenance of the mine cannot reasonably have been intended to bar the charterer's ability to rely upon clause 32; cf *Tandrin Aviation Holdings v Aero Toy Store* [2010] 2 Lloyd's Reports 668 at paragraphs 45-46 per Hamblen J. Whilst Limbungan would be responsible for anything that went wrong in the supply and loading of cargo by Samarco in its capacity as shipper Limbungan would not be responsible for anything that went wrong in the design, construction or maintenance of the mine. I therefore decide this issue in favour of Limbungan.

Damages

136. Limbungan is unable to rely upon clause 32 of the COA because it cannot show that, but for the dam burst, it would have supplied and shipped five cargoes of iron ore pellets between December 2015 and June 2016. But there remains the question whether Classic is entitled to recover substantial damages from Limbungan in respect of its breach of its obligation to supply and ship the five cargoes.

137. Mr. Rainey submitted, by reference to the compensatory principle which underlies the assessment of recoverable damages, that Classic could not recover substantial damages even

if Limbungan cannot rely upon clause 32 of the COA. Although Mr. Southern suggested that Mr. Rainey only relied upon the compensatory principle as an aid to construction of clause 32 my understanding is that Mr. Rainey made a further submission, separate from his submission on the true construction of clause 32 of the COA (which I have not accepted); see Day 5 pp.84-87 and 172.

138. Mr. Rainey submitted that no substantial damages are recoverable because, even if Limbungan had been able and willing to ship the cargoes but for the dam burst, Classic would not have been entitled to substantial damages because the dam burst would in fact have prevented Limbungan from shipping any iron ore pellets.

139. Mr. Southern submitted that this submission was an impermissible sleight of hand, from not being ready to perform the COA when liability was being assessed to being ready to perform when damages are being assessed.

140. This is a short point, notwithstanding its importance in the case.

141. There can be no dispute that the recoverability of substantial damages depends upon the compensatory principle and therefore upon a comparison between the position of Classic as a result of the breach and the position it would have been in had Limbungan performed its obligations; see, for example, *Flame SA v Glory Wealth Shipping* [2013] EWHC 3153 (Comm) at paragraphs 17-18 and *Bunge SA v Nidera BV* [2015] UKSC 43 at paragraphs 14 and 23 per Lord Sumption.

142. To recover the sum of approximately US$20 million which represents the freight it would have received on the five unperformed voyages Classic would, it seems to me, argue as follows. Limbungan was in breach of its duty to supply and ship cargoes of iron ore pellets; it was not able to rely upon clause 32 to excuse that breach. The assessment of the damages recoverable for such breach requires the court to compare the position that Classic was in as a result of that breach with the position Classic would have been in had Limbungan complied with its duty to supply and ship cargoes of iron ore pellets. Had it complied with that duty Classic would have earned freight for each of the five voyages and so substantial damages would be recoverable.

143. But application of the compensatory principle in that way appears to me to be unrealistic because it ignores the reason why, on the facts of this case, Limbungan was in breach of its duty. It was in breach of its duty because, had there been no dam burst, it was more likely than not that Limbungan would not have been able or willing to ship the five shipments and so it was unable to rely upon clause 32 to excuse its breach. The realistic comparison, and the one that reflects the facts of this case, is between the position that Classic is in with the position it would have been in had Limbungan been able and willing, but for the dam burst, to supply and ship the five cargoes.

144. If, but for the dam burst, Limbungan had been able and willing to ship the five cargoes, no cargoes would in fact have been shipped because of the dam burst and the dam burst would, in that event, have excused Limbungan from its failure to make the required shipments.

145. For that reason, and applying the compensatory principle which determines recoverability of damages, Classic is not entitled to substantial damages for Limbungan's failure to supply and ship the five cargoes, notwithstanding that Limbungan is unable to excuse its failure by reference to clause 32 of the COA. To award substantial damages on the facts of this case

would breach that principle. Had Limbungan been unable to rely upon clause 32 because it could have but failed to obtain a supply of pellets from Vale then substantial damages would have been recoverable because, had Limbungan performed its obligation and obtained supplies from Vale, Classic would have earned freight. That illustrates the importance of applying the compensatory principle by reference to the facts of the particular case.

146. This conclusion is not an impermissible sleight of hand, from not being ready to perform the COA when liability was being assessed to being ready to perform when damages are being assessed. When assessing what damages are recoverable it is necessary to compare Classic's position with the position it would have been in had Limbungan complied with its obligations. It would be contrary to the compensatory principle, when assessing damages, to ignore what Classic's position would have been had Limbungan been ready and willing to perform its obligations but for the dam burst. Classic cannot be put in a better position than it would have been in had Limbungan been able and willing, but for the dam burst, to ship the required cargoes.

