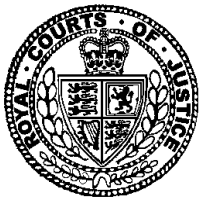

Neutral Citation Number: [2019] EWHC 2239 (QB)

Case No: HQ18X00935

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/08/2019

Before :

MR JUSTICE MARTIN SPENCER

- -

Between :

Captain Arshad Rashid	**Claimant**
- and -	
Oil Companies International Marine Forum	**Defendant**

- -
- -

Mr Matthew Parker (instructed by **Signature Litigation LLP**) for the **Claimant**
Mr Richard Leiper QC and Miss Natalie Connor
(instructed by **Oil Companies International Marine Forum**) for the **Defendant**

Hearing dates: 1, 2, 3, 4 and 29 July 2019

- -

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.

.....

MR JUSTICE MARTIN SPENCER

Mr Justice Martin Spencer :

Introduction

1. The Claimant, a qualified Master Mariner who spent 20 years at sea and captained various vessels including oil tankers, claims damages, a declaration and an injunction against the Defendant, Oil Companies International Marine Forum ("OCIMF") for removal of his accreditation as a ship inspector pursuant to its Ship Inspection Report ("SIRE") programme.

2. The removal of the Claimant's accreditation resulted from an investigation by OCIMF's compliance manager, an inquiry report submitted by him and a disciplinary hearing conducted on behalf of OCIMF on 25 October 2017. It is claimed that the procedures adopted by the Defendant, the hearing and the subsequent removal of the Claimant's accreditation was so flawed as to have amounted to a breach of natural justice entitling the Claimant to a declaration and an injunction. It is additionally claimed that a contract arose between the Claimant and the Defendant and that the removal of the Claimant's accreditation was carried out in such circumstances as to amount to a breach of contract entitling the Claimant to damages. For the Defendant, it is contended that OCIMF is equivalent to an unincorporated association and that the process which led to the removal of the Claimant's accreditation was a fair and lawful one, exercised in good faith and for the benefit of the association and that the disciplinary panel convened by OCIMF was well placed to evaluate the significance of the breaches of the rules and standards of behaviour which the panel found against the Claimant whereby removal of his accreditation was well within their discretionary area of judgment. The Defendant denies a contractual relationship with the Claimant.

The parties

3. The Claimant ("Captain Rashid") was born on 27 September 1960 in Lahore, Pakistan and for the first 20 years of his working life, he served at sea progressing to Captain. For the last nine years, he sailed on oil tankers worldwide.

4. In 2000, he left his job as Captain and served in various positions ashore as Port Captain, an Audit and Training Superintendent and a Senior Surveyor, working in Dubai and Singapore. He lived in Singapore for six years from 2002 to 2008, working for a number of different companies between 2002 and 2005.

5. In 2005, Captain Rashid joined a marine consultancy called Pac Marine Services, working as a ship inspector for Pac Marine's clients. Pac Marine arranged for him to undertake the necessary training and examinations to become an accredited SIRE inspector. Captain Rashid became an accredited category 1 SIRE inspector on 15 February 2006. Thereafter, the Claimant worked principally as an accredited SIRE inspector of oil tankers and he estimates that in 12 years of practice as a SIRE inspector he carried out over 1,100 inspections on oil, chemical and gas tankers.

6. In 2008, the Claimant and his wife moved from Singapore to Canada where they settled. The Claimant became a Canadian citizen in 2015. He continued to work for Pac Marine until 2011 when he and his wife set-up a company called Seashore Solutions Limited (see further paragraph 8 below). This was the corporate vehicle

through which the Claimant provided his services as a ship inspector: in due course, the function of Seashore was expanded to include the provision of ship inspections through other inspectors whether salaried or paid as sub-contractors. It should also be mentioned that in addition to carrying out inspections of oil tankers on behalf of OCIMF members, the Claimant also carried out inspections of vessels on behalf of the Chemical Distribution Institute ("CDI") and the removal of his accreditation has not prevented him from continuing to carry out such inspections although he argues that the effect of the removal of his accreditation on his reputation has had a knock-on effect on his CDI work.

7. As part of his OCIMF accreditation, the Claimant undertook regular refresher courses including on 16 June 2011, 2 June 2014 and 17 June 2016. In addition, OCIMF carried out audited inspections of the Claimant (in common with its other accredited inspectors) on a regular basis. Audited inspections were carried out on 15 February 2006, 22 February 2009, 4 November 2011 and 18 September 2014 with no criticisms raised of the Claimant's practices.

8. Seashore Solutions Limited is a company incorporated in Canada with two shareholders, the Claimant and his wife Neelma with the Claimant as President and Neelma as Director. Neelma's role in the company is on the administrative side, keeping records, booking the Claimant's travel, and liaising with the oil companies and chemical companies in relation to the inspection of their vessels. From the time of Seashore's incorporation in March 2011, all money earned by the Claimant was paid to Seashore and the Claimant's own income was derived from the salary paid by Seashore and the declaration of an annual dividend agreed at the Annual "Meeting of Directors". I have not, however, seen the minutes of those meetings.

9. The Claimant says that in his 12 years of practice as a SIRE inspector, to the best of his knowledge there have never been any complaints against him or his practice nor had there been any issues raised in respect of any of the ships which he had inspected, following his inspections. He claims to have built a reputation in the industry as a thorough, honest and reliable SIRE inspector.

OCIMF

10. OCIMF is a voluntary association of oil companies comprising around 109 companies worldwide, and includes all the oil majors and most national oil companies. It is incorporated in Bermuda and registered as a foreign company in England and Wales.

