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"LEGAL AND COMMERCIAL CONSEQUENCES OF PERFORMING UNSPECIFIED DESIGN WORK IN SHIP-CONVERSION PROJECTS"

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Mills & Co is a law firm specialising in ship-building, conversion , and repair contracts and disputes. The firm is based in Newcastle upon Tyne and is an associate firm of Ince & Co in London.

1. INTRODUCTION

1.1 The purpose of this paper is to increase awareness of:

1.1.1 the commercial consequences of performing unspecified design work;

1.1.2 why ship-conversion projects give rise to disputes involving unspecified design work;

1.1.3 typical disputes involving unspecified design work;

1.1.4 the underlying legal framework:

(1) the meaning of extra work;

(2) the parties' rights and remedies;

(3) legal requirements for claiming payment for the performance of unspecified work under a ship-conversion contract ("Contract");

(4) legal requirements for claiming time for the performance of unspecified work under a Contract;

(5) legal requirements for claiming delay and disruption losses caused by for the performance of unspecified work under a Contract;

(6) liability for the performance of unspecified and

unauthorised work; and

1.1.5 golden rules to avoid liability for, and to claim extra time and cost for the performance of unspecified work.

1.2 First some preliminary points about design:

1.2.1 there is no legal definition of design;

1.2.2 in principle there is a design element in the whole spectrum of ship-conversion activities ranging from concept design to appearance, functional criteria, detailed design, choice of materials and methods of work;

1.2.3 unspecified design work inevitably results in consequences which are only realised following construction;

1.2.4 the combined impact of unspecified design work in aggregate can result in radical changes in the:

(1) planned and priced volume of steelwork incorporated into the vessel;

(2) specified deadweight tonnage of the vessel;

(3) specified speed and fuel consumption of the vessel;

(4) specified meta-centric height of the vessel; and

(5) stability and trim of the vessel.

Consequently the vessel presented to Owners at re-delivery may be materially non-compliant with the Contract.

2. THE COMMERCIAL CONSEQUENCES OF PERFORMING UNSPECIFIED WORK

2.1 The performance of unspecified design work inevitably results in:

2.1.1 the incurrence by the Yard of extra man-hours and materials in carrying out the unspecified work of design and implementation ("Extra Work"); and

2.1.2 subject to critical path impact and programmed float:

(1) disruption to the planned timing, and sequence of work events; and

(2) cumulative delay resulting in failure to re-deliver the vessel by the Contractual date of re-delivery causing project prolongation costs ("Delay and disruption").

2.2 The performance of unauthorised unspecified works generally results:

2.2.1 in the non-recovery of extra man-hours, and material costs (which were not built into the Contract price);

2.2.2 in the non-recovery of delay and disruption costs (which were not built into the Contract price);

2.2.3 where the performance of the work causes delay in re-delivery of the vessel beyond the Contract re-delivery date in:

(1) the withholding/claiming of liquidated damages payable under the express terms of the Contract (if a rate for liquidated damages has been agreed) or alternatively a claim for loss of use;

(2) delay in payment of monies due on re-delivery (resulting in loss of interest and a gap in project cash-flow between monies paid out to sub-contractors and the planned financing of those payments out of the monies payable by Owners on re-delivery);

(3) project prolongation costs, including extended bonding and insurance costs; and

(4) delay in commencement of the defects liability period for the converted vessel, which prolongs and may increase the Yard's exposure to defects claims;

and

2.2.4 in the costs of remedying the design and consequential construction non-compliance (i.e to compensate for the impact of the implementation of the unspecified design work on the weight, stability, speed, and fuel consumption of the vessel).

Exceptionally it can also result in rescission of Contract, the return of all payments previously made to the Yard; and claims for damages under the express terms of the Contract:

(1) for the costs of remedying the non-compliant design and construction performed by the Yard; and

(2) for the additional costs of completing the conversion at another Yard.

2.3 There will also be resultant costs of claim preparation, management and litigation/ Arbitration, which are outlined below.

