Neutral Citation Number: [2013] EWHC 236 (Comm)

Case No: 2011 FOLIO 168

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/02/2013

Before :

MR JUSTICE WALKER

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Between :

Swallowfalls Ltd	**Claimant**
- and -	
(1) Monaco Yachting & Technologies S.A.M. **(2) Peter Landers**	**Defendants**

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Mr Michael Fealy (instructed by **Gibson, Dunn & Crutcher LLP**) for the **Claimant**
Mr Stephen Hofmeyr QC and Mr Michael Holmes (instructed by **MFB Solicitors**) for the **Defendant**

Hearing dates: 24 July 2012, 21 and 22 January 2013

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Walker :

A. Introduction

1. The claimant ("Swallowfalls") is a company incorporated in the Isle of Man. The first defendant ("MYT") is a company incorporated under the laws of Monaco. It is a contractor for the building of customised superyachts. The second defendant ("Mr Landers") is the chairman and managing director of MYT.

2. This case concerns financing arrangements made on 3 November 2010 when MYT needed assistance in order to fulfil its obligations to Swallowfalls. At a hearing on 4 July 2012 Swallowfalls sought summary judgment under those arrangements. In a reasoned judgment given orally on that day ([2012] EWHC 2057 (Comm), which I shall refer to as "the July judgment") I ruled on a point of construction ("the demand at will issue") in favour of Swallowfalls. Argument as to the consequential effects of this ruling was adjourned to 24 July 2012. Unfortunately the hearing could not be completed on that day. For reasons which I need not go into, it was not until last month that the hearing was able to resume. I now give my judgment accordingly. The structure of this judgment is as follows:

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B. The claims and the background

3. Swallowfalls claims against both MYT and Mr Landers. For the purposes of Swallowfalls' primary claim against MYT, the July judgment identified nine key factors. They were:

(1) By an agreement in writing dated 3 January 2006 MYT agreed to construct and sell and Swallowfalls agreed to purchase a motor yacht for a purchase price of €35,231,600 ("the Construction Agreement"). The price was payable by instalments. Specified instalments became payable at times when particular stages in construction ("milestones") were reached.

(2) Pursuant to agreements in writing dated 26 October 2007 ("the First Amendment") and 12 June 2008 ("the Second Amendment"), Swallowfalls loaned money to MYT to enable MYT to perform obligations under the Construction Agreement.

(3) By an agreement in writing dated 3 November 2010 between MYT and Swallowfalls, Swallowfalls agreed to provide MYT with a loan facility of €38,327.600 ("the 2010 Loan Agreement").

(4) The 2010 Loan Agreement replaced and superseded the agreements as regards the making of advances found in the First Amendment and the Second Amendment. As with the position prior to the 2010 Loan Agreement, arrangements were made at the time of the 2010 Loan Agreement so that when milestones were reached the associated instalment payment would be achieved by proceeding on the basis that there had been a repayment of a corresponding amount under the loan.

(5) Clause 2.5 of the 2010 Loan Agreement provided:

a) Unless previously repaid or prepaid pursuant to this Loan Agreement, the Borrower shall repay the Loan, accrued Interest and all other sums payable under the Loan Agreement on the first to occur of:

(i) the date on which the Lender gives the Borrower notice that the Loan is immediately due and repayable,

(ii) the date on which the Agreement terminates,

(iii) an Event of Default,

(iv) the Completion Date, or

(v) upon Delivery.

(6) Clause 2.4 of the 2010 Loan Agreement, when read with the definition of "Interest Rate" in clause 2.1, provided for MYT to pay interest to Swallowfalls on the Loan at the rate of 3% per annum above the three-month EURIBOR,

based on a 365 day calendar year, from the date of drawdown to the date of repayment on any sum borrowed.

(7) Clause 2.1 of the 2010 Loan Agreement defined the Loan as "the amount outstanding from time to time including interest under the Loan Agreement."

(8) In a letter to MYT dated 19 December 2011 Swallowfalls stated, among other things:

> The Lender hereby gives the Borrower notice pursuant to Article 2.5(a) of the [2010 Loan Agreement] that the Loan is immediately due and payable. Accordingly, the Borrower must immediately repay the Loan, accrued interest and all sums payable under the Loan Agreement.

(9) MYT has failed to pay the amount demanded in the letter of 19 December 2011 or any sum.

4. The claim against Mr Landers arises because he entered into a guarantee in favour of Swallowfalls under which he was the "Personal Guarantor" of MYT's obligations under the 2010 Loan Agreement. It may be noted that under this guarantee ("the 2010 Guarantee") Mr Landers undertook obligations which included those at clause 1.1 (a) and (b):

> 1.1 Personal Guarantor irrevocably and unconditionally:
>
> (a) guarantees to [Swallowfalls] due and punctual performance by MYT of all MYT's obligations as Borrower under the [2010 Loan Agreement] … and repayment of the Loan and Interest as provided for therein;
>
> (b) undertakes with [Swallowfalls] that, whenever MYT does not pay any amount when due under or in connection with the [2010 Loan Agreement], the Personal Guarantor shall immediately on demand pay that amount as if he was the principal obligor; …

5. The July judgment noted a point made by Mr Stephen Hofmeyr QC, who appeared on that occasion for MYT and Mr Lander, and more recently has appeared with Mr Michael Holmes on their behalf. This point was that the 2010 Loan Agreement formed part of a package of agreements. This was not disputed by Mr Michael Fealy, who has appeared throughout on behalf of Swallowfalls. In the July judgment I drew attention to three particular features of the package of agreements. They were set out by Mr Hofmeyr in his skeleton argument at paragraphs 26, 27 and 29 as follows:

> 26. On 3 November 2010, the parties to the Construction Agreement agreed a further set of amendments ("the Fourth Amendment"). The agreement followed a request by MYT to alter the Milestone dates under the Construction Agreement as a consequence of a dispute between MYT

> and their principal contractors Cantieri San Marco SRL ("CSM"), relating to payment, scheduling and the provision of services by CSM, in particular claims for 'late stay charges'.
>
> 27. During the course of the dispute, MYT suspended payment to CSM and, in response, CSM had prevented MYT from accessing the Yacht. That dispute was settled (in part) by a Tri-Partite Compromise Agreement ("the Tri-Partite Agreement") also dated 3 November 2010 between Swallowfalls, MYT and CSM. As a part of that agreement Swallowfalls provided additional funds for agreed late stay payments to CSM. Those payments together with certain "Working Capital", amounting to total sums of €3,000,000, were rolled into the loan facility under the Fourth Amendment.
>
> ...
>
> 29. Further, under the Fourth Amendment, MYT agreed to register the Yacht in [Swallowfalls'] name with the Italian Ship Registry (Article 3.25), thereby passing property in the Yacht in accordance with Article 16 of the Construction Agreement. In addition, MYT agreed to the abandonment of their right to a lien over the Yacht for the purchase price (Article 3.26), previously provided by Article 6.1 of the Construction Agreement. MYT were thus unsecured by any proprietary or contractual means for the contract price (less the sums paid or set off under instalments 1 to 4).

C. The July judgment and consequential orders

6. In the July judgment I held that on its true construction clause 2.5a)(i) of the 2010 Loan Agreement gave Swallowfalls the right without more to call in the loan. In opposing that construction Mr Hofmeyr relied on, among other things, the history of transactions between Swallowfalls, MYT, Mr Landers and CSM. It did not seem to me, however, that the history justified departing from the ordinary meaning of the words of clause 2.5a)(i), which contemplated that a demand would suffice for the loan to become repayable.

7. Mr Hofmeyr also relied on other arguments. Among them were a contention that a loan to assist with cash flow would not ordinarily give the lender an ability to call in the loan at its own discretion, and a contention which in broad terms made the point that the commercial consequences of such an ability would be severe. To my mind the answer to both these contentions was that there may be all sorts of good reasons why the lender may consider it desirable to have such an ability, and the borrower may consider it sensible for it to take the benefit of the facility and recognise that it runs the risk that the lender may call in the money on demand.

8. After I had given my oral judgment on 4 July 2012 Mr Fealy submitted that the appropriate course would be for the court to make an order for summary judgment in the full sum due under loan. He acknowledged however that two disputes would need to be dealt with before that could be done. The first dispute concerned the calculation of interest. The second dispute was more complex. MYT and Mr Landers said that the court was not in a position to determine the true sum due under the 2010 Loan Agreement pending determination of matters which had been referred to arbitration under the Construction Agreement. It was their case that the 6th Milestone had been achieved (and was achieved prior to 7 February 2011 when credit was given on the Loan Balance Statement) and that each of the 7th to 16th Milestones would have been achieved had Swallowfalls adhered to its contractual obligations under the Construction Agreement.

9. On this second dispute Mr Hofmeyr's skeleton argument of 3 July 2012 said at paragraphs 78 and 79:

> 78. … If the Defendants are right, the balance of the Loan will be very significantly reduced. The breaches of Swallowfalls alleged by the Defendants are the subject of the arbitration reference commenced in September 2011.
>
> 79. Until those issues have been determined in accordance with the terms of the dispute resolution provisions in the Construction Agreement, the Court is not in a position to determine how much is due under the [2010 Loan Agreement] for the purposes of the Summary Judgment Application.