11. OCIMF operates the SIRE programme which comprises a database of information about oil tankers and barges that is utilised by oil majors and prospective charterers. The information in the database is based on inspection reports carried out by ship inspectors who are accredited by OCIMF. OCIMF was formed in 1970 following a number of high profile marine pollution incidents and its mission is to drive up standards in safety and environmental responsibility within the tanker branch of the shipping industry. It fulfils this mission by providing guidance and expertise to its membership and by contributing to international shipping regulation through its consultative status at the International Maritime Organisation. It operates through a series of committees and working groups and it has a small secretariat of 22 staff based in London.

12. The SIRE programme is one of OCIMF's longest standing programmes and, through it, information about vessels that can transport oil and other hydrocarbons is gathered and shared to enable informed vetting decisions to be made by those seeking to charter such vessels and for assurance purposes. A member of OCIMF may commission a report from an inspector on a particular vessel and the report is then published on OCIMF's database.

13. SIRE inspections are extremely detailed and follow a comprehensive standard form template contained in OCIMF's Vessel Inspection Questionnaire ("VIQ"). In addition, OCIMF publish SIRE Inspector Training and Accreditation Guidelines ("the Guidelines") which contain rules and guidelines which apply to every inspection. Thus, the system is such that if an accredited inspector follows the VIQ and the Guidelines, OCIMF's members can be reassured as to the integrity and quality of the reports on each vessel and rely thereon in deciding whether to charter a vessel. Vessel owners, knowing that their vessels will be rigorously inspected in accordance with the VIQ and Guidelines, are thereby incentivised to improve and maintain the standards and quality of their vessels, including, and perhaps especially, in relation to safety. In the trial, the relationship between the various parties including the inspectors, OCIMF, the oil companies and the vessel owners and charterers was described as "symbiotic".

14. It is clear that, in relation to the SIRE programme and database, the role of the inspectors is critical. As Captain McGroggan, OCIMF's Compliance Manager, told me, the SIRE inspectors are both the programme's greatest asset but also potentially its weakest link. The system depends upon their integrity, their compliance with the Guidelines and VIQ and their general ethical approach to the task of inspection. If corners are cut in relation to the inspections, or if false information is included in the VIQ, this has the potential to undermine the whole system because complete trust in the database lies at the heart of the system. Furthermore, any less than complete and rigorous inspection has the potential to compromise the safety of the vessel and its crew and the general public, with potentially disastrous environmental consequences. Thus, as it seems to me, OCIMF has the right to expect its inspectors to abide not just by the letter but also by the spirit of its Guidelines. As was submitted to me on behalf of the Defendant, one of the most important training sessions for inspectors at every stage of accreditation concerns ethics. It was said:

> "This is because inspectors work alone, their names do not appear on the final published reports and there are virtually no checks on the quality and accuracy of their inspections. They may visit ships in any part of the world, conduct the inspection and write up their reports entirely without supervision. As a result, the utmost trust is placed in them and the system as a whole depends on that trust being respected.
>
> … given the confidence that SIRE subscribers place in OCIMF to operate an effective programme and the potential significance for the industry of an accurate SIRE report, the total objectivity, diligence and integrity of SIRE inspectors is absolutely critical."

In consequence, OCIMF understandably takes breaches of its ethical rules very seriously. The Guidelines refer to the disciplinary process that will be followed in circumstances where an investigation reveals a case for an inspector to answer. The Guidelines make it clear that a potential sanction in any case involving ethical misconduct is permanent withdrawal of SIRE accreditation.

The SIRE Inspector Training and Accreditation Guidelines

15. The SIRE (Ship Inspection and Reporting) Guidelines are published by OCIMF and constitute the basis of the relationship between OCIMF and its accredited inspectors of, amongst other vessels, oil tankers.

16. The following sections of the SIRE Guidelines are relevant for the purposes of this claim:

> "1.3 Ethics
> The integrity of OCIMF and its Members remains paramount and the SIRE programme requires all participants to share, retain and promote such value. SIRE inspectors are required to be Accredited prior to their involvement, to demonstrate their suitability to inspect and provide reports. Their ongoing performance and positive conclusion at subsequent re-accreditation courses will ensure they are worthy of retaining such accreditation. A panel formed of members of the SIRE Focus Group, will be responsible for performance standards. This panel has the authority to issue disciplinary measures ranging from personal warnings through to removal of the accreditation where the performance of the Inspector warrants such control.
>
> Inspectors who are accredited to the SIRE Programme must observe the highest standards of professional conduct at all times. They must be completely honest and impartial in their relationships with Vessel Operators' personnel, Masters, the vessels' crew with whom they come into contact and with other third parties who may be associated with the inspected vessels. Inspections must be conducted with scrupulous regard to uphold the integrity of the SIRE Programme and inspection reports must be completely unbiased.
>
> Accreditation is awarded by OCIMF and held by an Inspector on behalf of OCIMF. OCIMF reserves the right to review such accreditation when it is shown that an Inspector is not retaining the highest standards of professional conduct (see 2.6.5).
>
> 1.13 **Subscription**
>
> From the 1st January 2012 all Category 1 and 2 inspectors, with the exception of OCIMF Accredited Auditing Inspectors, shall be liable to pay an annual subscription fee as determined by the OCIMF Director. This annual subscription fee will cover all costs associated with **routine** three yearly re-auditing and does not cover the cost of audits for new inspectors.
>
> 2.6.5 **Withdrawal of Accreditation**
>
> Accreditation is awarded by OCIMF and held by an Inspector on behalf of OCIMF. OCIMF reserves the right to review such accreditation when it is shown that an Inspector is not retaining the highest standards of professional conduct.
> The SIRE Focus Group under the direction of the General Purposes Committee is responsible for determining the standards of professional conduct to ensure the reputation and integrity of OCIMF is enhanced and retained.

