The Union Power

This was an appeal against an arbitration Award. The Sellers sold the ship Union Power under a MOA on the terms of the Norwegian Sale form 1993. Following delivery, the vessel was found to have a severe engine problem, and a dispute arose as to whether the Sellers were liable to the Buyers for such damage. The arbitration tribunal held that Sellers were liable to the Buyers on the ground that Section 14 (2) of the SOGA implied a duty on the Sellers to provide a vessel of satisfactory quality and such duty was part of the agreed contract of sale.

The relevant clause of the agreed sale contract read: Clause 11. Condition on delivery: The Vessel shall be delivered and taken over as she was at the time of inspection, fair wear and tear excepted. However, the Vessel shall be delivered with her class maintained extended to 30 September 2009 without condition/recommendation, free of average damage affecting the Vessels class. The Vessel's continuous survey cycles of machinery are to be as per current machinery continuous status attached hereto (attached "A"). Her International, National, Class and Trading Certificates clean, valid until 30 September 2009, except ISSC and SMC to be valid at time of delivery only, …"

The Arbitration Tribunal held that Section 14 (2) of the 1979 SOGA implied term as to satisfactory quality, and the parties had not contracted out this term in their agreed MOA. The fact that the vessel was sold "as she was" in the context of clause 11 of the MOA did not prevent such implied term from being incorporated into the contract of sale. The Sellers appealed to the High Court. Mr. J. Flaux upheld the arbitration award in the following

- JUDGMENT -

The Honourable Mr Justice Flaux:

Introduction and background

1. The Appellant sellers appeal (with the permission of Hamblen J) a question of law arising out of the Final Award of the arbitrators, Simon Crookenden QC, Michael Baker-Harber and Simon Gault ("the tribunal") dated 8 May 2012 whereby the tribunal decided that the Respondent buyers' claim for damages for breach by the sellers of a contract for the sale of the vessel CALAFURIA now renamed UNION POWER succeeded in full.
2. The essential facts as found by the tribunal which are relevant for the purposes of this appeal are as follows. By a Memorandum of Agreement ("the MOA") on the Norwegian Saleform 1993 ("Saleform 93") dated 4 September 2009, the sellers agreed to sell and the buyers agreed to buy the vessel, a 1994 built motor tanker, for US$7 million.
3. The relevant terms of the MOA were as follows:

> Clause 4. Inspections
>
> a) The Buyers have inspected and accepted the Vessel and the Vessel's classification records. The Buyers have also inspected the Vessel in Piraeus, Greece on August 18, 2009 and have accepted the Vessel following this inspection and the sale is outright and definite subject only to the terms and conditions of this Agreement. ...
>
> Clause 6. Drydocking/Divers Inspections
>
> b) The Vessel is to be delivered without drydocking…
>
> Clause 11. Condition on delivery
>
> The Vessel shall be delivered and taken over as she was at the time of inspection, fair wear and tear excepted. However, the Vessel shall be delivered with her class maintained extended to 30 September 2009 without condition/recommendation, free of average damage affecting the Vessels class. The Vessel's continuous survey cycles of machinery are to be as per current machinery continuous status attached hereto (attached "A"). Her International, National, Class and Trading Certificates clean, valid until 30 September 2009, except ISSC and SMC to be valid at time of delivery only, …"

4. The buyers inspected the vessel at Piraeus on 18 August 2009. The vessel was classed by RINA and was due her third special survey as the buyers knew. They had carried out an underwater survey which revealed no bottom damage affecting class. Also, through their agents CS Associates, they inspected the class records (as was their right under the MOA). They found nothing of significance and reported that she could be characterised as "a quite good vessel". Unfortunately they failed to pick up a reference in the class records to an incident in October 2002 referring to damage to the no.1 crankpin of the main engine.
5. The vessel was delivered to the buyers at Tuzla, Turkey on 1 October 2009. She was immediately drydocked there, repairs were carried out and the special survey was undertaken by ABS, since the vessel changed class upon the transfer of ownership. During that survey, the crankpin bearings of nos. 2 and 4 units were opened up and found in a satisfactory condition, on the basis of which ABS credited all the crankpin bearings for the purposes of the special survey. Following the repairs and special survey, the vessel undertook a sea trial during which, apart from a minor oil leak, the main engine operated satisfactorily.
6. On 5 November 2009, the vessel departed from Tuzla on a ballast voyage to Malta to load a cargo of diesel. At about 19.00 hours on 6 November 2009, only some 30 hours after she had departed from Tuzla, the main engine broke down. On opening the crankcase, it was found that the no.1 crankpin bearing had failed. The vessel was towed to Greece for investigation and repairs. The crankpin was found to be significantly undersize and oval. Having heard factual and expert evidence, the tribunal concluded that the ovality of the no.1 crankpin was the cause of the main engine breakdown. The tribunal also found that the ovality had developed to such a state at the time of delivery that the crankpin bearing was likely to fail within a short period of normal operation of the main engine after delivery of the vessel.
7. The buyers contended in those circumstances that the sellers were in breach of the MOA either because the ovality was "average damage affecting class" within clause 11 (a contention which the tribunal rejected) or because there was a breach of the implied term as to satisfactory quality implied into the MOA by virtue of section 14(2) of the Sale of Goods Act 1979 ("SOGA") as amended. The sellers denied that any SOGA terms were to be implied into the MOA and argued that the terms of clause 11 were inconsistent with the SOGA implied terms in that the vessel was sold "as she was". The tribunal rejected that argument, holding that the implied term as to satisfactory quality was to be implied into the MOA, the sellers were in breach of that term and the buyers' claim succeeded in full.

The question of law

8. On 21 August Hamblen J gave permission to appeal on the following question of law:

> "Whether a term as to satisfactory quality is implied into the Contract/MOA by Section 14 of the Sale of Goods Act 1979?"

Hamblen J considered the question of law to be one of general public importance and the decision of the tribunal to be open to serious doubt. As the tribunal itself recorded in [45] of the Award, the issue whether the SOGA implied terms as to quality and fitness for purpose are implied into Saleform MOAs is one which has arisen many times in London arbitrations but surprisingly is an issue which has never been addressed directly by the English courts.

The relevant provisions of SOGA

9. The provisions of SOGA (as amended by the Sale and Supply of Goods Act 1994) which fall to be considered in this case are as follows:

> "14. Implied terms about quality or fitness.
>
> (1) Except as provided by this section and section 15 below and subject to any other enactment, there is no implied term about the quality or fitness for any particular purpose of goods supplied under a contract of sale.
>
> (2) Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.
>
> (2A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.
>
> (2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods—
>
> (a) fitness for all the purposes for which goods of the kind in question are commonly supplied,
>
> (b) appearance and finish,
>
> (c) freedom from minor defects,

(d) safety, and
(e) durability.
(2C) The term implied by subsection (2) above does not extend to any matter making the quality of goods unsatisfactory—
(a) which is specifically drawn to the buyer's attention before the contract is made,
(b) where the buyer examines the goods before the contract is made, which that examination ought to reveal, or
(c) in the case of a contract for sale by sample, which would have been apparent on a reasonable examination of the sample.
55. Exclusion of implied terms.
(1) Where a right, duty or liability would arise under a contract of sale of goods by implication of law, it may (subject to the Unfair Contract Terms Act 1977) be negatived or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract.
(2) An express term does not negative a term implied by this Act unless inconsistent with it."