10. At footnote 18 the skeleton argument added:

> On 26 May [a slip for "June"] 2012, the Defendants formally applied to stay this action pending resolution of the disputes which have been referred to arbitration by the parties. At the hearing, the Court will be invited to order a stay.

11. In relation to these matters I said that I considered it desirable for a defence to be served as to the amounts repayable. In that regard Mr Fealy noted that Swallowfalls had an application for interim payment. I directed that a defence be served within 14 days, that the matter be listed for a 2 hour hearing, and that the giving of judgment on the summary judgment application be adjourned to that hearing.

12. An order was drawn up to reflect what had been decided on 4 July 2012. It noted that the court, in the exercise of its case management powers, had directed that it would first decide whether summary judgment should be given on the demand at will issue, namely, whether clause 2.5a)(i) of the 2010 Loan Agreement gave Swallowfalls a right at will to demand immediate repayment of the Loan. The order duly recorded that the court had granted summary judgment in favour of Swallowfalls against the defendants on the demand at will issue: on the true construction of the 2010 Loan Agreement, Clause 2.5a)(i) gives the claimant a right at will to demand immediate repayment of the loan. It added that accordingly, subject to determination in due course of the amount falling due, and subject to any defence of set-off that may be advanced,

> (1) MYT was in breach of the 2010 Loan Agreement by failing to repay the Loan upon receipt of Swallowfalls' notice dated 19 December 2011; and
>
> (2) Mr Landers was in breach of the 2010 Guarantee by failing to repay the Loan upon receipt of Swallowfalls' demand dated 23 December 2011.

D. The amended defence and counterclaim

13. On 18 July 2012 MYT and Mr Landers served a defence and counterclaim. Amendments to the defence were made on 23 July 2012.

14. Paragraphs 1 to 34 in the defence dealt largely with factual matters. Paragraph 35 of the defence advanced a contention that clause 2.5a)(i) was properly to be understood as referring to the notice that Swallowfalls would give to inform MYT of the call for immediate repayment following an Event of Default, and/or termination of the 2010 Loan Agreement, or, indeed, the Completion Date. This contention had been held in the July judgment to be incorrect.

15. Paragraph 36 of the defence was in these terms:

> 36: Further, it was an implied term of the [2010 Loan Agreement], to be implied to give the Agreement business efficacy and/or by law and/or from the express terms of the [2010 Loan Agreement] as set out above, that
>
> > (1) Swallowfalls would not, by its own acts or defaults and/or the acts or defaults of its agents, in breach of the Construction Agreement and/or otherwise, prevent MYT from repaying the Loan, or delay MYT in repaying the Loan by the means identified in clause 2.5(b) and (c); and/or
> >
> > (2) ... Swallowfalls would cooperate with MYT in the confirmation of the achievement of Milestones and, in particular, the counter-signature of stage certificates.

16. Paragraphs 38 to 43 of the defence dealt with interest. Paragraph 44 asserted that Mr Landers' liability under the Third Guarantee was co-extensive with that of MYT. Paragraph 45 noted a passage in the amended particulars of claim.

17. Paragraph 46 of the defence denied any default in payment, and referred at paragraph 46(1) and (2) to issues about the amounts drawn down and interest. Paragraph 46(3) was as follows:

> (3) Further, had Swallowfalls adhered to the terms of the Construction Agreement and the amendments thereto, then MYT would have achieved each of Milestones 7 to 16 at the very least. The Defendants will say:

> (a) That Swallowfalls is not entitled to take advantage of its own breaches (which are the subject matter of the LMAA arbitration commenced in September 2011) of the Construction Agreement and the amendments thereto to profit under the [2010 Loan Agreement]; and/or
>
> (b) That each of Swallowfalls' breaches (which are the subject matter of the LMAA arbitration commenced in September 2011) also constitute breaches of the implied terms identified in paragraph 36 above, as set out more fully in the Counterclaim below. The Defendant is entitled to set-off against the sums said to be due under the [2010 Loan Agreement] damages for Swallowfalls' breach of the [2010 Loan Agreement]. Alternatively, Swallowfalls claim under the Loan Agreement will be bad for circuity of action.

18. Subsequent paragraphs of the defence denied various aspects of liability. Paragraphs 55 and 56 responded in these terms to an alternative contention in the amended points of claim about the completion date:

> 55. In the light of the provisions of the Construction Agreement, it is clear that the reference to the "Completion Date" in clause 2.5 a)(iv) of the [2010 Loan Agreement], must be to the date defined in the Fourth Amendment but as altered or varied by a decision of duly appointed arbitrators in proceedings commenced prior to that date. The relevant provisions of the Construction Agreement are Article 2.1 (in particular, the definition of "Completion Date"), Article 11.3.1, Article 11.3.2, Article 12.1 and Article 25.7. Any other construction would allow the [2010 Loan Agreement] to end prior to the altered completion and delivery provisions under the Construction Agreement.
>
> 56. The parties having commenced arbitration in September 2011, it remains to be determined by the arbitral tribunal whether MYT "prevails" and the Delivery Date is to be extended beyond 30 April 2012.

19. Paragraph 60 of the defence was altered, and paragraph 60A added, by the amendments of 23 July 2012. As so amended they stated:

> 60. Further, or alternatively, if, which is denied, the Defendants are liable to make immediate payment to Swallowfalls in respect of the Loan under the [2010 Loan Agreement], whether as alleged or at all, the Defendants will seek to set off, in equity or at law, against any such liability the loss or damage occasioned by Swallowfalls' breach of the [2010 Loan Agreement] as set out in the Counterclaim herein, which breach and damage is so closely connected with Swallowfalls' claim that it would be manifestly unjust to allow

> Swallowfalls to enforce payment without taking into account MYT's Counterclaim.
>
> 60A. Further or alternatively, if, which is denied, the Defendants are liable to make immediate payment to Swallowfalls in respect of the Loan under the [2010 Loan Agreement], whether as alleged or at all, the Defendants will seek to set off, in equity or at law, against any such liability the loss or damage occasioned by Swallowfalls' breach of the Construction Agreement (and/or the Amendments thereto), presently the subject of arbitration, which breach and damage is so closely connected with Swallowfalls' claim that it would be manifestly unjust to allow Swallowfalls to enforce payment without taking into account MYT's claim in arbitration.

20. Paragraph 61 was the first paragraph of the counterclaim, and repeated the defence. Paragraph 62 of the counterclaim stated:

> 62. In breach of the terms to be implied into the [2010 Loan Agreement] as set out in paragraph 36 above, Swallowfalls by its agents and employees has failed to cooperate with MYT and have prevented MYT from progressing the building of the Yacht towards the Milestones defined in the Construction Agreement as amended by failing to approve VTCs and sign stage certificates, and by withholding sums due to sub-contractors and to MYT. The breaches of the [2010 Loan Agreement] alleged by MYT constitute breaches under the Construction Agreement and the amendments thereto and have been referred to, and will be determined in, arbitration in London. They are particularised below for the information of the Court, but, for the avoidance of doubt, it is the Defendants' case that the factual aspects of the breaches alleged in the Counterclaim, in particular the delays associated with the construction process, are presently outside the jurisdiction of the Court, and the claim should be stayed pending determination of these matters in arbitration.

21. With that introduction, the remainder of paragraph 62 of the counterclaim set out alleged breaches of the Construction Agreement under four heads. The first head concerned what was described as "Instalment 6". Paragraph 62 (1) to (7) complained of delay on the part of Swallowfalls in the counter-signing of Stage Certificate 5 in respect of Instalment 6. It was said that a failure to counter-sign on 3 November 2010 resulted in instalment 6 being credited against the loan only on 3 February 2011, and that accordingly any sums otherwise due should be reduced by the interest on €575,000 from 3 November 2010 to 3 February 2011.

22. The second head of complaint concerned modifications under VTC 41 and 51. At paragraph 62 (8) to (16) it was asserted that Swallowfalls had bypassed the contractual mechanism for Buyer Requested Variations by dealing directly with the sub-contractor, Fitz Interior ("Fitz"). It was asserted that the consequence was that Fitz had refused to carry out further work, giving rise to Permissible Delays, within

the meaning of the Construction Agreement, of 510 days, with the additional consequence that the completion of Milestones 9, 11 and 12 had been rendered impossible. In these circumstances it was said that Swallowfalls by its own acts and/or the acts or defaults of its agents had prevented MYT from repaying the loan.

23. The third head of complaint concerned Milestones 7, 8, 14 and 15. It was asserted at paragraph 62 (17) to (25) that Swallowfalls had wrongly refused to confirm that a change of applicable laws and enactments covered by Article 9.6 of the Construction Agreement obliged it to pay €245,000, and that in consequence MYT had been deprived of payments for Milestone 7 (€574,959), Milestone 8 (€574,980) and Milestones 14 and 15 (€3,886,916).

24. The fourth head of complaint concerned the purported exercise on 16 December 2011 by Swallowfalls of the buyer's right under Article 19.2.2 of the Construction Agreement to step in to MYT's position as General Contractor under the Construction Agreement. It was asserted at paragraph 62 (26) to (28) that this purported exercise had been in breach of Clause 25.7 of the Construction Agreement, and that Swallowfalls had by its own acts or defaults and/or the acts or defaults of its agents prevented MYT thereby from achieving the remaining Milestones and repaying the loan.