It is possible in certain circumstances for an Inspector's Accreditation to be either temporarily or permanently withdrawn. These may include, but not be limited to:

2.6.5.1 **Unacceptable conduct during the course of an inspection**

It is essential that the Inspector's conduct during the course of an inspection sets an exemplary example to the Master, officers and crew. As a representative of the Submitting Company and OCIMF, the Inspector must at all times maintain a professional and cordial relationship with the Master, Officers and Ratings and must respect the authority of the Master.
The Inspector must fully respect the content of 1.3 Inspector Ethics.
…"

The basis upon which an Inspector's accreditation may be withdrawn is then set out in eight sub-headings as follows:

- Unacceptable conduct during the course of an inspection
- Submission of unsatisfactory reports
- Failure to submit a specific number of reports
- Failing an auditing review
- Failure to attend a refresher course
- Failure to undertake a periodic audit
- Unacceptable relationship with one or more vessel operator
- Submission of two reports of the same vessel by the same Inspector.

There is then set out a tabular summary of issues and potential recourse as follows:

Issue	**Potential Recourse**
2.6.5.1 Unacceptable Conduct	• Verbal caution by Submitting Member • Written caution by Submitting Member • Temporary withdrawal of Accreditation • Permanent withdrawal of Accreditation
2.6.5.2 Unsatisfactory reports	• Submitting Member to review or withdraw the report • Written caution, issued by Submitting Member, to seek improvement • Monitoring of future reports by a Submitting Member • Permanent withdrawal of Accreditation
2.6.5.3 Failure to provide the required number of reports	• Temporary withdrawal of Accreditation • Permanent withdrawal of Accreditation
2.6.5.4 Failure of audit	• Temporary withdrawal of Accreditation • Appeal by Inspector • Permanent withdrawal of Accreditation
2.6.5.5 Failure to attend a Refresher course	• Temporary withdrawal of Accreditation • Permanent withdrawal of Accreditation
2.6.5.6 Failure to undertake a Periodic Audit	• Permanent withdrawal of Accreditation
2.6.5.7 Unacceptable relationship with an Operator	• Permanent withdrawal of Accreditation
2.6.5.8 Submission of 2 reports on	• Temporary withdrawal of Accreditation

the same vessel	• Submitting Member notified • Investigation Panel • Permanent withdrawal of Accreditation

17. The SIRE Guidelines then continue:

> "2.6.6 Investigation Panel Hearings
> Investigations into any of the above-listed situations may be initiated by the OCIMF Compliance Manager in order to determine the facts associated with a particular case and whether there is sufficient evidence to convene the SIRE Focus Group Disciplinary Committee to consider the facts.
>
> 2.6.7 SIRE Focus Group Disciplinary Committee
>
> A Committee of at least 3 representatives of the SIRE Focus Group will be formed. This Committee will review the evidence in order to reach a decision as to what action should be taken. The [Compliance Manager] has the right to attend the hearing and present details of the alleged infringement. The Inspector may attend the hearing and be accompanied at the hearing by a representative and must submit any evidence that is intended to be considered at the hearing a minimum of two weeks before the hearing date. If the Inspector is unable to attend the hearing, the Inspector may participate in the hearing by the use of conference telephone call. The Committee has the authority to permanently disqualify an Inspector, to disqualify an Inspector for a specific period of time, to issue a warning letter of reprimand, or to make a decision to dismiss the case.
>
> If an Inspector requests an appeal, the sanctions imposed upon the Inspector shall remain in force until the appeal has taken place and a final decision reached. All costs associated with the attendance at the hearing will be for the Inspector's account. The location and date of the hearing will be determined by the OCIMF secretariat."

Section 2.7 of the Guidelines then deals with appeals.

Vessel Inspection Questionnaires

18. OCIMF also publish detailed guidance for Inspectors in relation to the inspection of oil tankers and other vessels, and the completion of the Vessel Inspection Questionnaires. At the relevant time, the guidance in force was VIQ6 published on 1 February 2016. This is a comprehensive document, running to 163 pages, setting out all the questions in the VIQ with guidance in respect of most of them. For example, in Chapter 1 dealing with General Information, questions 1.9 and 1.10 of the questionnaire deal with, respectively, the date and time that the Inspector boarded the vessel and the date and time the Inspector departed the vessel. After question 1.10, the guidance states: "If the inspection took place over two or more days, in two or more sessions, or was carried out by more than one inspector, record the arrival and departure details in Comments." Inspectors would be expected to comply strictly with the requirements of the VIQ guidance, as the accuracy and integrity of the inspection report would depend thereon.