The reasoning in the Award

10. Before considering the parties' submissions in more detail, I propose to set out the relevant part of the Award where the tribunal deals with the issue as to whether the terms in section 14 of SOGA are to be implied into the MOA. This is at [53] to [61]:

"53. In considering whether the SoGA terms are to be implied, the starting point must be s.55(2) of the SoGA as amended…
54. In the Tribunal's view, s.55(2) provides a statutory test for whether the SoGA terms are negated by the other terms of the contract. The normal rules for the construction of a contract by which a court or tribunal seeks to ascertain the presumed intentions of the parties from words they have used do not, therefore, apply.
55. The above cases of "*The Morning Watch*" and "*The Brave Challenger*" indicate an accepted and understood meaning to the phrase "as is, where is" as meaning that the purchaser takes a vessel as he finds it. It may be that a contract that states simply that a sale is "as is, where is" and little more would have that meaning. It does not follow that the words "as she was" in Saleform 93 have the same meaning.
56. The phrase "as she was" forms a necessary part of the contractual arrangement under Saleform 93 under which a vessel is inspected by a prospective purchaser on a particular date but remains in the possession of the seller who is free to continue to trade the vessel until delivery. Clause 11 of Saleform 93 provides for any changes that occur in the state of the vessel between inspection and delivery by providing that the vessel remains at the sellers' risk but shall be taken over by buyers on delivery "as she was at the time of inspection, fair wear and tear excepted". The phrase "as she was" is a necessary part of the above phrase to record that, save for fair wear and tear, the buyers are entitled to receive a vessel in the same state as when inspected. It cannot be said, therefore, that the phrase must have some further meaning if it is to have any meaning at all. The phrase "as is, where is", on the other hand is simply a truism (clearly any vessel must be as it is and where it is on delivery) if some other meaning is not to be imputed to the phrase.
57. The phrase "as she was" appears in clause 11 of the Contract and must be construed in that context. Clause 11 also requires the Vessel to be delivered "with her class maintained.., without condition/recommendation" and "free of average damage affecting the Vessel's class". The sale is not, therefore, simply a sale of the vessel as she was at the date of inspection. If the vessel is subject to a class condition or recommendation as at the time of inspection, the Seller is under an obligation to repair the vessel so as to delete that condition or recommendation prior to delivery. Similarly, if the vessel does in fact have average damage affecting class at the time of inspection then the Seller is obliged to repair that damage prior to delivery. The phrase "as she was" can be read consistently with the other requirements of clause 11 despite the fact that those provisions can require the Seller to deliver a vessel in a better condition than when inspected.
58. If the express requirements of clause 11 considered above are not inconsistent with the phrase "as she was", it is difficult to see how the SoGA terms can be inconsistent with that phrase. Like the express requirements of clause 11, the SoGA terms if implied

can require the Seller to deliver a vessel in a better condition than she was when inspected.

59. The Tribunal concludes, therefore, that the SoGA terms are not inconsistent with the words "as she was" in clause 11 of the Contract. It was not suggested that there was any other clause of the Contract with which the SoGA terms were inconsistent.

60. The Seller submitted that to imply the SoGA terms in the Contract would re-write the contract between the parties so as to impose on the Seller some of the commercial risk taken by the Buyers in purchasing a second hand vessel that was due for its special survey immediately following delivery. While these matters may be relevant to what amounts to "satisfactory quality" in relation to the sale of a second hand ship, they can not be relevant to whether the SoGA terms are inconsistent with the Contract. Implication of a term does not re-write a contract, it is a determination of what the contract provides in accordance with applicable statutes and rules of law.

61. The Tribunal concludes, therefore, that the SoGA term as to satisfactory quality is implied into the Contract.

Summary of parties' submissions

11. The primary submission of Mr Timothy Hill QC on behalf of the sellers was that the tribunal's analysis was wrong because it had failed to recognise that the words "as she was" in the first sentence of clause 11 had the same meaning as the words "as is" or "as is, where is" or similar phrases in other cases (both of sale of ships and other goods). Whilst he did not rely upon any trade custom or usage (and could not have done so, since there was no evidence of custom or usage called before the tribunal), he submitted that it was well settled that such phrases meant that the buyer takes the goods as he finds them, "warts and all" with no warranty or condition as to quality or fitness for purpose. Therefore such phrases, including "as she is" in Saleform 87 and "as she was" in Saleform 93, were inconsistent with the SOGA implied terms and excluded their application.

12. In support of that submission, Mr Hill relied upon a series of ship sale cases from *Lloyd del Pacifico v Board of Trade* (1929) 35 Ll. L.R. 217 to *Polestar v YHM ("The Rewa")*[2012] EWCA Civ 153, together with various passages from the two ship sale textbooks, Goldrein on Ship Sale and Purchase (the 5th 2008 edition of which is edited by two partners of Clyde & Co LLP, the buyers' solicitors) and Strong & Herring on Sale of Ships (Mr Herring of Ince & Co LLP being Mr Hill's own instructing solicitor). Mr Hill also relied upon certain additional authorities to which I drew attention, some Canadian cases on the use of the phrase "as is" in contracts for the sale of second hand cars and the decision of the Court of Queen's Bench in *Covas v Bingham* (1853) 2 El & Bl 836; 23 LJQB 27.

13. Mr Hill submitted that the tribunal's reasoning at [56]-[58] was false and had too narrow a focus. The tribunal simply assumed that "as she was" did not mean any more than that the vessel was to be in the same condition on the date of delivery as she had been on the earlier date of inspection, but overlooked that the words: "as she was at the time of inspection" were equivalent to "as is". It made no difference that the words were in the middle of a sentence. He submitted that clause 11 was, as he put it "redolent of a pure *caveat emptor* contract". If the buyer wanted additional protection, there had to be express provision. Hence the second sentence begins with the word: "However", indicating that what follows (which is the obligations to deliver with class maintained, without condition or recommendation and free of average damage affecting class) is a qualification to what would otherwise be a simple obligation to deliver the vessel "as she was". He submitted that clauses 4 and 11 were to be read together, which made it clear that, upon inspection the sale was outright and definite, that it was a sale of the vessel as inspected.

14. The fact that the only exceptions to the "as is" nature of the sale dealt with class reflected the fact, so Mr Hill contended, that vessels were built to class standard and when second hand vessels are sold on Saleform MOAs, it is invariably to that class standard reflected in that second sentence of clause 11. In other words, vessels were sold to the class standard not to the standard of satisfactory quality, which he submitted would be a nebulous and uncertain standard to apply in relation to second hand vessels.

15. Mr Simon Rainey QC submitted on behalf of the buyers that the MOA was a contract for the sale of goods expressly governed by English law and, like any other such contract, the default position was that the Section 14 implied terms applied unless the parties had contracted out which they could do either by expressly contracting out, as in the case of the detailed clause considered by Cooke J in *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm); [2012] 1 Lloyd's Rep 349 or by a clear and unequivocal statement of an alternative regime as to quality which was wholly inconsistent with the section 14(2) implied term as to satisfactory

quality, such as an entire agreement clause. Both routes to contracting out were commonly used by sellers under MOAs on Saleform, for example by express exclusions or by entire agreement clauses or by an express statement that the contract is "as is, where is" which, Mr Rainey submitted, might or might not be effective to exclude the statutory implied terms.

16. However, Mr Rainey took issue with Mr Hill's submission that it was well-settled that "as is" in the MOA would exclude the implied terms. He pointed out that the buyers had not sought to adduce evidence at the arbitration hearing that "as is" had some customary meaning. Rather, people in the market recognised that that phrase did not definitely exclude the implied terms, which was why they often sought to supplement that phrase by some express exclusion of SOGA or by an entire agreement clause. He referred in this regard to a passage at [6.9.3] of Goldrein 5th edition.
17. Mr Rainey submitted that the question of law in this appeal in fact raised two separate questions, one narrower and the other wider. The narrower first question was whether clause 11 in this MOA was equivalent to an "as is, where is" basis of contract, assuming that phrase has the effect of excluding the SOGA implied terms. The wider second question was, if it is equivalent, does "as is, where is" exclude section 14(2) in the light of section 55. If the tribunal was right in its analysis, then clause 11 was not equivalent to "as is, where is", whatever effect that phrase had on the statutory implied terms and the appeal must fail, in which case the court would not, strictly speaking, have to decide the second wider question. In other words, although Mr Rainey did submit that "as is, where is" was not in fact apt to exclude the implied terms, whatever various judges may have said over the years on an obiter basis, even if that submission was wrong, if he was right in his submission that on the first, narrower question, the tribunal was correct, then the appeal would fail.
18. In relation to the first, narrower question Mr Rainey submitted that the court should approach the question whether there was an express term in the contract, here clause 11, which excluded the implied terms set out in section 14, having in mind the principle that these are basic rights arising by operation of law, which are valuable to the buyers and which it should not be assumed would be lightly given up. He relied upon the most recent statement of this principle by Cooke J in *Air Transworld* at [26], which Mr Hill did not challenge.
19. Applying that principle in the present case, Mr Rainey submitted that, unless the buyers could show that the only possible meaning to be attributed to "as she was" in clause 11 was that those words were equivalent to "as is", they must lose. The tribunal had found that, reading those words in the context of the sentence as a whole, they meant that the buyers were entitled to delivery of the vessel in the same condition as when inspected. In those circumstances, as the tribunal also found, it was not appropriate to attribute some further meaning to the phrase as the buyers contended: see [56] of the Award. Mr Rainey submitted that the words "as she was" in the first sentence of clause 11 were not equivalent to "as is" or similar words in the cases relied upon by Mr Hill, as those cases were ones where the phrase was essentially a stand-alone provision.
20. Mr Rainey had a fall-back position that "as she was" in clause 11 should be read down in accordance with the principle that clauses which purport to exclude the buyer's statutory rights to claim damages under SOGA should be interpreted strictly. In those circumstances, the phrase in context: "the vessel shall be delivered and taken over as she was at the time of inspection" [underlining to emphasise the words relied on by Mr Rainey] should be restricted to exclusion of the right to reject the vessel, not exclusion of the right to claim damages for breach of the obligation of satisfactory quality in section 14(2) of SOGA: see per Davies LJ in the *Ashington Piggeries* case in the Court of Appeal [1969] 2 Lloyd's Rep 425 at 468. That approach had been endorsed in the House of Lords by all their Lordships.
21. So far as concerns Mr Hill's reliance on the second sentence of clause 11 beginning "However" as constituting exceptions to the buyer having to accept the vessel as she is, warts and all, Mr Rainey submitted that these obligations lay perfectly happily alongside the section 14(2) implied term and that it was well established that the statutory implied terms could not be excluded by the sellers providing some limited warranty such as "free of average damage affecting class".
22. As for the suggestion that second hand vessels were sold by reference to a class standard, not a standard of satisfactory quality, Mr Rainey pointed out the limitations of class, as discussed by Goldrein at p.42 where it is stated: "Classification does not constitute a guarantee that proper technical standards are maintained at all times, or that the ship in question is seaworthy, or even that the ship is free of significant defects." In other words, class does not tell you the quality of the vessel, which is why the independent implied term as to satisfactory quality is required. Mr Rainey drew the analogy with time charters which frequently provide that the vessel is "in class