25. Under the heading "the remaining Milestones", paragraph 62 (29) added that the knock-on effect of specific breaches and delays had been to delay commencement of work on tasks associated with Milestones 17 to 25.

26. The remaining paragraphs in the counterclaim were paragraphs 63 to 65. They, along with the prayer which followed them, stated as follows:

> 63. If, contrary to the Defendants' primary case, Swallowfalls is entitled to immediate repayment of the Loan, then, as a consequence of Swallowfalls' breaches of the [2010 Loan Agreement], MYT has suffered loss and damage in such sums as would have been paid to MYT (or deducted from the balance of the Loan) had Swallowfalls complied with the implied terms of the [2010 Loan Agreement] as well as interest accruing under the [2010 Loan Agreement]. The nature and extent of Swallowfalls' breaches will be matters for the arbitral tribunal.
>
> 64. Alternatively, if the Defendants' primary case is right and no repayment of the Loan is immediately due, the Defendants have suffered loss and damage in respect of their increased liability for interest under the [2010 Loan Agreement], as a consequence of the delay in the completion of the Construction of the Yacht.
>
> 65. MYT is entitled to and hereby claims interest under section 35A of the Senior Courts Act 1981, at such rate as the Court deems just and equitable, on such sums awarded to MYT as exceed the true balance of the Loan.

AND THE FIRST DEFENDANT COUNTERCLAIMS

1. Damages as aforesaid;

2. Further or other relief; and

3. Costs.

E. The arguments at the resumed hearing

27. Mr Fealy sought summary judgment for the full amount of the claim. Alternatively, he submitted that at a minimum the court should require an interim payment of €3m, with leave to defend as to the balance of the claim being conditional upon payment into court.

28. It was accepted by Mr Fealy that if the 2010 Loan Agreement contained the implied terms pleaded at paragraph 36 of the defence, then arguable claims (if any) to damages for breach of those terms could be set off against sums due under the 2010 Loan Agreement. However there was, Mr Fealy submitted, no real prospect of showing that any such terms were implied.

29. The only remaining defence comprised the assertion in paragraph 60A of the amended defence. This was that loss and damage occasioned by Swallowfalls' breach of the Construction Agreement as amended, presently the subject of arbitration, was so closely connected with Swallowfalls' claim that it would be manifestly unjust to allow Swallowfalls to enforce payment without taking into account MYT's claim in arbitration. I shall call it "the CA loss and damage set-off". After examining what MYT said about this loss and damage, Mr Fealy submitted that MYT had not shown that it would be "manifestly unjust" to allow Swallowfalls to enforce payment without taking into account MYT's claim in arbitration. On the contrary, submitted Mr Fealy, what had happened was that Swallowfalls had granted an indulgence to allow a debtor further finance, and this should not be used as a basis to allow subsequent events to come into play. Justice and fairness did not call for MYT's cross-claims under the arbitration to deprive Swallowfalls of its entitlement to repayment of the loan.

30. Mr Hofmeyr's arguments were founded on two alternative bases of defence. The primary basis of defence relied upon the alleged implied terms. Once they were established, the breaches of the Construction Agreement identified in the counterclaim would both:

    (1) disentitle Swallowfalls from claiming repayment (paragraph 46(3)(a) of the defence); and

    (2) give rise to claims for breaches of the 2010 Loan Agreement, which could be set off against Swallowfalls' claim to repayment of the Loan (paragraphs 46(3)(b) and 60 of the amended defence).

31. Should the primary basis of defence fail, however, Mr Hofmeyr relied in the alternative upon the CA loss and damage set-off. As pleaded at paragraph 60A of the amended defence, the connection between the two claims was so close as to make any other course manifestly unjust.

32. Mr Hofmeyr then developed a submission that whichever of these bases of defence was made out, the consequence was that issues which arose as to breaches of the Construction Agreement must be the subject of the stay sought on 26 June 2012. It was in the light of this submission that I adjourned the proceedings on 24 July 2012.

33. There were two principal reasons for the adjournment. The first was that Mr Hofmeyr had assumed that the principle in *Hayter v Nelson* [1990] 2 Lloyd's Rep 265 would result in a stay. That principle is that an agreement to refer differences to arbitration cannot be circumvented by one side inviting a court to conclude summarily that that the other side is indisputably wrong. In *Hayter v Nelson* the principle was applied when granting a stay under section 1 of the Arbitration Act 1975. It is now common ground that the principle would apply to a stay under section 9 of the Arbitration Act 1996. As at 24 July 2012, however, Mr Hofmeyr's submissions on that principle had not been set out in his skeleton argument and in my view required further consideration.

34. The second reason for the adjournment was that it was at least possible that I might need to try to assess the arguable value of the claims under the Construction Agreement. I decided that the defendants should have an opportunity of lodging further evidence in that regard. On that aspect of the case Mr Fealy stated on 24 July 2012 that Swallowfalls accepted that under the Construction Agreement MYT had arguable claims for a sum not in excess of:

    (1) €616,000 in relation to the second head in paragraph 62 of the counterclaim (Fitz); and

    (2) €245,000 in relation to the third head in paragraph 62 of the counterclaim (scaffolding).

35. At the hearing on 21 and 22 January 2013 Mr Hofmeyr advanced a primary case as to the alleged compulsory requirement for a stay. This primary case, which I shall call "the split jurisdiction contention", was that the clause in the 2010 Loan Agreement providing for the English courts to have jurisdiction should be read down, so as not to apply to "questions of fact associated with breaches or alleged breaches of the Construction Agreement." Once those facts had been established in arbitration under the Construction Agreement the court would be in a position to consider (a) to what extent there were breaches of the implied terms in the 2010 Loan Agreement; and (b) the consequences of those breaches. Only at that stage would it be possible for the court to determine what, if anything, was due to Swallowfalls on the Loan.

36. Mr Hofmeyr submitted that if the split jurisdiction contention were right, then this court's jurisdiction had been limited by the agreement of the parties. That being so, there could be no question of the court assuming jurisdiction over questions of fact associated with breaches or alleged breaches of the Construction Agreement.

37. If the court's jurisdiction were not limited in the way he suggested, however, Mr Hofmeyr still maintained that a stay would be compulsory. On this footing it would be statute, rather than the agreement of the parties, which required a stay. I shall refer to this alternative contention as "the section 9 contention," as the statutory provision relied upon was section 9 of the Arbitration Act 1996. That section envisages the possibility of a stay of part only of proceedings. Mr Hofmeyr submitted that it could

be invoked to insist on arbitration of claims that were the subject of an equitable set-off in legal proceedings.

38. If none of these contentions prevailed then Mr Hofmeyr had a final fallback contention as to a stay. I shall refer to this as "the case management stay contention." The contention was that the court under its inherent jurisdiction could and should grant a stay under which questions of fact associated with breaches or alleged breaches of the Construction Agreement would be determined in accordance with the dispute resolution procedures under that agreement.

39. At the hearing on 21 and 22 January 2013 there were, as well as submissions on the matters identified above (and in particular on the value of the claims under the Construction Agreement), additional submissions on the calculation of interest, on whether there should be an interim payment, and on the position of Mr Landers as guarantor.

40. In the next section of this judgment I give an account of the history of events. I then deal in order with the two primary bases of defence (the implied terms and the CA loss and damage set-off), before turning to the split jurisdiction contention and the section 9 contention. In relation to the latter contentions I note arguments by Mr Fealy that the Civil Procedure Rules and section 9(3) respectively debar the making of these contentions and that any award by the arbitrators would be ineffective. I then turn to the case management stay contention, and submissions on the value of the claims under the Construction Agreement, on the calculation of interest, on whether there should be an interim payment, and on the position of Mr Landers as guarantor.

F. History of events

F1. Background

41. Swallowfalls is a single-purpose company incorporated under the laws of the Isle of Man. It is administered by a Guernsey-based company called Artemis Trustees Limited ("Artemis"). Mr David Larkin is an employee and board member of Artemis and, since 2010, a Director of Swallowfalls.

42. MYT is a Monegasque company specialising in the design and construction of super-yachts. As noted earlier, Mr Landers is its chairman and managing director.

F2. The Construction Agreement

43. Under the Construction Agreement of 3 January 2006 MYT (described as "the General Contractor") agreed to construct and deliver to Swallowfalls (described as "the Buyer") a 71.5 metre motor yacht, and Swallowfalls agreed to purchase and take possession of the same. The Construction Agreement contemplated that MYT would engage a number of sub-contractors to carry out the work, among them CSM (which was defined as "the Builder").

44. The price for the construction and delivery of the yacht was €35,231,600 (article 8.1). Swallowfalls was to pay that price in 11 instalments. Instalment 1 was for 5% of the price, less a deposit of €150,000 which had been paid already. Instalment 1 was to be paid within 7 business days of signing the agreement. Instalment 2 was for a further

5% of the price. It and instalments 3 to 11, each for 10% of the price, were to be paid following the certified completion of defined milestones (article 10).