19. The VIQ is completed by the Inspector using the VIQ computer programme, which ensures that each question is answered and through which the completed report is

electronically transmitted to the commissioning Principal. The Claimant indicated in his evidence that it would take approximately 3 hours to complete the report (this is separate from the time taken to carry out the inspection). Section 3 of the introduction to the VIQ Guidance deals with using the VIQs and provides:

> "The inspection questionnaires used in this programme contain a series of questions related to safety and pollution prevention applicable to the type of vessel that is inspected.
>
> Each chapter contains a series of questions to be answered by the inspector. Questions ***may*** be accompanied by guidance, namely:
>
> 1. Guidance notes to inspectors;
> 2. Reference source(s) citing regulation(s) or industry guidelines pertaining to questions; and
> 3 An indicator to identify issues when an inspector comment is mandatory.
>
> The above-mentioned guidance, regulatory/industry references amplify the questions and these are provided to assist the inspector to answer the questions.
>
> If the guidance and references lead the inspector to conclude that the questions should be answered positively, the box "**Yes**" in the VIQ computer programme should be checked. On the other hand, if the guidance and any reference sources indicate to the inspector that the questions should be answered negatively, the "**No**" box should be checked. [A few questions do not have guidance, in such cases, the Inspector is required to make an unaided answer.] Where appropriate, the "**Not seen**" or "**Not applicable**" box should be ticked.
>
> The inspector ***must*** respond to all the questions appropriate to the type of vessel being inspected. ***Failure to do this will mean that the inspection report cannot be transmitted to the SIRE Internet site for processing by the principal who commissioned the inspection.***" …

20. Section 4 of the Introduction to the VIQ Guidance deals with the conduct of inspections. Section 4.1 contains Mandatory Inspection Requirements, with section 4.1.1 setting out a number of General Requirements. Of particular relevance are items 6 and 7 of the general requirements:

> "6. The guide time for an inspection as specified in 4.3.4 below is 8-10 hours and as a guide the documentation checks should not exceed 3 hours, and this time should be used to conduct the inspection of the vessel, compile the observation list if appropriate, and conduct the close out meeting. The completion of the report using the report editor software before the inspector leaves the vessel must not occur as this reduces the time that the inspector will spend conducting the physical inspection of the vessel. As specified in 4.1.1.5 above, the inspector must leave the vessel on completion of the inspection and must not remain on board to complete entering the report details into the report editor.
>
> 7. The guide time as specified below in 4.3.4 is 8-10 hours, however the actual time to conduct the inspection will be greater than this taking into

account travel time to and from the vessel. All inspectors should take into account their own rest hours and fatigue levels when conducting inspections. 'Back to back' inspections are discouraged and inspectors should complete the report for one vessel before commencing an inspection on another vessel."

21. Section 4.3 contains 'Other Inspection Requirements" including the following:

> 1. Unless authorised by the OCIMF Inspecting member and agreed by the vessel's operator inspections should not take place at night.
> …
> 4. The scope of a SIRE inspection is expected to enable an inspection to be accomplished within an 8-10 hour period. Inspectors must take into account the hours of rest requirements that must be observed and ensure that the SIRE inspection does not interfere with these."

This latter requirement can be explained by reference to section 3.3 of the VIQ which asks: "Do all personnel maintain hours of rest records and are the hours of rest in compliance with MLC or STCW requirements." Thus, it is clear that the crew need "hours of rest" for, among others, safety reasons and it would be unfortunate, to say the least, if the inspection itself interfered with the crew's hours of rest requirements.

The events leading to the removal of the Claimant's accreditation

22. On 27 July 2017, OCIMF's compliance manager, Captain McGroggan sent to the Claimant an email informing him that OCIMF had opened an enquiry "with regards to activities surrounding accompanied inspections facilitated by you for Excelerate Energy LP". The nature of the enquiry was that the Claimant had arranged for his inspections to be accompanied by two applicants for SIRE accreditation without first informing the member companies that had commissioned the SIRE inspections. The email asked the Claimant to provide a written response to four questions which implied a conflict of interest, the failure to have made a formal request to be accompanied and breach of confidence.

23. Before the Claimant could respond to the email of 27 July, Captain McGroggan sent a further email to him on 28 July 2017 stating that, as part of the enquiry process which had been started the previous day, a review of his profile had been undertaken and "a number of anomalies appear in your SIRE inspection schedule that require explanation." The email then set out a table of "some" of the anomalies and asked for comment as appropriate to provide clarity in relation to the travel carried out and the inspections conducted. There was then a table setting out details of the inspections of certain vessels:
    (1) the Maran Helen for a member company, ENOC, in Philadelphia on 28 June 2017 ending at 17:00 hours, followed by The Algosea in Nanticoke commencing at 21:00 on 28 June 2017 and ending the following day, 29 June 2017 at 10:30 followed by The Stolt Commitment in Savannah starting at 15:30 hours on 29 June 2017. The query related to how the Claimant could have got from Philadelphia to Nanticoke in the time indicated by comparison to the times of the inspections. Captain McGroggan suggested that the travel scenario was not possible given the travel time between the SIRE inspections.
    (2) Queries were also raised in relation to inspections of the British Cormorant and Minerva Julie on 14 January 2017 whereby the travel scenario was

regarded as not possible together with an inspection of the Energy Champion on 15 January 2017;

(3) Inspections of the Maersk Murotsu and Maersk Mizushima on, respectively, 20 December 2016 and 21 December 2016 where again the travel times were considered not possible. The email suggested that between 20 December 2016 and 22 December 2016 Captain Rashid carried out four SIRE inspections which involved a "best case scenario travel time" which was not achievable, with travel intervals which were not logically possible.

24. This email clearly challenged the Claimant's integrity as it was being alleged that false inspection times had been submitted. On 31 July 2017 Captain Rashid responded:

> "Through this message you are challenging my integrity, I find your actions amounting to prima facie slander, harassment, baseless allegations and assumptions. I am retaining a lawyer, you'll hear back from us, I would suggest you don't take any further steps in the meantime."