and in a thoroughly efficient state", recognising that class and quality are two different things. "Satisfactory quality" was not a nebulous or uncertain standard. It was all a question of fact in each case and section 14(2A) to (2C) provided extensive guidance on how to assess whether quality was satisfactory. The tribunal applied that guidance in this case at [90] to [93] of the Award.

23. In relation to the wider second question, Mr Rainey relied upon the line of authorities in appellate courts from *Wallis, Son & Wells v Pratt & Haynes* [1911] AC 394 to *Bominflot v Petroplus Marketing ("The Mercini Lady")* [2010] EWCA Civ 1145; [2011] 1 Lloyd's Rep 442 which establish that the implied terms under sections 13 and 14 of SOGA are conditions of a contract for the sale of goods which cannot be excluded by reference to guarantees or warranties. Mr Rainey submitted that for "as is" to have the effect of excluding the implied conditions as Mr Hill contended, that short phrase had to mean "with all faults and errors of description and with no warranties or conditions being given", but as a matter of construction, the words "as is" could simply not be interpreted as having that meaning and, despite Mr Hill's assertion to the contrary, the words were not a term of art. If Mr Hill's submission that the mere use of the words "as is" in a contract of sale excluded the implied terms, it would drive a coach and horses through the cases on how the implied terms could be excluded.

The correct approach to section 14(2)

24. I agree with Mr Rainey that the correct starting point is that the section 14 implied terms will apply to this English law contract of sale as to any other, unless the parties have contracted out of section 14 by one or other of the two routes he identified. This is not an example of adopting the fossilised approach to the application of SOGA which Lord Diplock deprecated in *Ashington Piggeries v Christopher Hill Ltd* [1972] AC 441 at 501, as Mr Hill suggested. It is simply well-established law. The suggestion that SOGA somehow does not apply to contracts for the sale of second hand ships which are governed by English law is contrary to the terms of the statute. Ships are "goods" within the statute like any other piece of machinery or equipment: see Goldrein at [4.5.1] and the decision of Wright J in *Behnke v Bede Shipping* [1927] 1 KB 649 at pp659-660 cited there.
25. If commercial parties do not want to be subject to the implied terms as to satisfactory quality and fitness for purpose, they can contract out of those implied terms, as provided for by section 55(1) of SOGA. Since this is not a case where the sellers contended that the statutory implied terms were negatived by the course of dealing between the parties or by some binding custom or usage, they could only be negatived by express agreement. It follows that, in my judgment, the tribunal was entirely correct in taking section 55(2) of SOGA as its starting point at [53] of the Award.
26. Before considering in more detail the various authorities upon which Mr Hill relies, it is instructive to consider the principle reiterated most recently by Rix LJ in *The Mercini Lady* and Cooke J in *Air Transworld* that clear language must be used in the contract, if the statutory implied terms which are conditions of the contract of sale, not mere warranties (see section 14(6) of SOGA as amended) are to be excluded. It is clear from all the cases that that principle is strictly applied, which it is fair to say sits somewhat uneasily with some of Mr Hill's submissions.
27. *The Mercini Lady* was a case of a contract for the sale of a cargo of gasoil which included at clause 18 an exclusion in these terms:

> "There are no guarantees, warranties or misrepresentations, express or implied [of] merchantability, fitness or suitability of the oil for any particular purpose or otherwise which extend beyond the description of the oil set forth in this agreement."

28. One of the issues before the court was whether that exclusion clause excluded the section 14(2) implied term. At [48] to [53] of his judgment, Rix LJ considered the authorities on exclusion of the implied conditions from *Wallis, Son & Wells v Pratt & Haynes* [1911] AC 394 to *Henry Kendall & Sons v William Lillico & Sons Ltd* (The Hardwick Game Farm Case) [1969] 2 AC 31. It was submitted by the sellers that the approach of these cases was too strict and dated and should be revisited in the light of the approach to exclusion clauses adopted in *Photo Production Ltd v Securicor* [1980] AC 827, a submission which found some support from academic commentary. The buyers submitted that the jurisprudence was long standing, of the highest authority and formulated as a matter of principle.
29. In determining that the court was bound by the principle established by the authorities, Rix LJ said at [59] to [61]:

> "59. It is not easy to choose between these submissions. On the one hand a principle has been established, on the highest authority, that Sale of Goods Act implied conditions

cannot be excluded by reference to guarantees or warranties and require clearer language extending to "conditions" themselves. Those authorities go beyond the relatively simple clause and stark facts of *Wallis v. Pratt* itself, where there was a breach of an express clause as to the product to be supplied, or the case of *Cammell Laird*, where there was no exclusion at all, and extend to *Baldry v. Marshall*, where the clause spoke expressly of the exclusion of "any other guarantee or warranty, *statutory* or otherwise", and above all to *Kendall v. Lillico*, where the clause was similar to ours in dealing expressly with the concept of merchantability and went on to refer expressly to "any *statute* or rule of law to the contrary notwithstanding" (emphasis added).

60. On the other hand, it is extremely difficult to read our exclusion clause as not being intended to cover the exclusion of the statutory implications of satisfactory quality (the new merchantable quality) and fitness for purpose. Mr Edey's reference to the little known or exemplified section 14(4) cannot realistically be considered as the exclusive subject matter of the clause's language about "merchantability, fitness or suitability of the oil for any particular purpose or otherwise". Moreover, what other implied terms about quality or fitness for purpose, other than the statutory implications are permitted in the light of section 14(1)? If an implied warranty of quality or fitness of purpose is excluded, why not an implied condition, since only the statute can supply any such term and the statute refers to such terms as conditions? This may be thought to be especially the case in an international sale of goods contract where quality is defined by reference to an express specification and that specification has to be determined once and for all on shipment by a final and binding inspection certificate. The clause 18 exception says "no guarantees…which extend beyond the description of the oil set forth in this agreement". What is that "description"? The word is not used (as far as has been brought to our attention) elsewhere in the contract. Strictly speaking the description may be thought to be found in clause 3, headed "Product". However, it is unrealistic and uncommercial to think that for the purpose of this contract "description" does not also embrace clause 4, albeit it is headed "Quality", especially since clause 18 refers to merchantability, an aspect of quality.