2.3.1 Internal management costs

At some point claim preparation will require the formulation of a claim document, and assembly and study of evidence in support of the claim. If Litigation /Arbitration proceedings are commenced this could involve:

- the extensive interviewing of witnesses;

- the assembly and study of documentary proof of the non-specification, authorisation and authorisation/waiver of authorisation of the extra work, and of time and material costs incurred, and of causation of prolongation and disruption.

This of necessity requires a significant expenditure of management and production time by Naval Architects, Contracts Managers, Ship-managers, and Charge-Hands in giving sworn testimony, and in the assembly and study of records which can run into thousands of pages. These internal management costs will not recoverable even if the Yard succeed with their claim at trial.

2.3.2 External professional advisors', and experts' costs, and any costs awarded against the Yard at the conclusion of

proceedings

Even if the Yard's Claims are successful at trial and costs are awarded against Owners the Yard may only recover those costs which the Courts consider to have been reasonably and necessarily incurred (after a process known as taxation of costs). This usually results in the recovery from Owners of only two thirds of the costs incurred by the Yard in prosecuting their Claims.

3. WHY SHIP-CONVERSION PROJECTS GIVE RISE TO DISPUTES INVOLVING UNSPECIFIED DESIGN WORK

Disputes in ship-conversion projects which involve design tend to arise because of:

3.1 the limited amount of detailed design information about the condition of the vessel made available to the Yard prior to delivery;

3.2 the limited opportunity of the Yard to thoroughly identify the existence and condition of structures within the hull and the condition of the vessel during pre-contract inspections of the vessel, and in particular, the difficulties of not being able to identify and take account of unseen:

3.2.1 obstructions; and

3.2.2 deterioration e.g. pipe work or steelwork requiring renewal and modification which at the time of inspection was hidden from view behind sheet metal cladding;

3.3 the undefined ancillary work obligations implicit in the broad work scope obligations undertaken by Yards under conversion contracts;

3.4 fast track re-delivery programmes which compel Yards to develop design in parallel with construction, and the problem of continuously monitoring the overall impact of the implementation of designs on the meta-centric height, tonnage, and the stability of the vessel;

3.5 the often unprecedented work required to convert a vessel;

3.6 the inevitable integration of old and new designs, material and equipment to form an integrated working system, and the problem

of new materials affecting the balance of stresses and forces in non-renewed sections of the vessel, resulting in damage to non-renewed structures inside the vessel; and

3.7 the performance of unspecified design work initiated by the Yard in order to enhance the outcome specified by the Contract; and

3.8 the performance of unspecified design work to implement the requirements of the vessel's Classification Society ("Class") , and of regulatory authorities, which were not published or notified prior to contracting in respect of both the existing vessel design and the conversion.

4. TYPICAL DISPUTES INVOLVING UNSPECIFIED DESIGN WORK

4.1 Claims by the Yard

4.1.1 Claims by the Yard for:

(1) the cost of performing unspecified work;

(2) the time of performing unspecified work; and

(3) the cost of disruption to the planned sequence and timing of the execution of the works, and cost of project prolongation beyond the Contract date for re-delivery caused by the performance of the unspecified work.

4.1.2 These claims typically occur where:

(1) The Owner's Superintendent requires the Yard to perform work which the Yard contend is unspecified, and which the Superintendent considers to be expressly or implicitly within the Yard's scope of work e.g

A) where the specification requires the changing of electric motors on accommodation ladder davits to be changed to portable air driven motors, and subsequently the Superintendent requires the Yard to replace the portable air driven motors with ladder winches driven by an air motor

which was unspecified;

B) where the Superintendent requires the installation of rubber bellows into a fire main which were not specified;

C) where the Superintendent contends that an extras claim for the cost of scaffolding hired for an extended period to carry out unspecified work is included within the contractual steel work rate;

(2) so called "emergent" work becomes apparent during conversion and is performed by the Yard on the assumption that it is necessary to hand over a seaworthy vessel or to carry out specified work e.g.