On the same day the Claimant retained Mr Christopher Somerville of Affleck Greene McMurtry LLP, a Canadian firm of lawyers, to represent him.

25. On 31 July 2017 Mr Somerville sent an email to Captain McGroggan introducing himself and the following day, 1 August 2017, Mr Somerville telephoned Captain McGroggan but Captain McGroggan indicated that he could not speak to Mr Somerville, who would need to speak OCIMF's General Counsel, Phillip Pascoe. Mr Somerville sent Mr Pascoe an email the same day. Mr Pascoe responded on 2 August 2017 indicating that he would call Mr Somerville later that day when he was available and that, in the meantime, Captain McGroggan would continue his investigation. There was then a call that afternoon between Mr Pascoe and Mr Somerville when Mr Pascoe explained the disciplinary process of OCIMF.

26. On 9 August 2017, Mr Somerville sent to Captain McGroggan a letter giving a full explanation of Captain Rashid's travel logistics in relation to each of the inspections which had been set out in Captain McGroggan's email of 28 July. The letter was accompanied by relevant documents including travel booking confirmations and log pages from the vessels documenting the boarding and departing times of the Claimant. Mr Somerville explained that Captain Rashid would not travel with checked baggage and, being a NEXUS card holder, enjoyed certain benefits including expedited clearance through security. Mr Somerville indicated that Captain Rashid and Seashore Solutions Limited were prepared to provide their full co-operation in connection with the enquiry.

27. On 14 August 2017, Captain McGroggan wrote asking for additional information and Mr Somerville responded on 16 August giving further explanations: he included, for example, as an attachment, a copy of confirmation from Air Canada of the flights taken.

28. The information and explanations provided by the Claimant did not satisfy Captain McGroggan and, on 25 September 2017, he sent an email to the Claimant indicating that OCIMF had determined to assemble an SFG (SIRE Focus Group) disciplinary committee. The email attached his OCIMF Inquiry Report which included embedded documentation in the appendices. The email asked Captain Rashid to respond to the

report with specific detail in sufficient time for review prior to the hearing which was to take place on 20 October 2017 in London (later changed to 25 October 2017).

29. The Inquiry Report indicated that the Inquiry had focused on four separate time periods involving 13 individual SIRE reports/vessel inspections. The Inquiry Report set out the following allegations:

> "1. Inspector has coerced a vessel crew to falsify log entries concerning Inspector's time spent on board carrying out a SIRE inspection at least once in the previous 12 months according to a vessel operator provided statement.
>
> 2. Inspector has misrepresented the time spent on board to complete at least four SIRE inspections within the last 12 months. The actual amount of time spent on board these vessels was not sufficient for an Inspector to have satisfactorily completed a SIRE inspection in accordance to the VIQ guidance and OCIMF inspector training. OCIMF alleges that all four of these inspections have been falsified.
>
> 3. The Inspector has failed to follow written guidance from two OCIMF submitting member companies concerning the arrangement of accompanied inspections for training purposes.
>
> 4. The Inspector has provided instruction to at least one applicant Inspector on a method that can be used to deceive submitting members and the SIRE programme to submit falsified SIRE reports."

The Inquiry Report drew specific attention to sections 1.3, 1.7, 2.6.5.1 and 2.6.5.2 of the SIRE inspector training and accreditation guidelines (see paragraph 16 above).

30. It may be of note that no further communication between Captain McGroggan and Mr Somerville had occurred since 16 August 2017 before the Inquiry Report was sent on 25 September 2017 and it was decided to convene the disciplinary committee. The allegations clearly raised the stakes significantly: not only was Captain Rashid's integrity impugned, but now he was accused of coercion of a crewman in order to falsify log entries and the corruption of a trainee inspector by teaching him how to deceive submitting members and to falsify SIRE reports. These are as serious allegations as can be made against an inspector in whom absolute trust and confidence must reside if the integrity of the SIRE inspection programme is to be maintained. If untrue, one could understand the anger and frustration which an inspector would feel to have had such accusations made against him.

31. On 2 October 2017, the Claimant instructed an English firm of solicitors, Signature Litigation LLP ("SL"), to represent him in relation to the disciplinary proceedings. SL acted through Josh Wong and Romina Chatzipapafotiou. On 10 October 2017, SL wrote to Captain McGroggan introducing themselves, indicating Captain Rashid would attend the hearing and wished to participate fully in the disciplinary process and seeking further information concerning the disciplinary process, the scope of the enquiry, disclosure of further documentation and an extension of time for Captain Rashid to prepare his response to the allegations.

32. In response, Mr Pascoe wrote on 13 October 2017 answering the matters raised. He indicated that OCIMF would have no objection to Captain Rashid being accompanied by legal counsel at the hearing saying:

> "OCIMF would encourage Captain Rashid to restrict his legal assistance to one person at the hearing. The legal representative may be present throughout the hearing but may not address the disciplinary committee. OCIMF will be represented by Captain McGroggan who will present evidence in support of the allegations. I will attend the hearing to assist the committee on process if requested but will not engage in any part of their deliberations."

Mr Pascoe stated that the burden of proof would be the balance of probabilities although the disciplinary committee would expect the evidence to be commensurate with the seriousness of the conduct alleged. Perhaps most importantly, Mr Pascoe indicated that the scope of the disciplinary hearing would be restricted to two allegations in respect of four inspections. The inspections in question were those of

- the Maersk Murotsu at Point Tupper, Nova Scotia, on 20 December 2016,
- the Minerva Julie at Montreal on 14 January 2017,
- the Maran Helen at Fort Mifflin, Philadelphia on 28 June 2017 and
- the Algosea at Nanticoke, Ontario, on 28 June 2017.