45. While Swallowfalls was obliged to pay the first instalment and instalments four to eleven to MYT's bank account, instalments two and three were to be paid to Merrill Lynch. Merrill Lynch would hold those sums, amounting to 15% of the price of the yacht, as a Refund Guarantor under the Refund Guarantee (as defined in the Construction Agreement). The Refund Guarantee was to remain in place until an advanced stage in the project (see article 10.4).

46. As regards ownership of the yacht, upon payment by Swallowfalls of the amount due on completion of the fifth milestone, MYT agreed to transfer the title to Swallowfalls (articles 6.1 and 16.1). Thereafter MYT was to have a lien over the yacht to secure payment of any outstanding sum from Swallowfalls.

47. The Construction Agreement contemplated that the design and construction of the yacht would be completed within a period of two and a half years. This was subject to the possibility of Permissible Delays, which were defined, inter alia, as "...any other delays which shall have the effect of extending the Completion Date without giving rise to any claim on the part of the Buyer for damages or otherwise..." (article 2.1). In order to be entitled to an extension of the Completion Date, however, article 11.3.3 required MYT to notify Swallowfalls of that delay within five business days.

48. Article 19.1 defines circumstances when MYT shall be deemed to be in default. Among other things, in those circumstances Swallowfalls is entitled to exercise "step in rights" and have its nominee complete the construction of the yacht (article 19.2.2).

49. Article 25 was entitled "Settlement of Dispute." Article 25.2 provided for technical questions or matters of Classification to be referred to an independent expert or the Classification Society respectively. All other disputes, and any dispute as to whether a question was of a technical nature suitable for decision under article 25.2, were to be referred to arbitration under the LMAA rules and the Arbitration Act 1996. Article 25.4 states that the arbitrators shall have substantial knowledge and experience in matters related to vessel construction. By article 25.7 no party shall be considered in default during the pending of arbitration proceedings relating to a disputed default.

50. Under article 26 the Construction Agreement was governed by English law.

F3. The First Amendment

51. By the First Amendment of 26 October 2007 MYT and Swallowfalls made certain amendments to the Construction Agreement. Article 1 of the First Amendment records that the purpose of the First Amendment was to:

> provide interim finance to [MYT] in advance of certain of the milestones having been reached and the relevant stage certificates therefore having been signed, and the security that [MYT] will provide to [Swallowfalls] in consideration of that interim finance.

52. Article 3 recorded that MYT had requested Swallowfalls to provide it with interim finance in advance of the milestones for instalments 3 and 4 having been reached, and that Swallowfalls agreed on the terms and conditions in the First Amendment to provide such finance. The interim finance comprised a total of €3,372,000. Of this, €640,000 was to be paid by Swallowfalls to MYT. The First Amendment made provision for the balance of €2.732 million to be paid by Swallowfalls to MYT's sub-contractors and suppliers against presentation of invoices from them (article 3.2.2). It was expressly agreed that payments to MYT's sub-contractors and suppliers could be made by way of direct remittance from Swallowfalls to those sub-contractors and suppliers, such remittances to be stated to have been made for and on behalf of MYT.

53. Also under article 3 changes were made to the milestones for instalments 3, 4 and 11, and the amounts payable under those instalments were altered to 2%, 14% and 14% respectively of the price.

54. In addition, Swallowfalls agreed that the instalment due after the third milestone would be paid to MYT's bank, rather than to Merrill Lynch under the Refund Guarantee (article 5.3).

55. The facility provided by Swallowfalls was limited in time. Article 5.1 provided that:

> The Interim Finance will be set off against the Fourth Instalment or repaid by [MYT] on or by the 30th April 2008, whichever is the earlier.

56. In return for Swallowfalls providing interim finance to MYT, Mr Landers agreed to provide a guarantee ("the 2007 Guarantee") of MYT's obligations to repay the interim finance (article 4.2 at 2/221). In addition, MYT agreed to register the yacht in Swallowfalls' name within 30 days (article 4.3). MYT was to retain a lien.

F4. The Second Amendment

57. The interim finance provided to MYT under the First Amendment proved not to be sufficient to enable MYT to complete the yacht. A document headed "NATO - BUDGET" dated 5 June 2008 ("the 5 June 2008 budget") identified direct costs and general expenses totalling €13.5m during the period May 2008 to June 2009 inclusive.

58. Recital B to the Second Amendment of 12 June 2008 recorded that:

> [MYT] has requested [Swallowfalls] to agree a new payment schedule and to borrow money in advance of reaching the milestones under the Agreement.

59. Under the Second Amendment Swallowfalls agreed to provide MYT with a loan facility of up to €33,803,980, "until the Delivery or until the termination of the Agreement, or upon demand for repayment by [Swallowfalls], whichever is the earliest..." (article 3.1.2). The Interim Facility provided under the First Amendment was to form part of this new loan facility. The loan facility was to be drawn down, in order of priority, (1) upon presentation of invoices listed in the 5 June 2008 budget (which became Schedule 3 to the Second Amendment), (2) as otherwise agreed with Swallowfalls, and (3) upon presentation of invoices from MYT for its general

expenses (article 3.1.3). Payment was to be made "by direct remittance to any such Sub-Contractor and/or Supplier ... or to [MYT], such remittance to be stated to have been made for and on behalf of [MYT]" (article 3.1.5).

60. The Second Amendment contemplated in articles 3.4 and 5.1 that the loan facility would be repaid by netting of milestone payments due from Swallowfalls to MYT against the outstanding amount of the loan. In particular, article 3.4 provided:

> As and when the Milestones are reached under the Agreement and the relevant Stage Certificates has been counter-signed by [Swallowfalls'] Technical Adviser, the Loan amount shall be reduced by the corresponding amount of the Instalment under the Agreement.

61. As regards the final repayment date of the loan, article 5.2 provided:

> ...the Loan shall be repayable upon Delivery, termination of the Agreement, at the expiry of the "Term" as provided for in the Loan Agreement or otherwise within thirty (30) days of demand of [Swallowfalls]".

62. Mr Landers provided a new personal guarantee ("the 2008 Guarantee"), replacing the previous guarantee associated with the First Amendment. The 2008 Guarantee was attached to the Second Amendment as Appendix 2.

63. The Second Amendment had a Loan Agreement scheduled to it ("the 2008 Loan Agreement"). The 2008 Loan Agreement provided for a facility of up to €33,803,980 (clause 2.2). It also provided for repayment by MYT "within thirty (30) days from receipt of a demand letter by [MYT]...or the earlier of the expiration of the Term hereunder..." (clause 2.5). Clause 2.6 provided that the term of the loan was "from the date hereof up to and including 01 September, 2009".

64. In summary, under the 2008 Loan Agreement, Swallowfalls was entitled to demand repayment within 30 days and the loan was due to be repaid in any event on 1 September 2009.

65. Clause 4.2 provided for the English courts to have exclusive jurisdiction over any dispute arising out of the loan agreement.

F5. The Third Amendment

66. A further document headed "NATO - BUDGET" was produced dated 14 April 2009 ("the 14 April 2009 budget"). It identified direct costs and general expenses totalling €13.5m during the period May 2008 to December 2009 inclusive.

67. By an agreement dated 1 May 2009 between Swallowfalls and MYT (the "Third Amendment"), Swallowfalls and MYT further amended the Construction Agreement. The purpose of the Third Amendment was to provide for early release to MYT of money held by Merrill Lynch under the Refund Guarantee (stated at article 3.2 to have amounted to €1,531,271 on 31 March 2009). Article 1 further provided that:

> "The purpose of the aforementioned release is inter alia to assist [MYT] with its cashflow...."

68. In return for Swallowfalls' agreeing to release the Refund Guarantee Money (as defined in the Construction Agreement), MYT agreed again to effect transfer of the title to the yacht within 60 days, with liquidated damages to be paid in the event of default by MYT (article 4.2). The parties also agreed (articles 3.1.1 to 3.1.3) that the 14 April 2009 budget (which became Schedule 3 to the Third Amendment) should replace Schedule 3 to the Second Amendment and that MYT would have no claim against Swallowfalls for its general expenses.

F6. The Fourth Amendment and the Tri-Partite Agreement

69. On 1 September 2009 the 2008 Loan Agreement expired. No payments under that agreement were made by MYT.

70. A dispute arose between MYT and CSM, relating to payment, scheduling and the provision of services by CSM, in particular claims for "late stay charges". These were charges levied to compensate CSM for the continuing occupation of space in its yard by the unfinished yacht. During the course of the dispute, MYT suspended payment to CSM and, in response, CSM prevented MYT from accessing the yacht.

71. A document headed "NATO - BUDGET" dated 26 October 2010 ("the 26 October 2010 budget") identified direct costs and general expenses totalling €6,954,428.18 during the period November 2010 to April 2012 inclusive.

72. As noted earlier, on 3 November 2010 issues between MYT, CSM and Swallowfalls were sought to be resolved by the Tri-Partite Agreement of that date, while issues between Swallowfalls and MYT were sought to be resolved by the Fourth Amendment of the same date. The 2010 Loan Agreement, pursuant to which Swallowfalls makes the present claim, was scheduled to the Fourth Amendment, which expressly provided for the 2010 Loan Agreement to replace the 2008 Loan Agreement (article 3.9).