A) unspecified work to remedy deterioration in the vessel's hull and equipment which were not seen at the time of pre-contract inspection of the vessel, and which only become apparent when conversion work had commenced on the vessel;

B) changes in pipe-work runs and equipment lay-out necessitated by obstructions which were not seen at the time of pre-contract inspection of the vessel;

C) where a standard rate for the fitting of items of equipment had been quoted by the Yard, and on delivery of the vessel it was found that installation requires access openings , scaffolding, or other services not includes in the standard price, and Owners refuse to pay the extra cost of performing this work / providing these services; and

D) where the specification requires the cargo tank bottoms to be painted to a specific standard, the paint supplier specifies that the surface preparation should be to say shot blast SA 2.5, and after cleaning the Yard notes that the steelwork is heavily pitted and corroded and that after shot blasting it is not up to the standard to

accept the paint. The Yard then carry out needle gunning to the worst areas and another blast to rectify the problem, and Owners refuse to pay the extra cost on the grounds that the work was not specified; and

(3) owners require work to be carried out to satisfy requirements notified by Class during construction, which requirements were not known nor taken into account at the time of contracting e.g. where the Yard priced against the specification of 500 Tonnes topsides steelwork to be installed on the main deck "on suitable foundation materials", and during design analysis, calculations indicate that the main deck is not strong enough to accept the new load, resulting in Class insisting on the fitting of additional support steelwork under the deck.

In the event that these claims are not settled by Owners prior to the departure of the vessel from the Yard, this may result in the exercise of a lien to prevent departure of or the subsequent arrest of the vessel by the Yard, until either a bond is posted by Owners in an amount sufficient to cover the Yard's claim or until payment of these claims is made.

4.2 Claims by Owners

Claims by Owners include:

4.2.1 liquidated damages (if a rate has been agreed), or alternatively a claim for loss of use for failure to redeliver the vessel by the Contract re-delivery date caused by delay generated by the performance of unspecified work;

4.2.2 damages for loss suffered in consequence of the Yard's failure to perform the specified work, e.g. loss of capacity, loss of ability to work in certain sea states;

4.2.3 rescission of contract; and

4.2.4 damages to compensate Owners for the rectification of non-compliant work, and completion of the works by another yard.

5. THE UNDERLYING LEGAL PRINCIPLES

5.1 The meaning of Extra Work

"There is no generally accepted definition of extra work, but in a lump sum contract it may be defined as work not expressly or impliedly included in the work for which the lump sum is payable. If work is included in the original contract sum the contractor must carry it out and cannot recover extra payment for it, although he may not at the time have thought that it was necessary for the completion of the contract...Where the contractor must complete a whole work for a lump sum [such as the building of a vessel] the courts readily infer a promise on his part to provide everything indispensably necessary to complete the whole work. Such necessary works are not extras for they are impliedly included in the lump sum." [Keating on Building Contracts 6th Edition (1995)]

5.2 The rights and remedies of the parties

5.2.1 The substantive rights and remedies of the parties to a Contract governed by English law are regulated by the express or implied terms of the Contract and supplemented by statute and common law. Therefore the starting point for analysing the merits of any claim arising out of the performance of unspecified work should always be the Contract.

5.2.2 In addition to the substantive rights of the parties there are procedural rules of the Court which regulate the conduct of litigation in the Courts, and procedural rules prescribed by arbitral bodies, and under the Arbitration Act 1996 for the conduct of arbitration proceedings.