In respect of each of Captain Rashid's SIRE reports the allegation would be that Captain Rashid misrepresented the amount of time he spent on board each vessel to conduct his inspection, in each case it being alleged that

1. He spent less time on board conducting his inspection than he had claimed in the SIRE report.
2. The time actually spent on board was insufficient to conduct a proper SIRE inspection.

Although Mr Pascoe did not repeat what had been said in the Inquiry Report, namely "OCIMF alleges that all four of these inspections have been falsified" nor was the allegation of falsification abandoned and the clear implication was that OCIMF's case would still be that the times recorded in the SIRE reports were known to have been inaccurate when entered. Captain Rashid would, after all, have known how long he had spent on board and the VIQ was being filled in within a short time of him disembarking. Mr Pascoe indicated that the hearing would be on 25 October 2017 and any written submissions were to be provided by close of business on 18 October 2017.

33. The effect of Mr Pascoe's email of 13 October 2017 was that the serious accusations of coercion of a crew member and corruption of a trainee inspector were not being pursued, along with the less serious allegation of failing to follow OCIMF's guidance on accompanied inspections. The two allegations being proceeded with were the ones contained within the second of the allegations in the Inquiry report (see paragraph 29 above), split into two. As stated, the residual allegation remained serious: the allegation contained in the Inquiry report had included the words "OCIMF alleges that all four of these inspections have been falsified," this was not withdrawn and

indicated that it remained OCIMF's position that the misstating of the times was not the result of an error but was deliberate.

34. As may be imagined, given the significant change of position represented by the email of 13 October, SL were concerned to clarify the position and ensure that there was no misunderstanding. They also wanted to do all they could to ensure that the disciplinary hearing was fair given that significant allegations which had been contained in the Inquiry Report were not being pursued. Mr Wong wrote on 17 October 2017 addressing a number of matters:
    (1) First, he asked OCIMF to reconsider its decision not to allow legal representation, confined to "making submissions on behalf of Captain Rashid where appropriate and to clarify or object to questions as required."
    (2) Second, he asked for confirmation that allegations 1, 3 and 4 in the Inquiry report were no longer being pursued.
    (3) Third, he addressed the potential prejudice to Captain Rashid from the Committee being "asked to review Captain McGroggan's Inquiry Report (he did not know, at that stage, that the Report had already been sent in full to each of the Committee members, including to Captain Ashby on 24 September 2017, the day before it was sent to the Claimant). He said:

> "Our concern is that the report makes reference to a number of assertions that are not being pursued, but because they are set out in the report they serve to prejudice the reader against our client in circumstances where our client does not have the opportunity to respond. Please confirm that at the outset of the Hearing, it will be made clear to the Committee exactly which allegations are to be dealt with by the Committee and they will be expressly requested not to draw any adverse inferences against our client in respect of any allegations that are no longer pursued. The specific allegations, not being pursued, <u>which we consider are unfounded</u> and prejudicial to our client are: …" [emphasis added]

The relevant allegations, including 1, 3 and 4 in the Inquiry Report are then set out. The reason I have emphasised the words "and which we consider are unfounded" are because, in my view, Mr Wong could have gone further and asked OCIMF to accept before the committee that OCIMF acknowledged that the other allegations were unfounded for the purposes of the Inquiry. This is because the unpursued allegations were so potentially serious and prejudicial that, arguably, they could only fairly be known by the Committee to have been made if the Committee was also informed that they were accepted to be unfounded. Otherwise, a mist of suspicion would be left hovering over Captain Rashid which potentially contaminated the Committee's consideration of the extant allegations.

35. Mr Pascoe replied on 18 October confirming that allegations 1, 3 and 4 (see paragraph 29 above) would not be pursued, but noting that, in relation to allegation 1, given that the Disciplinary Committee would lead the discussion, they might very well ask about times entered into the vessels' logs. This was fair enough: the times entered into the vessels' logs were relevant to the allegation being pursued (the original allegation 2) and the important thing was that OCIMF was no longer alleging coercion of a crew member. Mr Pascoe then said that the Committee would be asked to review Captain

McGroggan's investigation report together with attachments but OCIMF would provide a summary of the arguments, reflecting the scope of the Inquiry as set out in the email of 13 October and would confirm the scope of the Inquiry at the outset. Mr Pascoe further confirmed that the Committee would be asked not to draw adverse inferences. Nor would Captain McGroggan be suggesting that the documentation which Mr Somerville had sent in response to the original allegations had been intended to mislead. On the same day, SL served on Mr Pascoe the Claimant's witness statement with an exhibit and a witness statement from Tariq Awan together with an exhibit. Mr Awan was the Applicant Inspector who had accompanied Captain Rashid on his inspection of the Maran Hellen in Philadelphia. He confirmed picking Captain Rashid up from the airport at 8:45, driving him to the vessel which they boarded at 09:00 and from which they disembarked at 16:00

36. On 20 October 2017, OCIMF sent to SL further information including an outline of the allegations made against him. In respect of each of the four inspections referred to, the documents set out the onboard attendance times which Captain Rashid had submitted and the alternative boarding and departure times which OCIMF had obtained from other sources, setting out the points made against Captain Rashid in respect of each inspection. On 23 October 2017, SL sent written submissions for the hearing and a travel itinerary was attached.