61. If therefore I were construing this clause untrammelled by past authority, or if such authority was plainly limited, in the way that so many decisions on the construction of individual clauses are limited, by considerations of the precise language and context of those particular clauses, I would feel it open, in the modern world, to give to clause 18 the construction which I believe that it realistically bears: that is to say, that "guarantees" and "warranties" are intended to cover all terms, both those which entitle the innocent party in the case of breach to treat the contract as repudiated and those which sound only in damages. As section 11(3) of the 1979 Act itself records, "a stipulation may be a condition, though called a warranty in the contract": and clause 18 itself demonstrates that buyer's warranties there set out are treated by the contract as conditions. It might be said that what is good enough for Lord Diplock (see at para 55 above) is good enough for commercial traders. However, I am not so free. The jurisprudence extends beyond individual decisions and has become expressive of a principle, and what is more the principle also encompasses clauses very similar to clause 18. I must consider that the parties to this English law contract, foreign as both of them are and quite possibly ignorant of the consequences of their choice of language, intended to contract by reference to what English law had to say about the language which they have adopted."

30. It seems to me that that last point is apt to address the generalised submissions Mr Hill made about how application of an implied term as to satisfactory quality would be contrary to the expectations and intentions of parties to MOAs on Saleform and of "the market". In the absence of some market custom or usage to exclude the implied terms, as Rix LJ says, the parties to this English law contract are to be taken to have intended to contract by reference to what English law has to say about the language used. Even if Mr Hill were right that the expectation of "the market" was that no term as to satisfactory quality was to be implied into a Saleform MOA, no market custom or usage was pleaded, let alone established and, as Mr Rainey pointed out, the discussion of this issue in the textbooks suggests "the market" does not speak with one voice. The short answer to the expectation of the market point is that if the language used in the contract has consequences as a matter of English law which "the market" did not intend, then the language used should be changed to accord with that expectation. As the arbitrators noted at [45]

of the Award, the latest 2012 Saleform includes wording designed to make it clear the statutory implied terms are excluded.

31. I should add in parenthesis that the argument of the unsuccessful sellers in *The Mercini Lady* that the strict approach of the older cases should no longer be followed receives an echo in the discussion in Strong & Herring [2B-19], written before *The Mercini Lady* was decided, citing the approach to construction of exemption clauses of Lord Diplock in *Photo Production* and suggesting that the historical basis for the strict construction was a policy of consumer protection no longer needed in the light of the Unfair Contracts Terms Act 1977. That analysis and discussion is not correct as a matter of law in the light of Rix LJ's judgment.
32. *Air Transworld v Bombadier* was a case of the sale of an aircraft. the contract of sale included a detailed and far ranging exclusion clause in these terms:

> "4.1 THE WARRANTY, OBLIGATIONS AND LIABILITIES OF SELLER AND THE RIGHTS AND REMEDIES OF BUYER SET FORTH IN THE AGREEMENT ARE EXCLUSIVE AND ARE IN LIEU OF AND BUYER HEREBY WAIVES AND RELEASES ALL OTHER WARRANTIES, OBLIGATIONS, REPRESENTATIONS OR LIABILITIES, EXPRESS OR IMPLIED, ARISING BY LAW, IN CONTRACT, CIVIL LIABILITY OR IN TORT, OR OTHERWISE, INCLUDING BUT NOT LIMITED TO A) ANY IMPLIED WARRANTY OF MERCHANTABILITY OR OF FITNESS FOR A PARTICULAR PURPOSE, AND B) ANY OTHER OBLIGATION OR LIABILITY ON THE PART OF SELLER TO ANYONE OF ANY NATURE WHATSOEVER BY REASON OF THE DESIGN, MANUFACTURE, SALE, REPAIR, LEASE OR USE OF THE AIRCRAFT OR RELATED PRODUCTS AND SERVICES DELIVERED OR RENDERED HEREUNDER OR OTHERWISE."

33. One of the issues which arose was whether that clause had the effect of negating the conditions implied by sections 13 and 14 of SOGA. At [12] to [21] of his judgment, Cooke J went through the earlier authorities, culminating in the judgment of Rix LJ in *The Mercini Lady*. Then, at [26] he referred to Lewison: The Interpretation of Contracts 5th edition at [12-03] which cites the judgments of Moore-Bick LJ in *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] 2 Lloyd's Rep 216 and *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] 1 Lloyd's Rep 461.
34. Cooke J continued in [26]:

> "In these cases the Court refused to accept that there were two competing approaches to construction, struggling for supremacy, one of which required clear express words whilst the other favoured the natural meaning of the words used. He said that it was important to remember that any clause in a contract had to be construed in the context in which it was found, meaning both the immediate context of the other terms and the wider context of the transaction as a whole. The court was unlikely to be satisfied that a party to a contract had abandoned valuable rights arising by operation of law, unless the terms of the contract made it sufficiently clear that this was intended. The more valuable the right the clearer the language would need to be. Similarly, the more significant the departure from obligations implied by the law or ordinarily assumed under contracts of the kind in question, the more difficult it would be to persuade the court that the parties intended that result."

35. Cooke J then considered the wording of Article 4.1 of the contract and concluded at [29]:

> "No person reading this Article could be in any doubt that every promise implied by law is excluded, in favour of the contractual promises set out in the APA. It is right that there is no term which purports to exclude the buyer's right to reject the goods and recover the price, nor to the specific sections of the Sale of Goods Act, but the words "all other… obligations… or liabilities express or implied arising by law", which the purchaser expressly waives, necessarily include the conditions implied by the Sale of Goods Act. In my judgment these are apt and precise words which are sufficiently clear to exclude those implied conditions and the Article, by necessary inference does negative the application of those implied conditions. The parties' language is in my judgment fairly susceptible of only one meaning (to employ the expression used by Lord Diplock in *Photo Production* and Rix LJ in *The Mercini Lady*.) There is no express reference to the word "condition" but the language must necessarily be taken to refer to the implied conditions of the Sale of Goods Act, because they are obligations and liabilities "implied, arising by law". Moreover, the illustration of the application of this general provision in Article 4.1(B) covers any other obligation or liability devolving on the seller, "of any nature whatsoever", resulting from the design, manufacture and sale of the aircraft. No buyer could be in any doubt as to the extent of

the rights he was getting and the limitation on the seller's obligations. What the buyer was to get was the Warranty found in the APA and its Appendix in place of the terms implied by the Sale of Goods Act, whether conditions or warranties."

The cases on "as is" and similar phrases

36. It is against the background of the application of the principle reiterated by those cases that the various cases relied upon by Mr Hill are to be considered. It is also worth stressing at the outset that, upon a proper analysis of the cases, it is not strictly part of the ratio of the decision in any of them that the words "as is" or similar exclude the statutory implied terms in sections 13 and 14 of SOGA. Rather, as Mr Hill fairly accepts, the statements made are obiter.

37. Mr Hill's starting point is the decision of the Court of Appeal in *Lloyd del Pacifico v Board of Trade* (1929) 35 LL.L.R. 217. In that case, the British Government had contracted with the Italian Government in 1919, at a time when freight rates were extraordinarily high, to dispose of surplus merchant shipping tonnage built during the First World War. The structure of the agreement was that the Italian Government would put forward approved buyers, of whom the appellants were one. They agreed to buy the vessel *War Column* built in the United States with turbine engines which it transpired were extremely expensive to operate and which meant their trading of the vessel was unprofitable when freight rates plummeted during the 1920s. The contract of sale contained this clause 5:

> "The steamer with her broached stores spare gear and outfit shall be taken with all faults and errors of description without any allowance or abatement."

38. The buyers had claims under both section 14(1) and (2) of the Sale of Goods Act 1893 (fitness for purpose where that purpose was made known by the buyer and merchantable quality). The members of the Court of Appeal were all agreed that the claims failed, although their reasoning differed somewhat. Scrutton LJ considered the claim under section 14(1) failed because the buyers had not made their purpose known to the sellers and the clause stating that the vessel was to be taken with all faults and errors of description shut out any inference that the buyers had relied on the sellers' skill and judgment. He considered that the claim for breach of section 14(2) failed because the vessel was of merchantable quality. Although he said it was not necessary to decide the point, he would also have decided that any claim was excluded by clause 5, stating (at p.222):

> "I think that the cases cited show that the reading of that clause is not 'faults of description and errors of description' but 'faults and errors of description'; there are no errors of description that I can see. The unsuitability of the engines to the hull is a fault in the ship, and appears to me to be excluded as a cause of action by the provisions of clause 5."