5.3 Legal requirements for claiming payment for the performance of unspecified work under a Contract

5.3.1 What has to be proved

"A contractor [who] carries out or is asked to carry out work for which he considers he is entitled to payment in excess of the original contract sum ... to recover such payment must be prepared to prove:

(1) *that it is extra work not included in the work for which the contract sum is payable;*

(2) *that there is a promise express or implied to pay for the work*, i.e. either that:

A) the Contract expressly provided for the payment of the costs claimed by the Yard in consequence of performing the unspecified work; or

B) it was an implied term of the contract that the Yard would be paid a reasonable sum for the performance of unspecified work where Owners waived the contractual requirements of authorisation and notification (see implied promise and Quantum Meruit below);

(3) *that any condition precedent to payment imposed by the contract has been fulfilled* [i.e. that any extra work authorisation and claims notification procedures set out in the contract were complied with, otherwise the claim may be barred under the terms of the contract]; and

(4) *that any agent who ordered the work was authorised to do so.*

5.3.2 <u>Whether the extra work is included in the work for which the Contract sum is payable</u>

The Yard will have to prove that the alleged extra Work was neither:

(1) specified in the Contract; nor

(2) ancillary thereto.

The Courts determine these issues by weighing up evidence presented to them about what the Contract specified, and what was implicit in the specification. The parties usually present expert testimony to support their interpretation of the Contract. Since this inevitably involves the interpretation of

drawings and of written design information, Naval Architects are often called upon to provide expert testimony. To illustrate the Court's approach I set out below extracts from the Judgment of Staughton . J in The "Cape Hatteras" (1982) 1 Lloyd's Rep 518.

[Extracted from the Judge's analysis of the Yard's extra work claims]:

> *"This topic requires me to consider, first what work the contract did cover, and secondly, its terms regarding the ordering of extras.*
>
> *It was argued for [Owners] that the agreement covered all such work as should prove necessary to recondition the crankshaft.*
>
> *[The specification document] refers to grinding or polishing of the main journals. Significantly there is no reference to the crankpins.*
>
> *[The specification document] did define and circumscribe the work to be done under the agreement. No shipyard would be likely to contract out for a lump sum all the work which might prove necessary to recondition a crankshaft until the extent of the work had been ascertained. Grinding of the crankpins was, as I have mentioned, a completely different operation to any that was specified in the agreement on its true construction. The Yard's claim for the cost of grinding crankpins is thus an extra, outside the lump sum price for the contract."*

[Extracted from the Judge's consideration of Owners' argument that the work was necessarily incidental to the specified work]

> *"[Owners] submitted that any additions, to be within the clause, must be necessarily ancillary to the contract works, since the consequence (if the additions are not approved in writing) is that they are considered to be expressly included in the lump sum.*
>
> *Rather than provide my own test, I prefer to reach a decision on each of the items to which this dispute*

applies.

The [first item of extra work claimed] in my judgment plainly [does] not have any connection with the engine repairs at all, except that they were carried out at the same time. They were independent of the contract.... it would be absurd if they were considered to be expressly included in the lump sum".

5.3.3 *Whether there is a promise express or implied to pay for the work*

(1) The Yard will have to prove either that:

A) the Contract expressly provided for an entitlement to payment for the performance of unspecified work; or

B) it was an implied term of the contract that the Yard would be paid a reasonable sum on what is known as a "Quantum Meruit", for the performance of unspecified work where Owners effectively required the work to be carried out, and by words or conduct waived the contractual requirements of authorisation and notification.

(2) Implied promise and Quantum Meruit are complex and flexible concepts. The following extracts illustrate their application:

A) "*When there is a condition in the contract that extras shall not be paid for unless ordered in writing by the* [Owner's Superintendent] *and the employer orders work which he knows, or is told will cause extra cost* [the Judge] *or an arbitrator may find that there was an implied promise by the Employer that the work should be paid for as an extra and especially so in cases where any other inference from the facts would be to attribute dishonesty to the employer.*" [Extracted from Hudsons (6th ed), p. 313, referred to with approval by Humphreys J, in Taverner & Co .Ltd -v- Glamorgan County Council (1941) 57 T.L.R.

AT 245, and quoted in Keating at p.98].

B) Commenting on the above passage Keating says,

"Such a promise may be implied where there has been a waiver of the condition. "In order to constitute a waiver there must be conduct which leads the other party reasonably to believe that their strict rights will not be insisted upon. (Denning L.J. in Rickards -v- Oppenheim [1950] 1 K.B. at 626).