73. Under the Tri-Partite Agreement MYT was to make certain late stay payments to CSM, with funds loaned by Swallowfalls to MYT (see clauses 2 and 8). The parties also recorded their objective to make the yacht ready for launch by 30 October 2011, and their aspiration to deliver the yacht to Swallowfalls within six months of launching (i.e. on or about 1 April 2012)(clause 4).

74. The Fourth Amendment recorded that its purpose was to "provide a further loan facility to [MYT]...for the Late Stay Payments and [MYT's] General Working Capital" (article 1.1). Article 2.1 defined certain terms and provided that "in the event of any inconsistencies between terms used herein and terms used in the Agreement, the terms of this Fourth Amendment shall apply". Article 2.1 continued to provide, inter alia, that "Completion Date, means the 30th April, 2012."

75. The Fourth Amendment also provided for a change to the milestones set out in the Construction Agreement, as amended. The amendments are set out in Schedule 2 to the Fourth Amendment (see article 3.1 and schedule 2). Schedule 2 recorded that milestones 1 to 5 had been achieved, with payment of 36% of the purchase price

having been made to MYT. The remainder of the project was divided into milestones 6 to 24. The contract price was also increased to some €41.6m (see article 3.3 and schedule 5).

76. The Fourth Amendment provided for a Further Finance Facility "in an amount of up to €3,000,000..." (article 3.4). That facility was divided in two, with one half to be used to pay the Late Stay Payments to CSM and the other half to be paid into a joint account, held by Swallowfalls and MYT, to help MYT with its working capital requirements.

77. Articles 3.9 to 3.22 made provision for the 2010 Loan Agreement. Article 3.11 provided that:

> "From the signing of this Fourth Amendment until the Delivery or until the termination of the Agreement, or upon demand for repayment by [Swallowfalls], whichever is the earliest, [Swallowfalls] agrees to provide the Loan Facility of up to €38,327,600."

78. Article 3.19 then provided that:

> "As and when the Milestones are reached under the Agreement and the relevant Stage Certificate has been counter-signed by [Swallowfalls'] Representative, ..., the Loan amount shall be reduced by the corresponding amount of the Instalment under the Agreement."

79. Under article 3.25, MYT repeated its commitment to transfer title in the yacht to Swallowfalls "without further delay and in any event within 30 days of the date of this Fourth Amendment". MYT also agreed to waive its lien over the yacht (article 3.26).

80. In consideration of the Further Finance Facility and of Swallowfalls' agreement to continue to provide the Loan (as defined in the Fourth Amendment), Mr Landers was to provide the 2010 Guarantee, to replace the 2008 Guarantee (article 4.1).

81. Under the 2010 Loan Agreement, which is schedule 1 to the Fourth Amendment, Swallowfalls agreed to provide the facility of up to €38,327,600 envisaged by the Fourth Amendment. Clause 2.2b) explained that this facility included €22,943,202 drawndown under the Second Amendment. The "Loan" as defined in the 2010 Loan Agreement was described in clause 2.3a) as (1) the amount outstanding as at 3 November 2010 under the 2008 Loan Agreement, identified in schedule 1 to the 2010 Loan Agreement as a total of €13,964,164.28, plus (2) any and all further amounts drawndown and not repaid under the 2010 Loan Agreement plus (3) Interest.

82. Clause 2.5a) of the 2010 Loan Agreement set out the terms on which MYT was obliged to repay the loan. Clause 2.6 provided that "the term of the Loan Facility shall be from the date hereof up to and including the Completion Date as defined in the Fourth Amendment". As noted above, the Fourth Amendment defined the Completion Date as 30 April 2012.

83. The 2010 Loan Agreement stated in clause 4:

4. GOVERNING LAW

4.1 Law

This Loan Agreement and any disputes or claims arising out of or in connection with its subject matter are governed by and construed in accordance with the laws of England.

4.2 Jurisdiction

The Parties irrevocably agree that the courts of England have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this Loan Agreement.

84. The 26 October 2010 budget became Schedule 3 to the 2010 Loan Agreement. Articles 3.14 and 3.17 of the Fourth Amendment replicated the previous arrangements so that Swallowfalls, by reference to Schedule 3 to the 2010 Loan Agreement, could make direct payments to MYT's sub-contractors and suppliers.

F7. Swallowfalls' notice of breach and the start of arbitration

85. On 9 July 2011 Mr Larkin on behalf of Swallowfalls wrote to MYT giving notice under Article 19.1.1 of the Construction Agreement of material breaches of the Construction Agreement, the Fourth Amendment and the Tri-Partite Agreement. The alleged breaches were:

    (1) Under the Construction Agreement, a failure to perform the work and construct the Vessel in accordance with the Production Schedule;

    (2) Under the Fourth Amendment, a failure to furnish CSM with the outstanding plans and drawings for piping, electrical and mechanical arrangements by 30 November 2010;

    (3) Under the Tri-Partite Agreement, failure (a) to work towards the goal of making the Yacht watertight, weather tight and ready for launching on or before 30 October 2011; (b) to provide CSM with the outstanding plans and drawings for piping, electrical and mechanical arrangements by 30 November 2010; (c) to mediate the dispute between MYT and CSM regarding extra work; and (d) to agree and produce a Production Schedule within 14 days of the signing of the Tri-Partite Agreement.

86. Mr Landers responded to Mr Larkin's letter on 2 September 2011, asserting compliance by MYT with its obligations and non-compliance on the part of CSM and Swallowfalls.

87. On 5 September 2011, Mr Landers wrote on behalf of MYT to Swallowfalls giving notice of commencement of arbitration under the Construction Agreement and the Tri-Partite Agreement by the appointment of Mr Ian Gaunt as MYT's arbitrator. Mr Gaunt was appointed in respect of all disputes arising under the Construction Agreement and the Tri-Partite Agreement. Four particular disputes were identified in

the notice of commencement: (a) the extent of Swallowfalls' delays on submission of buyer variation requests, (b) failure by Swallowfalls to provide a buyer's representative in the period November 2010 – February 2011, (c) Swallowfalls' failure to countersign stage certificates (so that the Loan would be repaid) and (d) the failure to provide Working Capital as agreed under the Fourth Amendment.

88. On 16 September 2011 Swallowfalls replied to the notice of commencement, appointing Mr Christopher Hancock QC as its arbitrator.

F8. Exercise of "step-in" rights by Swallowfalls

89. On 16 December 2011 Swallowfalls wrote to MYT giving notice that it was exercising its rights under Article 19.2.2 of the Construction Agreement to step into the position of MYT as general contractor. The letter said that Swallowfalls was doing this through its nominee, CSM. At paragraphs 3 and 4 of the letter the basis for taking this course was said to be the failure on the part of MYT to remedy the breaches notified on 9 July 2011.

F9. Demands under the 2010 Loan Agreement and Guarantee

90. As noted earlier, on 19 December 2011, Mr Larkin on behalf of Swallowfalls wrote to MYT giving notice under clause 2.5a) of the 2010 Loan Agreement that the Loan was immediately due and payable. The sum said to be due was €15,699,864.21.

91. On 23 December 2011 Swallowfalls wrote to Mr Landers. The letter referred to the 2010 Guarantee and demanded that Mr Landers pay the amount due by MYT under the 2010 Loan Agreement.

F10. Dispute resolution in the High Court and elsewhere

92. The claim form in these proceedings was issued on 1 February 2012, and was accompanied by particulars of claim dated 2 February 2012. An acknowledgment of service was filed on behalf of each of MYT and Mr Landers on 13 February 2012. An application notice seeking summary judgment was issued by Swallowfalls on 20 February 2012, supported by a witness statement of Mr Larkin of the same date. On 1 May 2012 amended particulars of claim were produced. The amendments advanced a secondary case. This was that if an obligation had not arisen on 19 December 2011 to pay the Loan Sum, then nevertheless such an obligation arose on 30 April 2012, this being the completion date specified in clause 2.5a) of the 2010 Loan Agreement.

93. Witness statements on behalf of the defendants were served in May 2012. An application notice seeking an interim payment was issued by Swallowfalls on 20 June 2012. An application notice seeking a stay of proceedings was issued by MYT on 26 June 2012.

94. On 4 July 2012 I heard argument and gave the July judgment on the "demand at will" issue. On 24 July 2012 at the adjourned hearing Mr Fealy and Mr Hofmeyr advanced the submissions described in section E above, and the hearing was adjourned for the reasons explained in that section.

95. On 30 July 2012 MYT wrote to Swallowfalls' representative recording that on 20 July 2012 stage certificates 5 to 16 had been presented and that on 23 July 2012 Swallowfalls had disputed that any of the Milestones relating to stage certificates 6 to 16 had been reached. The letter of 30 July 2012 gave "a last chance" for Swallowfalls to sign stage certificate number 5 or take alternative action, and requested that Swallowfalls remedy various breaches in that regard. On 8 August 2012 Swallowfalls' solicitors replied that the allegations raised were the subject of "ongoing litigation between our respective clients", and stated for the record that all allegations were denied.