The hearing of the disciplinary committee

37. The disciplinary committee hearing took place in London before a panel of three independent industry experts, Captain Timothy Ashby (BP and Chairman of the Disciplinary Committee), Captain Sach Sharma (Statoil) and Captain Patrick Mathy (Total). Captain Rashid was accompanied by Mr Wong of SL who was not generally allowed to address the disciplinary committee but who was allowed to make a statement at the end of the process, to which I shall refer in paragraph 40 below. Miss Chatzipapafotiou of SL also attended simply in order to take a note. A typed version of the note is at page 429 of trial bundle C.

38. After an initial brief opening statement from Captain Rashid, Captain McGroggan opened the hearing as follows:

> "I ask the SIRE Focus group to review the allegations against Captain Rashid which have been selected to be presented. OCIMF has not withdrawn any allegation. The four SIRE reports in question contain information which conflicts with other information. OCIMF allege that Captains Rashid did not spend sufficient time onboard each vessel relating to these SIRE reports. Captain Rashid's counsel have requested that we ask the Focusi Group that no adverse inferences be drawn from any matter in the Inquiry report outside of the four inspections in question.
>
> I sent Captain Rashid a spreadsheet of inspections on 28 July. Captain Rashid was less than forthcoming in his response and slow to include documents relating to his SIRE activity. The documentation he did provide failed to provide any evidence. The travel itinerary was only sent to me yesterday and fails to prove his travel arrangements. There are substantial

> inconsistencies between his travel arrangements and the terminal logs. OCIMF considers it remarkable that four oil Terminals fail to make records in accordance with US legislation."

I would make two comments about this opening statement. First, the words "OCIMF has not withdrawn any allegation" would only seek to enhance the mist of suspicion to which I refer in paragraph 34 above. Secondly, to say that "the Claimant's counsel had requested" that they ask the Focus Group not to draw adverse inferences had the effect of distancing OCIMF and himself from that request by saying, in effect, "it comes from them, not from us." In my view, this was not loyal to the assurance which Mr Pascoe had given SL.

39. Captain McGroggan then presented the case against Captain Rashid reviewing each of the inspections in turn. As each inspection was presented, Captain Ashby asked Captain Rashid for his comments. It is clear that, despite the assurance contained in the email of 13 October (see paragraph 32 above) and the outline of allegations sent on 20 October (which was consistent with the parameters set out on 13 October), the panel's questions were allowed to range across a number of matters which were outside those parameters. The questions included matters such as

    - the hours of rest which he had (Capt Ashby asked: "So hours of work, hours of rest. How do you question staff members on the vessel on rest when you work 24 hours non-stop?" and, later: "18 hours continuous working I feel you are putting yourself in danger")
    - The conducting of back-to-back inspections;
    - The failure to report that the inspection of The Algosea was split in 2 (Captain Mathy, a Committee Member, asked: "In the SIRE report you mention the time for the inspection [of the Algosea] duration [is] 7.30. In the SIRE VIQ it states that [if] you split the inspection in two, you must state it on the report, the reasons and the times, but you did not.").

40. Towards the end of the hearing, Captain Ashby said that the committee would take a break to discuss and deliberate and asked Captain Rashid if he wanted to add anything. Captain Rashid referred to the scope of the enquiry and the allegations against him at page 22 of the Committee's bundle. Captain Ashby then said this:

> "My role as chairman is to make sure that the integrity of SIRE is upheld. We will deliberate and anything which does not accord to OCIMF standard will be discussed together with everything else we think is relevant. This includes the recording of time on SIRE reports, quality of reports and everything to do with the SIRE system."

It was in response to this that Mr Wong made a statement to the committee as follows:

> "The allegations made at the beginning of the enquiry have been reduced and are now as set out in OCIMF's letter at page 22 of the bundle. Captain Rashid has only addressed these remaining allegations. Our concern is that there have been questions raised during the course of the hearing in relation to matters not mentioned in the allegations, such as the standard of reports, number of inspections per year and the need to take

> breaks. At the moment no allegations have been made in respect to these matters. Without appropriate allegations [having] been made Captain Rashid is unable to respond to such allegations. We therefore ask the committee to only make decisions in relation to the specific allegations that have been made in order to ensure matters are dealt with fairly."

At that stage, the committee adjourned to make their deliberations, the time being 15:30 and the hearing having lasted two hours. I regard it as significant that Mr Wong felt constrained to draw to the Committee's attention the way in which he perceived the Inquiry was going awry by stepping outside the agreed parameters: his instinct was that the process was in danger of becoming unfair.

41. The committee returned at 16:10 having deliberated for 40 minutes and Captain Ashby said this:

> "On behalf of the committee we would like to thank you for coming. We have reviewed the evidence and considered the discussions and reached a decision regarding the outcome. We recommend permanent withdrawal of accreditation. The time spent on ships was not within guidelines of eight to ten hours. Being on a vessel before an inspection is no defence to do a shorter inspection. Hours of work and hours of rest from the schedules seems that you are putting yourself at risk and the reputation of OCIMF. It affects the quality of inspections carrying out three to four back to back. There has been admitted that for the Maran Hellen and Algosea, the times were not properly recorded on the reports and were definitely not recorded properly. The time spent on the other vessels it is inconclusive if they are accurate or not. Our recommendation to [Captain McGroggan] is that OCIMF permanently withdraw accreditation. He will write next week and give the decision in writing."