Thus in principle a written waiver by the employer would be effective, and even an oral waiver would be sufficient, if it were a clear undertaking not to rely on the condition. In Molloy -v- Liebe the contractor maintained that certain work was extra work. The employer said that it was not and insisted on the work being done. Upon arbitration the arbitrator held that the work was extra work, and inferred a promise on the part of the employer to pay for it if it should be found to be extra work, although it was not ordered in writing as an extra in the manner required by the Contract. The arbitrator's award was upheld, and it was said that it was difficult to see how he could have drawn any other inference without attributing dishonesty to the employer."

C) *"The Court may find that where the employer has desired the execution of extra works, and has stood by and seen the expenditure on them ,and taken the benefit of that expenditure, that it would be fraud on the part of the employer to refuse to pay on the ground that the work was not properly ordered. In such a case the employer will be ordered to account for the value of the extra work."* [Keating p.99].

D) The following extract from the judgment in the Cape Hatteras (mentioned above) illustrates the willingness of the Courts to accept the argument:

[The Yard] "argued that, if any of their [extra work] claims would otherwise be defeated by [the extra work authorisation clause of the ship- repair contract], still Owners were not entitled to rely [on that clause] because they had stood by while the work was to their knowledge being done, and had taken the benefit of it....I readily accept that estoppel or waiver may, in some circumstances, circumvent a clause in a contract which requires that variations to it shall be in writing. Furthermore I would have been very much inclined to find, if it had been necessary to decide the point (if) ...such circumstances existed in the present case"

E) However following the decision of the Australian High Court in Pavey and Mathews Proprietary Limited -v- Paul (1987) 61 ALJR 151, implied promise claims otherwise than in connection with a contractual Quantum Meruit claim (see below) should be treated with caution.

F) A contractual Quantum Meruit claim *"will arise for work done or goods delivered under a contract which does not expressly provide how much the contractor is to be paid. This will be the case where the parties have failed to stipulate a rate of payment. For example where a variation is required and is to be valued on the basis of a reasonable price for the work done."*

[Restitutionary Quantum Meruit - The Crossroads: Levine and Williams (1992) 8 Const. L.J. 244].

This basis of claim is illustrated by the judgment of Mr Justice Saville in Greenmast Shipping Co. S.A. -v- Jean Lion Et Cie S.A. (The "Saronikos") (1986) 2 Lloyd's Rep 277 at 278 (a case which concerned a voyage charter-party);

"*In my view, the position is that the*

charterers requested the owners to perform services outside the terms of the charter-party - that is to say, services which the owners were not obliged to perform under the charter-party - and the owners acceded to this request in circumstances in which both parties recognised that for such services the owners should be remunerated. The reasons of the arbitrators disclose that the parties were unable to agree at the time on what the remuneration should be; accordingly, it seems to me that having performed the services, the owners are, in the circumstances, entitled to recover reasonable remuneration for them, on the basis of an implied contract to pay such remuneration for such services: see, for example, Steven -v- Bromley & Son (1919) 2 K.B. 722, and British Bank for Foreign Trade Ltd. -v- Novinex. ,(1949) 1 K.B. 623."

5.3.4 Whether any condition precedent to payment imposed by the contract has been fulfilled

Failure to comply with any extra work authorisation, claim notification and certification procedures provided for in the Contract and drafted as conditions precedent to the payment of extra cost and the granting of extra time will bar the Yard from obtaining extra cost and time.

The point is illustrated by a ship-building case summarised on page 750 of Hudson's Building and Engineering Law (11th ed) Vol 1:

> *"It was provided by Clause 11 in a ship-building contract that the consulting engineer should have power to make additions to or deductions from the works and that "the value of all such additions , deductions, alterations and deviations should be ascertained and added to or deducted from the amount of the contract price, as the case may require". An instruction in writing was to be a condition precedent to recovery. There was also a clause that any dispute as to the value of such additions, alterations etc, should from time to time be referred to the*

consulting engineer, whose decision, valuation or award, interim or final, was to be conclusive and binding upon both parties to the contract. Held, by the Court of Queen's Bench, that the ascertainment of value by the engineer under Clause 11 was a condition precedent: Westwood -v- Secretary of State for India (1863).