39. Lawrence LJ also considered the authorities on the expression "all faults and errors of description" and reached the same conclusion on the meaning of "all faults" so he decided that if the fact that the vessel had turbine engines was a fault, there was no breach of contract (at p.223). He also agreed with Scrutton LJ that the claim under section 14(1) failed because there was no evidence that the buyers made their purpose known to the sellers or that they relied on the sellers' skill and judgment. He also considered that on the facts, the vessel was clearly of merchantable quality.

40. Greer LJ also held (at p.224) that the words "all faults" encompassed any fault in the engines and (at p.225) that, on the facts, the vessel was clearly of merchantable quality. Mr Hill relied in particular on the passage at the end of Greer LJ's judgment, where he said:

> "…for the very purpose of excluding all questions of warranties they used the term 'with all faults' which in business has been long understood to mean 'as she stands, with all faults that she has and any errors of description'".

41. Mr Hill placed considerable reliance on that case and on the fact that the Court of Appeal, at least obiter, would have decided if necessary that the phrase: "the [vessel]… shall be taken with all faults and errors of description" (for which he contended "as is" was a modern shorthand) excluded the implied terms in section 14(1) and (2) of the Sale of Goods Act 1893. In my judgment those obiter statements have to be viewed with some circumspection. So far as I can tell the judgments were ex tempore, since the Lloyd's List Reports would state when judgment was reserved and the decision of the House of Lords in *Wallis, Son & Wells v Pratt & Haynes* [1911] AC 394 and of a different Court of Appeal (Bankes, Atkin & Sargant LJJ) in *Baldry v Marshall* [1925] 1 KB 260 which followed *Wallis*, do not seem to have been cited to the Court of Appeal in *Lloyd del Pacifico*, so specific consideration does not seem to have been given to whether the phrase "the [vessel]… shall be taken with all faults and errors of description" really was apt to exclude conditions of the contract, which the statutory implied terms are.

42. Furthermore, there is considerable similarity between the phrase under consideration in *Lloyd del Pacifico* and the clause in *Christopher Hill Limited v Ashington Piggeries Ltd* [1969] 2 Lloyd's Rep 425: "the goods to be taken with all faults and defects", which Davies LJ held at 468 was to be read down as excluding only the right to reject the goods not the right to claim damages for breach of a statutory implied term, an approach approved by their Lordships in the House of Lords in that case. It follows that, in my judgment, *Lloyd del Pacifico* may be of doubtful assistance in the modern law.
43. In the context of *Lloyd del Pacifico*, Mr Hill also placed some reliance on an earlier sale of goods case to which I drew attention, *Covas v Bingham* (1853) 2 El & Bl 836; 23 LJQB 27, a decision of the Court of Queen's Bench in relation to a cargo of corn from a particular vessel: "now at Queenstown, as it stands, consisting of about thirteen hundred quarters of…corn…the quantity to be taken from the bill of lading". The dispute in that case concerned the quantity and the court held that the basis of sale was one under which the buyers took the chance that the actual quantity might exceed or fall short of that specified in the bill of lading, a point on which a different conclusion would clearly be reached in the modern law.
44. However, a majority of the court did consider the effect of the contract not just on quantity but quality. Lord Campbell CJ said: "I think the intention of the parties to be gathered from the contract itself was, that the cargo should be taken by the purchaser, for better for worse, for less or more. Both parties put faith in the correctness of the bill of lading." Coleridge J, at least as reported by Ellis & Blackburn, said: "The sale is of a cargo afloat. There are therefore two important points not ascertained, its quality and its quantity. As to the quality, they agree to take it 'as it stands' and, as there is a mode by which the quantity may be roughly ascertained by reference to the bill of lading, they agree to the quantity as it appears on that". In the Law Journal Report, he is reported as having said: "[the cargo] was to be taken whatever the actual quantity or quality should turn out to be." Erle J, as I read his judgment, had nothing to say of any relevance to the question of the impact of the words "as it stands" on quality.
45. Mr Hill pointed out that the words "as it stands" were used in the body of the contract, not as typed additions or rider clauses and yet still meant that the goods were delivered for better or worse or whatever the quality turned out to be. However, I am far from convinced that that case assists Mr Hill in establishing some general principle that words such as "as is" or "as it was" negative any implied term as to quality. As Mr Rainey pointed out, all three members of the court decided the case on the basis of the construction of the contract in question, which was a sale of a cargo afloat where the parties put their faith in the correctness of the bill of lading. I agree with Mr Rainey that the case is of little assistance as to the meaning of "as is" or "as she was" in a modern contract of sale.
46. *Mariola Marine Corporation v Lloyd's Register of Shipping ("The Morning Watch")* [1990] 1 Lloyd's Rep 547 was a case where the plaintiff had purchased a twenty three year old yacht. The contract of sale was short and informal, consisting of an exchange of telexes whereby the principal of the buyers telexed the sellers' brokers offering £185,000 for the yacht "as is, where is" and the brokers accepted that offer by return telex. Having discovered defects in the vessel after purchase, the buyers claimed against the vessel's classification society for alleged breach of a duty of care owed to them. The claim failed, as Phillips J held no duty of care was owed. Part of Lloyd's case was that no claim could be founded on events after the exchange of telexes, because by then the buyers were legally committed to complete the purchase of the vessel. The buyers sought to counter that argument by submitting that "as is" meant "as reported to be" so that the sale was conditional upon the vessel being properly classed 100A1 at Lloyd's.
47. Phillips J gave that argument pretty short shrift, saying at 555-6:

> "This argument is untenable. The term 'as is' has a clearly recognised meaning in a contract of sale. The purchaser takes the object sold as he finds it without any warranty as to quality or condition. It was not open to Mariola having agreed to purchase the *Morning Watch* 'as is where is' to complain that her condition did not justify a classification 100A1 at Lloyd's".

48. As Mr Rainey correctly points out, that was an informal ad hoc contract, the only term of which apart from price seems to have been "as is, where is", which was in fact offered by the buyers, so in one sense it is perhaps not surprising that the learned judge considered that the buyers were agreeing to take the vessel without any warranty as to quality. There was no discussion in terms of whether the phrase "as is" was an express exclusion of the implied terms as required by section 55 of SOGA, nor any citation of authority on that issue. Nonetheless, the case is of obvious assistance (together with the Canadian cases to which I refer below) to the sellers here, at least as regards the second, wider question.

49. The next case on which the sellers rely is the decision of David Steel J in *The Brave Challenger* [2003] EWHC 3154 (Admlty). In that case the vessel was a one-off luxury yacht capable of 60 knots, built in 1962 but extensively refurbished. The MOA for her sale was not on Saleform 87 or 93 but was another ad hoc contract, as is apparent from the terms set out in [57] of the judgment. The relevant clause was clause 6, headed "Passing of risk" which provided:

> "The vessel with everything belonging to her shall be at the seller's risk and expense until she is delivered to the buyer but subject to the conditions of this contract she shall be delivered and taken over as she is at Hasler Marina Portsmouth."

50. In that case where the trial lasted 17 days, Mr Haydon-Baillie acted in person on behalf of the buying company of which he was sole director, with the permission of the judge, but as the judge recorded, it was complex litigation and "the nature of the representation made the task of the court in ensuring a fair trial for both parties and resolving the issues between them immeasurably more difficult" [99]. The buyers' primary claim was for damages for misrepresentation. The learned judge, who concluded that clause 6 was an "as is, where is" clause, rejected the sellers' argument that the clause demonstrated a lack of reliance on any misrepresentations, saying at [170]:

> "I reject the submission that the "as is where is" clause in the contract demonstrates a lack of reliance on any contractual representations. If anything that clause (and the absence of any survey) manifest total reliance on the sellers."

51. His conclusion that the buyers were entitled to damages under the Misrepresentation Act 1967 made it unnecessary to consider the buyers' alternative claim for breach of the implied terms under section 14 of SOGA but at [177] the learned judge concluded:

> "In any event, the short answer to those claims is that the express term with regard acceptance of the vessel "as is where is" negatives the implication."

52. As Mr Rainey points out, that was another case where there was no discussion of section 55 of SOGA, perhaps unsurprisingly since Mr Haydon-Baillie was a litigant in person. Mr Hill submitted that clause 6 of that contract was almost identical to clause 11 of Saleform 87 which provided for the vessel "to be delivered and taken over as she is at the time of inspection" and that the only difference between the first sentence of clause 11 in Saleform 87 and the first sentence of clause 11 in Saleform 93 was the change of tense from "is" to "was", which is more grammatically correct. Mr Hill relied upon the dictum of David Steel J in *The Brave Challenger* in support of the proposition that clause 11 in both forms is an "as is, where is" clause with the same meaning as in *The Morning Watch*.