96. On 29 August 2012 solicitors for MYT emailed Swallowfalls' solicitors noting that stage certificate number 5 remained unsigned. It was asserted that under Article 25.2 of the Construction Agreement there should be reference to Lloyds Register as an independent expert to rule on whether Milestone 6 had been reached, what if any work remained to be completed in respect of Milestones 7 to 17, and what, from a technical perspective, needed to be done to enable MYT to carry out those works. The response dated 3 September 2012 was again that the issued raised formed part of the current proceedings in the Commercial Court.

97. By letter dated 11 September 2012 MYT's solicitors wrote to the arbitrators (Mr Ian Gaunt and Mr Christopher Hancock QC) setting out MYT's claim in the arbitration and enclosing a bundle of documents. A response was sent to the arbitrators by Swallowfalls' solicitors on 4 October 2012 asserting that any award made by the arbitral tribunal would be wholly ineffective while the Commercial Court remained seised of the dispute. While that remained the position, Swallowfalls intended to take no part in the arbitration.

98. In an email to the arbitrators dated 22 December 2012 MYT's solicitors sought an order that Swallowfalls serve defence submissions by Friday 1 February 2013. In response to the letter of 4 October 2012, they asserted that the position taken by Swallowfalls was "totally unsupportable as a matter of modern arbitration law." It was said that the English court had a duty under section 9 of the Arbitration Act 1996 provisionally to renounce jurisdiction over a dispute which falls within an agreement to arbitrate. Until it relinquished jurisdiction, both the English court and the arbitral tribunal had jurisdiction over the dispute. They concluded that there was no reason why the arbitration should be delayed while the Commercial Court considered the position. Immediately before saying this, however, the preceding paragraph stated:

> It may of course be right that the English court will not enforce an Award in England where the subject matter of the reference is also in issue in the Commercial Court, but in this case enforcement of any Award in favour of MYT is more likely to be in Italy where the Yacht, Swallowfalls' sole known asset, is located, rather than in London.

99. In response on 11 January 2013 Swallowfalls' solicitors said that MYT had been attempting to pre-empt the decision of the Commercial Court. Further, given the suggestion that MYT would "seek to disregard a court decision in Swallowfalls' favour, and to enforce a conflicting arbitration award in MYT's favour in Italy", Swallowfalls reserved its right to apply for an injunction to restrain MYT from proceeding with the arbitration.

100. After further exchanges between the parties, the arbitrators on 17 January 2013 made an order that Swallowfalls serve defence and any counterclaim submissions in the arbitration within 28 days, i.e. by 14 February 2013.

101. Returning to the present proceedings, a draft re-amended defence and counterclaim were settled by Mr Holmes on 20 January 2013. The re-amendments related to the counterclaim and were designed to ensure that it reflected the case that had been advanced to the arbitrators in the submissions of 11 September 2012. The argument before me then proceeded on 21 and 22 January 2013 as described in section E above.

G. Implied terms in the 2010 Loan Agreement

102. Two implied terms were alleged in paragraph 36 of the defence:

> (1) Swallowfalls would not, by its own acts or defaults and/or the acts or defaults of its agents, in breach of the Construction Agreement and/or otherwise, prevent MYT from repaying the Loan, or delay MYT in repaying the Loan by the means identified in clause 2.5(b) and (c); and/or
>
> (2) ... Swallowfalls would cooperate with MYT in the confirmation of the achievement of Milestones and, in particular, the counter-signature of stage certificates.

103. In support of the implied terms Mr Hofmeyr relied on two propositions. First, where the existing terms of the contract justify the implication, the court will imply a term that the parties shall cooperate to ensure the performance of their bargain. Second, where there are conditions precedent to performance of an obligation under a binding contract, a term may be implied that a party will not do an act which, if done, would prevent fulfilment of the condition. For the first proposition Mr Hofmeyr cited what was said by Lord Blackburn in *Mackay v Dick* (1881) 6 App Cas 251 at 263. For the second Mr Hofmeyr cited what was said by Cockburn CJ in *Stirling v Maitland* (1864) 5 B&S 840 at 852, and added that such terms are really no more than the obverse of the type of cooperation term implied in *Mackay v Dick*.

104. Mr Hofmeyr identified nine features of the relationship between the parties which warranted the implied terms:

> (1) The primary method for repayment of the Loan is set out at clause 2.5(c) of the 2010 Loan Agreement:
>
> *"Upon the achievement of any Milestone under the Agreement as certified by a Stage Certificate countersigned by the Buyer's Representative, after deduction of Interest, the principal amount of the Loan shall be reduced by the corresponding Instalment amount under the Agreement as at the date of the relevant Stage Certificate."*
>
> (2) Similarly, clause 3.19 of the Fourth Amendment provides :

"*As and when the Milestones are reached under the* [Construction] *Agreement and the relevant Stage Certificate has been counter-signed by the Buyer's Representative, after deduction of Interest as provided for herein, the Loan amount shall be reduced by the corresponding amount of the Instalment under the Agreement.*

(3) The original terms of the Construction Agreement require that the stage certificates shall be counter-signed or disputed by the Buyer's Representative within two business days of presentation (article 10.2). But, those provisions have not been incorporated into the 2010 Loan Agreement.

(4) Thus, while a breach of the Construction Agreement by failure to appoint a Buyer's Representative and/or to sign Stage Certificates might sound in damages under that contract, without the implied terms for which the defendants contend, it would not prevent a claim for repayment of a balance under the 2010 Loan Agreement that did not reflect the sums that ought to have been "paid" to MYT, by deduction from the balance of the Loan. In contrast, the implication of the terms contended for into the 2010 Loan Agreement provides a defence (by set-off) to the claim for repayment.

(5) More broadly, the process of building the Yacht, as regulated by the Construction Agreement and the Amendments, requires a high degree of cooperation between MYT and Swallowfalls.

(6) That is most evident with regard to the variations to contract (VTCs) that may be requested by the Buyer or MYT. These VTCs are regulated by articles 9.1 to 9.5 of the Construction Agreement. Where VTCs are instigated by the Buyer, MYT has 14 days to consider the VTC and notify the buyer of the impact in terms of price, performance, delivery and cost on the project. The Buyer is then to give notice "promptly" of agreement to the VTC, an alternative solution to the proposal, or a rejection of the VTC wholesale.

(7) Article 3.29 of the Fourth Amendment identified by reference to Schedule 4 to the Amendment existing VTCs and required the Buyer's Representative to respond to the VTCs within 14 days notifying MYT of acceptance, qualified acceptance, an alternative solution or rejection.

(8) Those provisions do not form part of the 2010 Loan Agreement, but the observance or the breach of those obligations plainly impacts upon the ability of MYT to achieve the individual Milestones (as well as the delivery of the Yacht more generally) and thus to pay down the Loan.

> (9) The implied terms eliminate the possibility that Swallowfalls' delays in progressing the building of the Yacht, in breach of the Construction Agreement and the Amendments or otherwise, can benefit Swallowfalls by preventing notional repayment of the Loan and thereby entitling Swallowfalls to increased interest on the Loan.

105. Mr Fealy submitted that there was no basis for implying the alleged terms into the 2010 Loan Agreement. The contentions he advanced can be summarised:

> (1) As the court held on 4 July 2012, Swallowfalls is entitled at will to demand immediate repayment of the amount due under the 2010 Loan Agreement. In response to a demand for repayment, MYT is not entitled to resist repayment on the grounds that it has not yet completed the remaining work under the Construction Agreement and ought to be permitted to do.
>
> (2) Following a demand for repayment by Swallowfalls, performance by MYT of its obligation under the 2010 Loan Agreement requires it to repay Swallowfalls the amount due. Even if Swallowfalls were in breach of the Construction Agreement as alleged, it would not follow that the alleged breach would prevent MYT performing its obligations under the 2010 Loan Agreement. Neither would repayment of the loan require Swallowfalls' co-operation. Repayment of the loan, under clause 2.5(c) of the 2010 Loan Agreement, following the countersignature of a Stage Certification is not the sole means by which MYT may discharge its payment obligation. In addition, MYT may repay – or prepay - the loan using its own funds or funds obtained from a third party.
>
> (3) In any event, the alleged necessity of the implied term turns on whether MYT would have funds available to it to meet a demand for repayment. But this extraneous factor cannot be relevant to determining whether the 2010 Loan Agreement ought to contain the alleged implied terms. The risk of financial embarrassment is a risk that MYT took when it entered into the loan agreement.
>
> (4) Moreover, the alleged implied terms cannot be justified on the grounds of necessity in circumstances where the Defendants allege that the matters said to breach that implied term are also alleged to breach of the Construction Agreement. In those circumstances, MYT has its remedy in damages under the Construction Agreement. There is no necessity for a duplicative cause of action under the 2010 Loan Agreement.

106. Thus it was said on behalf of Swallowfalls that the 2010 Loan Agreement does not include the alleged implied terms and the Defendants' primary case has no real prospects of success. It does not seem to me, however, that these contentions answer the points made by Mr Hofmeyr. It is one thing to conclude, as I have done in the July

judgment, that the wording of the 2010 Loan Agreement was such that MYT ran the risk that Swallowfalls could decide to call in the loan at will. It is quite another thing to say that Swallowfalls could impede MYT's ability to repay in the manner contemplated by the 2010 Loan Agreement – namely, by achieving relevant milestones under the Construction Agreement. The implied terms ensure that Swallowfalls cannot do this. They are fully consistent with the legal principles described by Cockburn CJ and Lord Blackburn. Using more modern terminology, they spell out expressly what the agreement, read against the relevant background, would reasonably be understood to mean.