5.3.5 Whether any agent who ordered the work was authorised to do so

Generally Owners' agents may only bind Owners in their dealings with the Yard to the extent of the actual authority vested in them by Owners. Therefore any claim against Owners for extra time / cost resulting from the performance of unspecified work authorised or instructed by Owner's agents in excess of the actual authority conferred upon them by Owners will fail.

The following extract from the judgment in Forman & Co Proprietary Ltd -v- The Ship "Liddesdale" (1900) AC 190 illustrates the point:

"[The ship's Master]..was limited in respect of the price to £6000, in respect of the nature of the repairs to stranding damage, in respect of time to twenty days, and in respect of judgment on details to things approved by Lloyd's agent. Within these limits it seems to their lordships that [the Master] was free to contract, and that where he was free to contract that he might vary the contract as might be found expedient in the progress of the work. But he could not transcend the limits imposed upon him by his principals.... If [the Yard] did not really know the extent of [the Master's] authority, it was their business to learn it; and thus that whatever restrictions existed between [the Master] and his principal were equally binding as between his principal and [the Yard]....If and in so far as [the Master] gave orders for repairs wanted on account of deterioration alone, he acted contrary to instructions, and his orders cannot be of any avail to [the Yard]".

This however would not be the case where Owners' agents whilst exceeding their actual authority did not exceed their ostensible or apparent authority communicated by Owners to the Yard.

5.4 Legal requirements for claiming time for the performance of unspecified work under a Contract

5.4.1 Extra time claims are made for the purpose of extending the

time for re-delivery. Otherwise in the event of delay in re-delivery of the vessel the Contract will usually entitle Owners to claim/deduct liquidated damages.

5.4.2 The success of such extra time claims generally depends upon the success of the underlying extra cost claims. Thereafter the Yard will have to demonstrate that:

(1) the performance of extra work for which the Owners are liable to pay is an event which entitles them to extra time under the extension of time provisions of the Contract; or

(2) if it does not, that the performance of extra work for which the Owners are liable to pay extra cost ,evidences prevention by the Owners, and therefore that the liquidated damages regime of the Contract thereafter ceased to operate.

The applicable legal principles are summarised on p 1157 of Vol 2 of Hudson from which the following passage is extracted:

"*(a) acts of prevention by the owners, whether authorised by or breaches of the contract, will set time at large and invalidate any liquidated damages clause, in the absence of an applicable extension of time clause. Variations whether authorised under the original contract or subsequently agreed, will be regarded as acts of prevention (or of waiver) for this purpose;*

(b) where the act of prevention or waiver goes to part of the delay but not to the whole, the entire liquidated damages clause will still be invalidated, unless an applicable extension of time clause exists;

(c) where there is an extension of time clause, this is regarded as being inserted for the benefit of the owner, to the extent that it may operate to keep alive the liquidated damages clause in the event of delay due to waiver, prevention or breach by the owner or his agents. Where it does not cover the

acts of waiver, prevention or breach which have in fact occurred, no decisions by a certifier under the clause can bind the builder, or preserve the liquidated damages clause;

(d) that general or ambiguous words in an extension of time clause, such as "exceptional circumstances", or "any matters beyond the control of the builder", or "other special circumstances of any kind whatsoever which may occur such as fairly to entitle the contractor to an extension of time" will not for this reason, be construed so as to cover waiver, prevention or breach of contract by the owner or his [Superintendent]";

(e) but that where the extension of time clause sufficiently clearly covers the owner's waiver, prevention or breach, the liquidated damages clause will be unaffected and will apply."