147. For these reasons I have concluded that Classic cannot recover substantial damages.

148. In that event it is unnecessary, in the context of the five shipments with which I am concerned, to resolve the two points of detail which divide the quantum experts. I shall however do so because my decision will, I am told, enable the parties to agree the quantum of damages in respect of the two voyages for which Classic already has judgment.

149. The first point is the question what quantity of cargo should it be assumed Classic would have loaded. Limbungan's expert, Ms. Richards, has used the average of all liftings between 2009 and 2016, namely, 173,718 mt. Classic's expert, Mr. Robson, has used 176,000 mt being the maximum which Classic was permitted to ship on each voyage.

150. The relevant question is one of fact: what would have happened if the shipments in question had been performed. Classic says that it was in its interests to maximise its profits by maximising the cargo intake. True it was but the experience of 2009-2015 shows that Classic did not maximise its profits by maximising the cargo intake.

151. In my judgment the average of all liftings is the best evidence of what would have been shipped. It is objected by Classic that the total number of shipments included three shipments to Labuan alone, where there is a draft restriction. Thus the inclusion of such shipments distorts the average figure, though Mr. Leung, junior counsel for Limbungan told me that the effect was marginal, about 0.3% .

152. Since Labuan is where Antara had its plant that is where shipments between November 2015 and June 2016 would have gone and so it could have been argued by Limbungan that the quantity not shipped between those dates should be limited by the draft restriction at Labuan. But that has not been argued because, I assume, the notional missed voyages have been deemed to be from Tubarao to Port Kelang (see paragraph 70.4 of Classic's opening submissions). The calculation of loss is therefore very much a broad brush exercise rather than one fine tuned to a detailed analysis of what in fact would have happened. That being so, I think it is appropriate to take the average rate.

153. The second point arises from the circumstance that the notional ballast voyage to Tubarao used by the experts to calculate damages is from Qingdao rather than from Port Kelang. The point which arises is how should account be taken of the fact that after discharging at Port

Kelang the vessel is more advantageously positioned than if she had discharged at Qingdao (because the next ballast voyage was likely to be shorter). Mr. Robson has quantified the positional advantage and applied it by assuming that the voyage started from Port Kelang, thereby giving the correct credit mathematically by applying it at the start of the voyage. Ms. Richards does not agree with that approach because, in her view, it is not a realistic assumption that the next ballast voyage will be shorter because the majority of Capesize vessels would be discharging in China. Further, she is of the opinion that any positional advantage should not be factored in because it is not consistent with the methodology of the claim which is "not comparing trip charters and daily rates but calculating voyage surplus from voyage business". The positional advantage is, she says, already factored into the COA rate.

154. For no doubt good reasons the parties decided not to call the quantum experts to be cross-examined upon their respective opinions. I found this second issue somewhat puzzling, the answer to which was elusive, notwithstanding the submissions of Mr. Southern for Classic and of Mr. Leung, junior counsel for Limbungan. In the end I was impressed by Mr. Leung's point that Mr. Robson was comparing a COA voyage which assumed delivery and redelivery at Port Kelang with a mitigation voyage which assumed delivery and redelivery at Qingdao. This did not appear to be comparing like with like. Since the burden of proving damages lies on Classic, since the effect of Mr. Robson's mathematical credit is to increase the return Classic would have made under the COA and since there is or might be a problem with Mr. Robson's approach I consider that the damages should be assessed in accordance with Ms. Richards' method.

Conclusion

155. Limbungan cannot rely upon clause 32 of the COA to excuse its failure to ship cargoes between December 2015 and June 2016 because, in circumstances where, but for the dam burst, it is more likely than not that Limbungan would not have shipped the cargoes pursuant to the COA with Classic, Limbungan cannot show that its failure to supply cargoes resulted from the dam burst or that the dam burst directly affected the performance of its obligations. However, Classic is not entitled to substantial damages from Limbungan because if Limbungan, but for the dam burst, had been able and willing to ship the cargoes Classic would not have been able to recover substantial damages from Limbungan. The compensatory principle therefore debars recovery of substantial damages.

156. There is no reason why Classic is not entitled to substantial damages in respect of the two missed shipments before the dam burst. I invite the parties to agree the damages recoverable in respect of those shipments in the light of my resolution of the two points of detail regarding the assessment of damages