107. It is true that the agreement enables MYT to repay in other ways, and indeed to prepay. The background shows very clearly, however, that the primary method of repayment agreed upon was by the intended course of achieving relevant milestones. Agreeing upon this intended course could only have been upon the basis that Swallowfalls would not impede it.

108. Mr Fealy is right to stress that the test is necessity. I do not accept, however, that the existence of other agreements made it unnecessary to imply terms in the 2010 Loan Agreement. To my mind the test of necessity is overwhelmingly met in the context of the Fourth Amendment. New agreements were combined with amendments to the Construction Agreement. One of the new agreements, the 2010 Loan Agreement, took the place of the 2008 Loan Agreement. Repayment by achieving milestones was a feature which had occurred under the 2008 Loan Agreement and was carried forward from that agreement to the 2010 Loan Agreement. What is necessary for that feature to work is that it should not be impeded. This is a different concept from the separate questions which might arise under other agreements. Breaches of those other agreements might or might not impede the repayment method contemplated by the loan agreement. What is crucial is that it was the loan agreement that contemplated this repayment method. It necessarily follows that insofar as MYT is entitled to complain that breach of some other agreement must not impede what was contemplated, it is under the loan agreement that MYT is entitled to make this specific complaint. The other agreements are concerned with other things: their focus is not upon MYT being able to repay the loan.

109. For these reasons, which are essentially those advanced by Mr Hofmeyr in reply, I conclude that the 2010 Loan Agreement contained the implied terms alleged. It was acknowledged by Swallowfalls that if that is the case then there must be a stay as regards arguable breaches of the implied terms arising from failures to comply with the Construction Agreement. I shall nevertheless deal briefly with the CA loss and damage set-off and some of the main aspects of the various ways in which the Defendants' case for a stay was put.

H. The CA loss and damage set-off

110. The issue here would be whether MYT could answer a claim for repayment under the 2010 Loan Agreement by saying that allowance must be made for its claims under the Construction Agreement. It was common ground that the principles governing availability of the CA loss and damage set off are those set out by Rix LJ at paragraph 43 of his judgment in *Geldof Metaalconstructie NV v Simon Carves Ltd* [2011] 1 Lloyd's Rep 517. At paragraph 43 (vi) Rix LJ underlined Lord Denning's test "as the

best restatement". Under this test the question is whether there are "cross-claims... so closely connected with [the plaintiff's] demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim".

111. Mr Fealy submitted that the requirement of "manifestly unjust" – which Rix LJ referred to as the "functional requirement" – was not met. I agree with him, but not for the reasons he would wish. I refuse to permit the CA loss and damage set-off because the implied terms enable issues on the cross-claims to be raised in answer to the claim for the loan, and it is not suggested that there is any issue in that regard which will not fall within the implied terms. That being so there is no functional requirement for the CA loss and damage set-off.

112. For completeness, however, I note that Mr Hofmeyr submitted that the 2010 Loan Agreement arose out of and was stipulated for in the Construction Agreement as amended by the Fourth Amendment. Further, in the ordinary course, it was the intention of the parties that any amounts drawn down under the 2010 Loan Agreement would be repaid over time by set-off against instalment payments made by Swallowfalls under the Construction Agreement (as amended). This, he submitted, was a paradigm case in which it can be said that the cross-claims under the Construction Agreement are so closely connected to the claims under the 2010 Loan Agreement that it would be manifestly unjust to allow Swallowfalls to enforce payment without taking into account the cross-claims.

113. Mr Fealy responded that it would not be manifestly unjust to permit Swallowfalls to enforce its claim under the 2010 Loan Agreement without any set off: His principal reasons can be summarised:

> (1) Although the two agreements are part of the same transaction, they were not part of the same transaction as originally structured. Under the Construction Agreement of 3 January 2006, Swallowfalls did not provide any loan facility to MYT.
>
> (2) The 2010 Loan Agreement was entered into on 3 November 2010 and it was admitted by MYT that it owed €13,964,164.28 as at that date (see clause 2.3(a) and schedule 1 of the 2010 Loan Agreement at 2/279 and 286).
>
> (3) As at that date, MYT had no cross-claim and no possible defence of set off to a claim for repayment of that sum.
>
> (4) MYT relies on events subsequent to that date as justifying a set off.
>
> (5) As at 19 December 2012, the date the loan was due for repayment, MYT owed Swallowfalls principal of €13,808,007, plus interest (see paragraph 15 of the Amended Particulars of Claim at 1/8/23). It follows that the sum now claimed is less than was owed on 3 November 2010, together with interest since that date.

(6) There is nothing manifestly unjust in denying MYT a set off in respect of events subsequent to 3 November 2010.

(7) In effect, denying MYT a set off puts in a position not materially different to that it occupied on 3 November 2010.

114. These points were relied upon as supporting a broad submission that indulgence to allow a debtor further finance should not be used as a basis to allow subsequent events to come into play. Those subsequent events could, without manifest injustice, be left to be dealt with in other proceedings.

115. The difficulty with these submissions is that they take no account of what the parties agreed when the 2010 Loan Agreement was made. It was an agreement for the future. Putting on one side the implied terms, it would be manifestly unjust to take no account of what occurred once the agreement had been made.

116. An additional point was relied upon by Mr Fealy. This complained of "the dilatory manner in which MYT has advanced its cross-claims." The point, as I understand it, was that while MYT had commenced arbitration in September 2011 it had not progressed the arbitration proceedings since then. Putting on one side the implied terms, I do not consider that any complaint in this regard is of such weight as would significantly detract from the injustice of divorcing Swallowfalls' claim under the 2010 Loan Agreement from MYTs' claims under the Construction Agreement. As I have found for MYT on the basis of the implied terms, however, these considerations become academic.

[There is no section I]

J. The split jurisdiction contention

117. The split jurisdiction contention is dependent upon a particular meaning being given to the jurisdiction clause in the 2010 Loan Agreement. On its face that clause (the second part of clause 4, quoted in section F6 above) gives exclusive jurisdiction to the courts of England. Mr Hofmeyr submitted that it should be construed so as to recognise that disputes arising under the Construction Agreement fell solely within the dispute resolution provisions of that agreement.

118. I am not persuaded that it would be appropriate to adopt any such construction of clause 4, whether by way of implied term or in some other way reading down the jurisdiction provision. Mr Hofmeyr cited *UBS AG v HSH Nordbank* [2009] EWCA Civ 585 where the court looked to "the centre of the relationship". However, as was recognised by Thomas LJ at paragraph 50 of his judgment in *Deutsche Bank AG v Sebastian Holdings Inc* [2010] EWCA Civ 998, the court must focus on finding the commercially rational construction giving effect to clear agreements, even if this may result in a degree of fragmentation in the resolution of disputes between parties to a series of agreements.

119. The parties plainly decided that there was not to be a single jurisdiction in which all disputes under the agreements associated with the Fourth Amendment would be resolved. It is in my view plain that as regards jurisdiction the parties intended an apparently straightforward division. Proceedings under the 2010 Loan Agreement and

under the 2010 Guarantee were to be brought in the courts of England. Proceedings under the Construction Agreement and the Tripartite Agreement were to be conducted in accordance with the dispute resolution proceedings in those agreements. For this purpose I do not need to speculate about the parties' motives. I infer merely that Swallowfalls and MYT both thought that the means of dispute resolution identified in a particular agreement was what best suited that agreement – or at least that a deal under which particular means of dispute resolution were identified in particular agreements was a deal which was acceptable overall.

120. The defendants' construction would mean that before beginning proceedings under either the 2010 Loan Agreement or the 2010 Guarantee an analysis should be conducted to see whether the dispute was one for which procedures under the Construction Agreement or the Tripartite Agreement were to be followed. This seems to me to be such a cumbersome procedure as to lack commercial reality.

121. It was urged that a construction under which the parties adopted such a procedure would result in disputes being resolved in their most natural home, and would avoid overlap. Such results undoubtedly have merit. They are not, however, to my mind best achieved by an artificial construction of the jurisdiction clauses. As Mr Hofmeyr acknowledged, the construction he advances creates a practical difficulty in setting the boundary between what is for the tribunal to determine and what is for the court to decide. He submitted that this was nevertheless preferable to overlapping jurisdictions. I do not consider that the difficulties of overlapping jurisdictions are necessarily such that the parties must be taken to have arrived at a cumbersome procedure to determine jurisdiction. On the contrary, it seems to me that when account is taken of the court's case management powers, discussed below, potential difficulties can – as the parties would be entitled to expect – be overcome.

122. In these circumstances it is not necessary for me to deal with Mr Hofmeyr's contention that agreement by the parties on split jurisdiction would deprive the court of any ability to determine the matters which were, on this hypothesis, to be arbitrated. Nor is it necessary for me to deal with Mr Fealy's answer that on this hypothesis any entitlement to contest jurisdiction had been lost by virtue of the Civil Procedure Rules. I think it preferable that such matters be dealt with in a case where they affect the outcome, and accordingly I say no more about them.