53. The recent decision of the Court of Appeal in *Polestar Maritime Limited v YHM Shipping Co Ltd ("The Rewa")* [2012] EWCA Civ 153 was a case considering an MOA on Saleform 93. The question at issue was whether the vessel as delivered had to have on board only such trading and other international certificates as she had at the time of inspection or, as contended by the buyers, was required to have on board additional certificates, specifically an international sewage pollution prevention certificate, the requirement for which came into effect after inspection and three days before delivery. That issue was determined against the buyers by both Field J and the Court of Appeal on the basis that the wording of lines 222-223 in clause 11 of the Saleform (in fact deleted from clause 11 in the present case) only required the vessel to have on board the same certificates as she had at the time of inspection.

54. Mr Hill relied upon [27] of the judgment of Aikens LJ:

> "In my view the judge's construction of this wording is the correct one. Clause 11 deals with the condition of the Vessel upon her delivery. The basic agreement between the parties is that the Vessel is to be delivered and taken over "*…as she was at the time of inspection*". In short, this is an "as was" sale and purchase contract. The basic obligation on the Sellers with regard to documentation is set out in clause 8, which stipulates what documents are to be delivered to the Buyers at the time of closing. At the stage of closing the Sellers have to deliver the ***originals*** of all "*trading/class, national and international certificates in accordance with the MOA*" as stipulated in paragraph (12) of Addendum No 1. That same paragraph notes that copies of all such certificates will already have been passed to the Buyers. The MOA therefore contemplates that the Buyers will already have been given the national and international certificates existing at the time of the vessel's inspection and that they will get the originals of those certificates at the closing."

55. Mr Hill submitted that when Aikens LJ described this as an "as was" contract he was saying that the contract was an "as is" contract in the sense that there were no warranties as to quality. With respect to Mr Hill, I consider this is a false point. There was no issue in that case as to the quality

of the vessel either upon inspection or delivery, the only issue was as to the documents, so that by definition there was no discussion of whether the SOGA implied terms were excluded by clause 11 of Saleform 93. I suspect that when Aikens LJ referred to the contract as an "as was" one, he was picking up on the point made by Field J which he referred to at [19] of his own judgment and with which he agreed: "The judge rejected the arbitrator's construction of clause 11 for three reasons…Secondly, at [16], he considered that the arbitrator's construction was "*unjustifiably inconsistent*" with the emphasis placed by the NSF terms on the "*as was*" nature of the sale, ie. that the Vessel was being sold in the condition (and with the certificates) as she was at the time of her inspection." That is simply making the point that the obligation under clause 11 is to deliver the vessel in the same condition as upon inspection, but is saying nothing about what the obligation of the sellers is as to the quality of the vessel upon inspection (and therefore upon delivery). In other words, nothing in that case is inconsistent with the arbitrators' reasoning and conclusion in the present case.

56. In written submissions served after the hearing dealing with *Covas v Bingham* and the Canadian cases to which I refer below, Mr Rainey also drew my attention to the decision of Christopher Clarke J in *Choil Trading SA v Sahara Energy Resources Ltd* [2010] EWHC 374 (Comm). That case involved a contract for the sale of naphtha where one of the issues was the meaning of the term "as is" in various refined crude oil product trades. The learned judge heard expert evidence of trade custom and apparently no authorities were cited (evidently in view of what was common ground as to the customary meaning of "as is" in particular trades, because cases like *The Morning Watch* would have been of no assistance). He concluded as follows in relation to the term in the contract as to quality at [104]-[106]:

> "104. In my judgment, the combined effect of the 17th July exchange and the 18th July e-mail was that the contract was to be on terms that the naphtha sold was to be of PHRC naphtha quality, i.e. having characteristics within the range for naphtha normally produced by PHRC. The expression "*as is*" was sufficient to indicate that the naphtha to be received would have whatever characteristics (within that range) the cargo supplied to Choil ex PHRC happened to have. But, whatever might have been the position if the words "*as is*" had stood alone, they cannot in context be taken to signify that the sellers could provide cargo which was not of normal PHRC quality for naphtha because of its very high MTBE content.
>
> 105. Sahara's evidence is that it is usual to sell Nigerian naphtha (at a heavy discount in price) without any warranty as to quality because its quality is variable and the means to determine important aspects of quality relevant to European , US and Far East buyers do not exist locally. Naphtha is purchased FOB without warranty, and, when the quality of the cargo on board ship has been accurately determined, is sold CIF with an appropriate warranty of quality. It submits that, in that context, "*PHRC naphtha quality*" (or "*Naphtha of normal running production as produced by Port Harcourt Refining Company*") should be interpreted as meaning a sale without any warranty as to quality at all.
>
> 106. I accept that sales of Nigerian naphtha are often made "as is" or without warranty and at a heavy discount for the reasons set out in the previous paragraph. But I do not accept that the term "*Quality: PHRC naphtha quality*" can or should be interpreted as if it said or meant that there was literally no term as to quality of any kind. The inclusion of a "*Quality*" term is inconsistent with this. If the parties had intended that all that was warranted about the product sold was that it could be called "naphtha" they would have expressed themselves differently. Choil was, bound to accept naphtha, whatever its characteristics, provided it was "*PHRC naphtha quality*". But it was not that obliged to accept a cargo which was heavily contaminated by a substance which was not the result of naphtha production and which is not normally present in naphtha produced by PHRC. I note that Ms Annesley, the expert called by Sahara, accepted that the term "*as is*" would not be understood as going "*as far as to permit MTBE content*"; and that, in the subsequent communications between the parties, no suggestion is made that the reference to "*as is*" meant that there was no warranty whatever as to the quality of the product.

57. Mr Rainey very fairly accepted that these passages could be construed as the learned judge accepting, by implication, that the words "as is" at least if standing alone, were capable of meaning "without warranty". However, the case is really of no assistance to the issues I have to decide. It simply illustrates that in certain trades, the words "as is" may come to have a

customary meaning that is shorthand for an exclusion of any warranty as to quality. The learned judge was careful to confine his decision to the particular specific trade he was considering.

58. Mr Hill in particular relied on various passages in the two textbooks to which I have already referred, Goldrein on Ship Sale and Purchase and Strong & Herring: Sale of Ships. Although I have considered carefully the views expressed by the editors and authors respectively of those two books, all of whom are practising solicitors in the field of commercial law, ultimately, since the issue I have to decide is one on which there is no decision of the courts directly on the point, the textbooks assist in identifying and refining the relevant arguments on both sides, but not in determining the issue. Also, Mr Hill cited a number of passages from previous editions of Goldrein dealing with Saleform 87. This smacked of an exercise in the "archaeology of the forms" which Aikens LJ discouraged at [30] of his judgment in *The Rewa* and was not helpful.

59. The meaning of the phrase "as is" has also been considered in a series of Canadian cases concerned with the sale of second hand cars. The actual decision of the Saskatchewan Court of Appeal in *MacLeod v Ens* (1983) 135 DLR 3d 365 (referred to by Strong & Herring at [2B-19]), where the buyer agreed in writing to take a car "as is", was that the provision was rendered null and void by the Canadian Consumer Products Warranties Act because it purported to exclude the statutory warranties provided by that Act, including those of "acceptable quality" and "durability". Cameron JA, giving the judgment of the Court, described the effect of the "as is" provision if the statute had not applied, in these terms:

> "When used with reference to a sale, people generally take the term 'as is' to mean that the product is bought and sold in the condition in which it then exists, for better or for worse, with altogether no warranties in relation to quality, durability, or fitness, and with the entire risk in those respects to be borne by the buyer. I agree with the trial judge that the parties intended to buy and sell this vehicle on that basis and that it seems only fair to hold Mrs MacLeod to the bargain; after all, she agreed to take the car 'as is' only after she had driven it and had it checked by her husband and another; why should she not be bound? In my view, she should, unless the statute otherwise provides, which in short, is the issue."