5.5 Legal requirements for claiming delay and disruption costs

5.5.1 A claim can be made either:

(1) under the express terms of the Contract - to the extent that provision has been made for the recovery of such losses;

(2) for damages resulting from breach of contract under general contractual principles - to the extent that by their refusal to grant a variation order / intervention in the progress of the works / failure to perform any of their contractual obligations, Owners have committed a breach of Contract; or

(3) to an extent as part of the costs rolled up into a contractual Quantum Meruit claim.

5.5.2 Quantification issues aside, the success of these claims hinges upon:

(1) proof of:

- contractual entitlement to claim, and of the event(s) which trigger that entitlement;

- breach of Contract by Owners; or

- the success of the underlying extra time claims; and

(2) proof of cause and effect of the underlying event / breach /extra time claim on the critical path underpinning the Contract programme.

5.6 The legal consequences of carrying out unauthorised and unspecified work

5.6.1 "*Unauthorised alterations or variations of the physical work, whether voluntary or involuntary on the part of the Contractor, far from entitling him to extra payment, will usually be a breach of contract for which damages are in principle recoverable.*" *(Hudson's p.878);*

5.6.2 "*If the Contractor has undertaken to do specified work with certain materials for an agreed price, and without request uses better materials or does more work, this does not entitle him to demand extra payment; and if the materials or work are not in accordance with the contract he may not be able to recover the contract price because he has not completed the contract.*" *(Keating p.96);*

5.6.3 On a strict legal analysis failure to perform the contractually specified works in compliance with the terms of the Contract, either at all in any respect, or by carrying out a performance which results in a different outcome to that specified by the Contract, constitutes breach of contract.

5.6.4 This is the legal position even where it is the Yard's contention that the work carried has resulted in a better outcome than the outcome specified by the Contract. This is illustrated by the following extract from the judgment in the Liddesdale

"*The substitution of iron for steel not only added to the weight*

and to the expense, but altered the structure of the vessel - to her advantage, as the [Yard] contend, but as [Owners] say, causing a rigidity in her framework which is a source of damage to her. That is a matter upon which opinions vary; but there is no dispute that the alteration is not consistent with the [Yard's] obligation to restore the vessel to her original condition prior to the accident".

5.6.5 This is also the case where minor emergent work is carried out to maintain progress prior to notification and authorisation by Owners unless an entitlement to payment for such work, carried out otherwise than in an emergency is expressly provided for in the Contract or can reasonably be implied into it. Where as in the Liddesdale there was an express clause prohibiting any alteration or deviation from the specification, and disallowing any entitlement to extras for work in excess of the specification unless previously authorised in writing there will be no space to imply such a term. This is illustrated by the following extract from the Liddesdale:

"*It was quite reasonable to contemplate that in the course of repairing further stranding damage might be disclosed , or that variations of detail might be expedient. Under Clause 8 [a clause of the type described above] the [Yard] could not do work of this kind, or at least could not charge for it, unless they got [the Master's] written order. The clause was evidently intended as a check on the contractors, and to prevent disputes about what the parties must have contemplated would be small matters.*"

5.6.6 Depending on the gravity of the breach, the act of non-compliance entitles Owners either at common law and more usually under the express terms of the Contract to either:

(1) claim damages; or

(2) treat the Contract as having been discharged by the Yard's breach, to recover any payments made, and in addition to claim damages.

6. Golden Rules

6.1 Be conversant with both the technical and commercial

parameters of the design obligations undertaken by the Yard.

6.2 Know the extent of the Owners' agents authority.

6.3 Before performing unspecified work:

6.3.1 notify Owners of your claim/intention to claim in accordance with the procedures set out in the Contract; and

6.3.2 seek Owners' authorisation in accordance with the Contract.

6.4 Document and keep:

6.4.1 all communications with Owners' regarding notification and authorisation of unspecified work claims;

6.4.2 extra time and cost records to prove quantification of your claim; and

6.4.3 where appropriate, evidence of the disruption caused by the unspecified work to the Contract's critical path so as to justify a claim for extra time.