K. The section 9 contention

123. The findings above have the consequence, as it seems to me, that the section 9 contention cannot get off the ground. The defendants' primary case for reliance on section 9 depended upon the split jurisdiction contention. This fails for the reason given in section J above. In oral argument a secondary contention appeared to be advanced, that as MYT was relying on breaches of the Construction Agreement it could insist that any dispute as to those breaches must be arbitrated. However my conclusion in section G above is that MYT's potential answer to the claim under the 2012 Loan Agreement is that there were breaches of the implied terms of that agreement. There was no agreement that disputes as to those breaches be arbitrated. For the reasons given in section H above the CA loss and damage set-off does not arise.

124. In those circumstances it becomes unnecessary to decide other issues which would arise under section 9. Accordingly I simply note that Swallowfalls contended that section 9 was inapt for a case of the present kind, and that if it were apt it would be barred under section 9(3) because MYT had taken a step in the action. I also note that as section 9 is not engaged in the present case the principle in *Hayter v Nelson* [1990] 2 Lloyd's Rep 265 (see section E above) does not arise.

125. For reasons explained below I conclude, however, that the appropriate course in the present case is to grant a case management stay. This means that it is unnecessary to decide the issue between the parties as to whether Swallowfalls was right to say to the arbitrators on 4 October 2012 that in the absence of a stay by the court, any award would be ineffective. I consider that this issue is best decided in the context of a case where it will affect the outcome. Accordingly I say no more about it.

L. The case management stay contention

126. As noted earlier, Swallowfalls accepts that there must be a stay as regards arguable breaches of the implied terms arising from failures to comply with the Construction Agreement. It is common ground that the court has an inherent jurisdiction to stay its proceedings. The inherent jurisdiction is to be exercised with caution. At one point in argument Mr Fealy commented that in the 2010 Loan Agreement Swallowfalls had bought and paid for a right of access to the court. Any such "right of access", however, must take account of the court's own procedures and in particular the overriding objective set out in the Civil Procedure Rules. When seeking to achieve that objective the court will bear in mind that the parties have agreed that any proceedings must be brought here. That fact cannot of itself prevent the court from doing what the justice of the case requires. Indeed Mr Fealy did not suggest otherwise. With that background I explain briefly the three key features which in my view justify a stay, and which may affect the terms in which the stay should be expressed.

127. The first key feature is that where the implied terms in the 2010 Loan Agreement give rise to issues as to compliance with the Construction Agreement or the Tri-Partite Agreement, the parties have identified tailor-made dispute resolution procedures for those issues which place a premium on expertise. This is seen, for example, in the initial provisions in article 25 of the Construction Agreement, providing for resolution of technical and Class questions to be resolved by an expert or by the Classification Society. It is also seen in the requirement that the arbitrators must not merely be members of the LMAA but also must have substantial knowledge and experience in matters related to vessel construction.

128. The second key feature is that these tailor-made dispute resolution procedures have been activated. Most importantly, the arbitrators have the documentary material relied on by MYT. There is no impediment to the arbitration proceeding speedily.

129. The third key feature is that a case management stay is flexible. It does not involve the court relinquishing jurisdiction. The stay is granted because, and remains in place so long as, it is in the interests of justice to defer the determination of specific issues in the present proceedings. If at any stage there is good reason for the stay to be lifted or varied, the court will be able to do so. Moreover if in all the circumstances it is appropriate to make the stay conditional the court can do this. One aspect which may

have relevance in this regard is the value of the claims made by MYT against Swallowfalls, a question to which I now turn.

M. The value of MYT's claims

130. The first head of claim identified by MYT is for a relatively insignificant amount of money. It concerns instalment 6, and the allegation is that Swallowfalls delayed some three months in signing Stage Certificate 5. The direct loss to MYT is that interest was accruing under the 2010 Loan Agreement during the period of delay. The amount of interest would have been in the region of €5,000. In my view Mr Hofmeyr is right to say that there is ample evidence of delay by Swallowfalls, not least by cancelling the Progress Meeting planned for 15 December 2010. At the very least, there are serious questions which arise as to the role played by Swallowfalls' representatives during the period from 3 November 2010 onwards. Mr Fealy complains of the lack of a plea that if Swallowfalls representatives had been available the certificate would have been presented any earlier, but in my view the purport of the claim is perfectly clear. Moreover, as Mr Hofmeyr noted in reply, the issues concerning the role played by Swallowfalls' representatives are of wider significance. They may, in particular, be relevant on the questions of fact and evaluation which arise on MYT's other claims.

131. The second head of claim is that Swallowfalls instructed Fitz to carry out work, that Swallowfalls refused to pay for the work, and that Fitz stopped further work until paid. MYT say that in consequence it was unable to complete relevant milestones and deprived of €2.6m. In my view MYT plainly has an arguable case of instructions being given by Swallowfalls direct to Fitz outside the contractual procedures. Mr Fealy says that MYT ought to have paid the €616,000 demanded by Fitz, but in my view it is at least arguable that MYT could not be expected to do this until the contractual position had been regularised.

132. The third head of claim is that the scaffolding around the vessel had to be re-configured due to a change in local safety-in-the-workplace legislation, that Swallowfalls failed to agree VTC 72 in relation to the cost of the re-configuration or to pay the additional cost, and that work ceased as a result. Whether VTC 72 should have been agreed depends on the meaning of article 9.6 of the Construction Agreement. In my view MYT has at least an arguable contention that there was a change in the "laws ... applicable to the Vessel" within the meaning of that article. Mr Fealy urges that the claim must be limited to €245,000, this being the amount claimed by CSM, and that loss greater than this arose from MYT's failure to agree to pay that sum to CSM. To my mind, however, MYT's claims as to the consequences of Swallowfalls' failure to sign VTC 72 raise questions of fact and evaluation which cannot be resolved against MYT summarily.

133. The fourth head of claim is that Swallowfalls' exercise of the right to step in on 16 December 2011 (see section F8 above) was a breach of contract. This is the most far-reaching of MYT's claims. If it is sound, then MYT will have a strong case that, in breach of the implied terms in the 2010 Loan Agreement, Swallowfalls prevented MYT from completing the construction of the yacht and thereby achieving full payment of all that was due to Swallowfalls.

134. In my view MYT has an arguable case in this regard. Mr Fealy urged that MYT could not demonstrate that it would have been able to complete construction of the yacht.

This is a point on causation and quantum. Irrespective of which side has the burden of proof in that regard, however, it seems to me that a question of that kind is not one which the court can answer summarily: it must inevitably be a question of fact and evaluation. As to liability, the two crucial issues concern the validity of the notice given by Swallowfalls on 9 July 2011 (see section F7 above) and whether, if valid, it enables Swallowfalls to say that the step-in was permissible even though arbitration proceedings were pending. MYT has an arguable case on both these issues.

135. For these reasons I conclude that MYT has an arguable case that its claims against Swallowfalls give rise to breaches of the implied terms in the 2010 Loan Agreement such as would provide a complete answer to the present claim.

N. The calculation of interest

136. Issues arise both as to the precise figures for Euribor and as to whether compound interest was payable in the manner contended by Swallowfalls. In circumstances where, irrespective of these issues, MYT arguably has a complete answer to the present claim, I consider as a matter of case management that these issues are better left over for decision if and when they arise.

[There is no section O]

P. The application for an interim payment

137. The inevitable consequence of my conclusions in section M above is that Swallowfalls' application for an interim payment fails.

Q. The position of Mr Landers

138. The grant of a stay of the claim against MYT does not necessarily entail that such a stay must be granted of the claim against Mr Landers as guarantor. In *Deutsche Bank v Tongkah* [2011] EWHC 2251 (QB) Blair J refused to stay a claim against a guarantor, even though the claim against the principal debtor had been stayed – in that case, under section 9. Blair J noted in this regard what Thomas LJ had said about a degree of fragmentation (see section J above).

139. Whether there should be a case management stay of the claim against Mr Landers is in my view a pre-eminently fact sensitive question. Here the issues which Mr Landers would be entitled to argue in answer to the claim include all those that I have discussed in section M above. It is true, as Mr Fealy observes, that while MYT will be bound by findings of the arbitrators, Mr Landers is not a party to the arbitration and will not be bound by findings of the arbitrators. Nevertheless as a matter of practical reality Mr Hofmeyr is right to point out that the "ground-clearing will take place in arbitration." There is a great deal of ground to clear. The possibility that Mr Landers may seek to say that the court should arrive at a different conclusion from the arbitrators is in my view realistically to be regarded as no more than remote. The over-riding objective will best be met by the grant of a stay of the claim against Mr Landers on the same terms as the stay of the claim against MYT.

R. Conclusion

140. For the reasons given above I grant a stay of the proceedings against both defendants. I have in mind that the stay would be expressly worded so as to apply, in the absence of any contrary order, until the matters identified in the re-amended counterclaim (for which I would give permission) have been determined by the arbitral tribunal appointed under article 25 of the Construction Agreement. The parties are asked to seek to agree the formal terms of the order.