60. Statements to similar effect are to be found in other cases. Thus, in *Smith v Lasko* [1987] 5 WWR 412, a decision of the Manitoba Court of Appeal, Philp JA stated the general effect of the words "as is" in these terms at pp.424-5:

> "Generally the use of the expression 'as is' in a contract for the sale of goods implies that the purchaser relies on his or her own inspection of the goods and that the express and implied warranties as to merchantable quality and fitness are excluded. But that is not always the case. For example, in *Radul v Daudrich* [1983] 6 WWR 278, this court found that, in circumstances where the purchaser of a used car was entitled to expect the vehicle to be reasonably fit for her personal use, the expression 'as is condition' in the sale agreement did not exclude the implied condition of merchantable quality under s. 58(1)(e) of the Consumer Protection Act."

61. The first two sentences in that passage are cited with approval by Halsbury's Laws of Canada: Sale of Goods [HSG-21]. In *Smith v Lasko* itself, the receipt for the car said it was "taken on an as is basis" but the Court of Appeal found that the contract was partly oral and partly in writing and that the buyer had been repeatedly told that the car was in an excellent condition, which statement was incorporated in the contract. Philp JA concluded that it was a condition of the contract that the vehicle was in excellent condition and the vehicle did not answer that condition, so the seller was in breach. What that case and *Radul v Daudrich* (where the main judgment was also delivered by Philp JA) demonstrate is that use of the expression "as is" will not always exclude express or implied warranties as to merchantable quality or fitness for purpose. It will depend upon the circumstances and upon the other terms of the contract.

62. However, I accept that the Canadian cases decide that, as a general rule, a statement that the contract is "as is" will exclude the statutory implied terms as to merchantability and fitness for purpose, save where consumer protection legislation renders such a statement of no effect or there are other inconsistent terms of the contract. There is no justification for limiting the Canadian cases on "as is" to exclusion of the implied term as to fitness for purpose, but not that as to merchantable quality, as Mr Rainey suggested in his additional written submissions put in after the hearing.

63. In my judgment, the difficulty with the Canadian cases on "as is" provisions is that they do not appear to recognise that the implied terms are conditions and that (whilst it may not be necessary in a modern context to exclude conditions expressly) clear words are needed to exclude the statutory implied conditions (see for example *Air Transworld*). It may be that the law in Canada

has changed and the implied terms as to merchantability and fitness for purpose are no longer conditions, but certainly those implied terms as contained in section 16 of the original Canadian Sale of Goods Act 1909 were regarded as conditions. In the decision of the Saskatchewan Court of Appeal in *Marshall v Ryan Motors Ltd* [1922] 65 DLR 742 (also cited by Halsbury at [HSG-21]), the majority of the court held that the words of an exclusion (albeit not an "as is" provision) were not sufficient to exclude the implied condition as to fitness for purpose in section 16(1) (in essentially the same terms as what was section 14(1) of the English 1893 Act), applying the decision of the House of Lords in *Wallis, Son & Wells v Pratt & Haynes*.

The narrower question

64. In my judgment, the tribunal was clearly right to conclude that the words "as she was" in the first sentence of clause 11 are a necessary part of a sentence which is recording the obligation to deliver the vessel in the same condition as she was when inspected. In other words, they are part of a temporal obligation which arises because, usually, there will be a period of time of weeks or even months between inspection and delivery. However, those words tell one nothing about what the sellers' obligations are, either on inspection or delivery, as regards the quality of the vessel. Hence they do not and cannot exclude the implied term as to satisfactory quality under section 14(2) of SOGA.
65. I agree with Mr Rainey that, in one sense, the cases on "as is" provisions, such as *The Morning Watch* or *The Brave Challenger*, do pose a real difficulty for the sellers' case, since they demonstrate that sellers who wish to put themselves into an "as is" regime, with the intention of excluding the statutory implied terms, use those specific words either on their own (as in *The Morning Watch*) or by way of addition to the contract terms, for example by adding "as is, where is" after the reference to the sale being "outright and definite" in clause 4 of Saleform 93. This was a point made by the tribunal at [55] of the Award.
66. The same point was also made by the arbitrators in another arbitration when faced with the same argument about the words "as she was at the time of inspection" or "as she is at the time of inspection" in clause 11 of Saleform 87 or 93, as in the present case. Their reaction to the sellers' argument set out in their Award is cited by Mr Crookenden QC (one of the present tribunal) in a paper entitled "Norwegian Saleform Contracts: Implied terms of satisfactory quality and fitness for purpose and right to reject delivery" updated to December 2008, which Mr Herring exhibited to his witness statement in support of the sellers' application for permission to appeal. Those arbitrators said this:

> "We also mention that the sellers' "as is" argument has no appeal to us. Many sale and purchase contracts are on this basis but this is made clear by use of the well-known words "as is" used by those involved in the ship sale and purchase market. No such words were in our contract."

67. I agree with that reasoning and with the reasoning of the tribunal in the present case at [55] to [59] which I regard as impeccable. In my judgment, the words "as she was", in the context of the first sentence of clause 11, are incapable of bearing the same meaning as the free-standing words "as is, where is" in a sale contract, assuming for the purposes of the argument that those words do exclude the statutory implied terms.
68. Even if the sellers were right that a possible meaning of the words "as she was" was to exclude the implied terms, it remains the case that the sellers cannot establish that that was the only meaning the words were intended to have, since plainly the context indicates the temporal purpose of the words, to make it clear that the vessel is to be delivered in the same condition as when inspected. Given the strict approach to construction of terms alleged to exclude the statutory implied terms consistently adopted by the courts, up to and including the decision of Cooke J in *Air Transworld*, the fact that even on the sellers' best case the words must have more than one meaning is fatal to the sellers' case that these words exclude the statutory implied terms. Furthermore, given that an obvious sensible meaning of the words is as part of the temporal obligation to which I have referred, section 55(2) defeats the sellers' argument, since it cannot be said that the first sentence of clause 11 is inconsistent with the implied term in section 14(2).
69. I also agree with Mr Rainey that the second sentence of clause 11 is not inconsistent with the implied term as to satisfactory quality and sits quite happily alongside it. The obligations as regards class in that second sentence simply do not impinge on the obligation to deliver the vessel in a satisfactory quality imposed by section 14(2). As the tribunal pointed out at [57], the obligation to deliver the vessel "with her class maintained…without condition/recommendation" and "free of average damage affecting class" may well impose obligations on the seller to deliver the vessel in a better condition than on inspection. For example, if at the time of inspection, the vessel is subject to a class condition or recommendation, the seller will be obliged to repair the

vessel so as to remove the condition or recommendation or, if the vessel has average damage (i.e. damage normally covered by hull insurance) at the time of inspection or suffers such damage between inspection and delivery, the seller will be obliged to repair that damage before delivery. Thus, the obligations in the second sentence complement or supplement the obligation to deliver the vessel in a satisfactory condition rather than being inconsistent with it.

70. This analysis that the obligations imposed by the second sentence of clause 11 supplement the implied term as to satisfactory quality is consistent with the principle stated in Benjamin: Sale of Goods 8th edition [11-068]: "express conditions or warranties will normally be construed as additional to the implied terms." Benjamin cites the old pre-1893 Act case of *Bigge v Parkinson* (1862) 7 H & N 955, where a contractor agreed to supply troop stores "guaranteed to pass survey of the East India Company's officers". In that case, Cockburn CJ giving the judgment of the Court of Exchequer Chamber said that that express warranty did not exclude the implied warranty as to fitness for purpose, "not qualifying the [implied condition] but inserted for the benefit of the buyer" (at p.961). In my judgment, the same can be said of the obligations as to class in the second sentence of clause 11 in the present case.
71. I was unimpressed by Mr Hill's argument that second hand vessels sold pursuant to MOAs on Saleform were simply sold to a class standard, not to a standard of satisfactory quality under the SOGA. In the absence of cogent evidence of market custom to that effect, this is no more than an assertion and an unconvincing one at that, given the obvious limitations of class recognised by Goldrein at p.42 and given that a vessel may be fully classed without any condition and yet not be of satisfactory quality because, for whatever reason, the classification society have not picked up a particular defect in the vessel or it has not been drawn to their attention, either deliberately or inadvertently. In my judgment, it is precisely such potential limitations in Mr Hill's "class standard" that highlight the need for the protection of the buyers by the implied term and that the buyers will not be taken to have abandoned the valuable rights given to them by operation of law without sufficiently clear wording in the contract that that was intended: see per Cooke J in *Air Transworld* at [26]. For the reasons I have given, there was no such sufficiently clear exclusion in this case.
72. Mr Hill sought to make much of the fact that, if there is an implied term of satisfactory quality, the sellers could be liable for a latent defect in the vessel of which they were unaware. However, as I see it, there is nothing surprising or unjust in that. The same could be said of a seller of any second hand goods such as a car or a piece of machinery and yet it is well established that the implied terms under section 14 of SOGA apply to second hand goods: see Benjamin at [11-048]. The answer to Mr Hill's suggestion that a test of satisfactory quality applied to second hand ships is nebulous or uncertain is the one Mr Rainey gave, that it all depends on the facts of each case and the section as amended gives extensive guidance as to the criteria to be borne in mind. The exercise may be a difficult one, as the tribunal in this case recognised, but by no means impossible.
73. In the circumstances, it is not strictly necessary to consider Mr Rainey's fall-back position that the first sentence of clause 11 should be read down as excluding the right to reject the vessel whilst not precluding the buyers from claiming damages for breach of the implied term as to satisfactory quality. The argument relied upon the principle enunciated by Davies LJ giving the judgment of the Court of Appeal in *Christopher Hill Limited v Ashington Piggeries Limited* [1969] 2 Lloyd's Rep 425 at 468. The clause under consideration in that case provided as follows:

> "3. The goods to be taken with all faults and defects, damaged or inferior, if any, at valuation to be arranged mutually or by arbitration."

74. Davies LJ held at 468 as follows:

> "The third answer put forward by the third party to the allegation of breach of Sect. 13 in respect of "fair average quality" was based on General Condition 3. This clause, though sometimes with different punctuation, is hallowed by antiquity, if by nothing else. Its words are obscure, and its interpretation gave rise to prolonged arguments. In our judgment, the clause would not have availed the third party here, if there had been a failure to supply goods of fair average quality of the season. A clause of this nature must be read strictly, when it is put forward by one party as limiting or restricting what would otherwise be the ordinary legal right of the opposite party: as here, the plaintiffs' right to recover for failure to supply goods corresponding with the contractual description. No authority need be cited for that well-established principle. The words of the clause are capable of being read, and should be read, as purporting (whether effectively or not, we need not stay to consider) to exclude the buyer's right to reject the

goods for faults and defects; but not as purporting to exclude the buyer's right to recover from the seller compensation for any consequential damage which he may sustain by reason of the voluntary or enforced acceptance of goods which thereafter turn out to be defective and which cause loss or damage by reason of that defect."

75. This approach of reading down the clause so that it only excluded the right to reject the goods, not the buyers' right to claim damages for breach of the implied term was approved by the House of Lords: see per Lord Hodson at p.471B-C; Lord Guest at p.475H; Viscount Dilhorne at p.488D; Lord Wilberforce at p.495G and Lord Diplock at p.514F. I note in passing that *Lloyd del Pacifico* and one of the earlier "all faults" provision cases to which Lawrence LJ referred, *Ward v Hobbs* (1878) 4 App Cas 13, were cited to the House of Lords in argument, although not referred to in any of the speeches.
76. If the point had arisen for decision, I would have been prepared to read down the first sentence of clause 11 in accordance with that approach, so that at most the words: "the vessel shall be…taken over as she was at the time of inspection.." would exclude the right to reject the vessel as not being of satisfactory quality but would not preclude the buyers from claiming damages for breach of the section 14(2) implied term as to satisfactory quality.

The wider question

77. In the light of the conclusion I have reached on the narrower question that the tribunal was right to conclude that the first sentence of clause 11 is not an "as is" provision, it is not strictly necessary to decide the wider question whether the words "as is" are apt to exclude the statutory implied terms as to satisfactory quality and fitness for purpose. However, since the point was fully argued, I will deal with it if only to express a provisional view.
78. It seems to me that, for a number of reasons, there is considerable force in Mr Rainey's submissions that the words "as is" do not amount to an express provision which is inconsistent with the statutory implied terms so as to negative them pursuant to section 55 of SOGA. First, Mr Hill's assertion that "as is" in cases such as *The Morning Watch* is modern shorthand for "the [vessel] shall be taken with all faults and errors of description", the clause in *Lloyd del Pacifico v Board of Trade*, is just that, an assertion. No evidence has been put before the court about the genesis of "as is" or as to whether it is, as Mr Hill asserted, some modern shorthand for "all faults" provisions found in the older cases and if so, how this shorthand came about.
79. Furthermore, for the reasons given in [41-42] above, *Lloyd del Pacifico* must be of doubtful assistance in a modern context. As Davies LJ said in *Ashington Piggeries*: "[the 'all faults' clause] is hallowed by antiquity, if by nothing else. Its words are obscure, and its interpretation gave rise to prolonged arguments", hardly a promising start for a provision whose modern 'shorthand' is said to exclude the statutory implied terms.
80. Second, the exclusion, if it operates, is not all encompassing in the sense that even Strong & Herring (exponents of Saleform as a contract which excludes the implied terms in section 14 of SOGA) accept at [14-10] that the words "as is" or "as she is" are only concerned with the condition of the vessel not with her description, so the words would not exclude the implication of a condition as to compliance with description under section 13 of SOGA. That may well be right, but does not explain how (absent some customary meaning) the words "as is" are sufficiently clear to exclude conditions as to quality and fitness for purpose implied by section 14 of SOGA. What the debate in the textbooks does demonstrate is that, contrary to Mr Hill's submissions, the words "as is" are not a term of art.
81. Third, if the sellers are right that the two short words "as is" have the effect of excluding all the implied terms under SOGA, even though those implied terms are conditions, notwithstanding that the words do not have a customary meaning and are not a term of art, then I agree with Mr Rainey that that conclusion rather drives a coach and horses through the authorities on the need for clear words to be used to exclude statutory implied conditions. If the implied terms can be excluded by the simple expedient of inserting a provision that the contract is to be on an "as is" basis, then generations of commercial men have missed a trick in not adopting that two short word approach rather than devising detailed and supposedly all-encompassing exclusions in their contracts (some of which have successfully excluded the implied conditions as in *Air Transworld*, others of which have not as in *The Mercini Lady*). That suggests that the words "as is" do not upon proper and detailed analysis have the meaning for which the sellers contend.
82. Having said all of that, the problem with the buyers' argument that the words "as is" do not exclude the implied terms at all is that it deprives the words of any real meaning and reduces them to the truism identified by the tribunal at [56] of the Award. In those circumstances, there is considerable attraction in the reading down approach of the Court of Appeal in the *Ashington Piggeries* case which says that all the words "as is" do is exclude the right to reject the vessel,

but leave unaffected the right to claim damages for breach of the implied condition as to satisfactory quality. Certainly, that is the context of the statement by Phillips J in *The Morning Watch*, since the issue was whether the buyers were contractually bound, in other words whether they could reject the vessel, not whether they could claim damages from the sellers.

83. None of the English cases considers in terms whether the phrase "as is" is inconsistent with the statutory implied term so that the test in section 55(2) of SOGA is satisfied and, as Strong & Herring recognise at [2B-20] the issue of the meaning of "as is" was not fully argued in either *The Morning Watch* or *The Brave Challenger* and the *Ashington Piggeries* case was not drawn to the attention of the Court in either case. Nonetheless, the Canadian cases certainly suggest that the term "as is" does normally exclude the statutory implied terms completely, but as I identified above the problem with the Canadian cases is the same one as with *The Morning Watch* and *The Brave Challenger*, that they do not analyse how, in the absence of some customary meaning, the words "as is" can be said to be sufficiently clear and unequivocal to exclude the statutory implied terms.

84. It follows that, my provisional view is that, if I had to decide this point, I would conclude that the correct approach is to read down "as is" provisions as excluding the right to reject the vessel, whilst leaving the right to claim damages for breach of the implied terms as to description, satisfactory quality and fitness for purpose unaffected. However, since I have concluded that the first sentence of clause 11 is not an "as is" provision, it is not necessary to reach a definitive conclusion on this wider second question and it seems to me better not to do so, particularly since the parties in some subsequent dispute in what might be described as a "pure as is" situation might wish to call evidence as to custom or market meaning which might impact on the interpretation the court would place on such an "as is" provision.

Conclusion

85. In all the circumstances, I have concluded that the tribunal's decision that the first sentence of clause 11 of the MOA does not exclude the implied term as to satisfactory quality and that the sellers were in breach of that implied term was correct and that the appeal should be dismissed.