42. On 30 October 2017, OCIMF sent to Captain Rashid its written reasons for the decision. The letter stated:

> "In addition to the determined points below there were discrepancies between the recording of times in your published SIRE reports and those recorded by port/terminal officials and vessel crews. The SFG disciplinary committee, after seeing and hearing all the evidence, concluded that regardless of which times were correct there was sufficient other evidence to reach these determinations.
>
> The SFG disciplinary committee has made these determinations:
>
> - Time spent on board vessels to carry out the four presented SIRE inspections fails to meet the OCIMF guidelines of eight to ten hours.
>
> - Flights and travel arranged and planned by you would have allowed for about six hours to carry out the

inspection to produce SIRE report DCPL-8627-6818-4986 [The Maran Hellen].

- The time recorded by you for departing the vessel in SIRE report DCPL-8627-6818-4986 was confirmed by you as being incorrect.

- SIRE report DCMK-7304-9204-4990 [The Algosea] did not record the fact stated by you at the hearing that the inspection was carried out in two parts.

- You made a statement to the committee that you do not need to spend as much time on board vessels you have previously inspected to carry out a successive SIRE inspection. This practice is against the principles of SIRE which are that every vessel inspection should be treated as if it is a first inspection.

- In examining the time periods around the four presented inspections you gave evidence to the committee indicating that you have repeatedly conducted three or four inspections back to back with minimal rest time (six hours or less) between each inspection. This practice has a number of consequences that concern the committee, most important of which are:

    - Risk to your own safety and health

    - Risk to third parties while driving personal or hired cars on public roads

    - Risk to the vessels you inspect

    - Risk to OCIMF reputation

    - Fatigue affecting the quality of inspections carried out

    - Inability to write accurate reports.

In consideration of the above determinations the SFG disciplinary committee has instructed OCIMF to permanently withdraw your accreditation.

In reaching this decision the committee considered all information presented. This decision has been based solely on the evidence and explanations given by yourself as it relates to the four inspections detailed in the OCIMF's outline of allegations."

43. On 9 November 2017, Captain Rashid submitted to OCIMF grounds of appeal, but the appeal was summarily rejected on 7 December 2017 by Captain Andrew Cassels, OCIMF's director. One of the grounds of appeal concerned the fairness of the disciplinary process by reference to the fact that the committee raised questions of Captain Rashid during the hearing in relation to matters which were not mentioned in

the allegations against him such as the standard of his reports, the number of inspections he carried out per year and the extent of rest periods during and between inspections. This was despite no allegations having been made against him in relation to those matters in the course of the enquiry before the hearing. In response, Captain Cassels said, among other things:

> "The panel of experts are not bound to restrict their lines of enquiry as this is a professional enquiry. They have a duty to apply their knowledge and experience to question the Inspector so that they understand his management and conduct during the period in question."

It seems to me that this is an issue which lies at the heart of this claim.

44. Another of the accreditation programmes run by OCIMF is the Offshore Vessel Inspection Database ("OVID") and the Claimant was also accredited under this programme. On 17 January 2018, OCIMF emailed the Claimant to inform him that they had suspended his OVID inspector's account for the following reason: "Inspector accreditation permanently withdrawn for misconduct within another OCIMF Programme."

The proceedings brought by the Claimant against the Defendant

45. A Claim Form was issued on 12 March 2018 and Amended Particulars of Claim were drafted on 11 May 2018. At paragraph 18 it is pleaded:

> "18. It is averred that on each occasion that the Claimant obtained his accreditation from the Defendant (either by way of initial application or renewal), he did so pursuant to a contract that he entered into with the Defendant. Under this contract the Defendant provided the Claimant with the accreditation, in exchange for the consideration of the Claimant paying a subscription fee to the Defendant."

In fact, the subscription fee was first payable in 2012 and it is the Claimant's case that the contractual relationship pre-dated 2012, the Claimant providing consideration in other forms (see paragraph 58 below).

46. Having thus pleaded the contract, the Amended Particulars of Claim go on to set out express and implied terms of the contract.

47. At paragraph 21, it is pleaded in the alternative that even if there was no contract between the parties, the Defendant, in exercising its disciplinary powers over accredited inspectors, was obliged to comply with the requirements of natural justice and fairness which included an obligation to adopt a disciplinary procedure that was fair and transparent and would only impose a sanction proportionate to any wrongdoing established against the Claimant. It is common ground between the parties that the requirements of natural justice applied to the Defendant's disciplinary.

48. At paragraph 42 of the Amended Particulars of Claim, it is pleaded that the Defendant's decision to withdraw the Claimant's SIRE accreditation was fundamentally flawed and arbitrary. It is unnecessary to set out here each and every regard in which it is pleaded that the decision was flawed but, importantly, it is asserted at paragraph 42.3 that the Defendant's disciplinary committee imposed a

sanction which was based on a consideration of matters outside the scope of its enquiry.

49. Finally, in relation to remedy, loss and damage is pleaded at paragraph 51 arising from the Defendant's alleged breaches of contract, including damage to the Claimant's reputation, and, in the prayer to the Amended Particulars of Claim, a declaration is claimed that the Defendant acted unlawfully in withdrawing the Claimant's accreditation and a mandatory injunction is sought requiring the Defendant to reinstate the Claimant's accreditation.

50. The Amended Defence (which throughout refers to OCIMF as "the Forum"), at paragraphs 70 to 71 denies the alleged contract between the parties. Alternatively, the Defendant pleads that if there was a contract between the parties, this was an implied contract not an express one. At paragraph 72.2 the Defendant pleads:

> "a) It is admitted that it was an implied term of any contract between the Claimant and the Forum that the latter would set up a fair and proper enquiry into any disciplinary allegations against an accredited SIRE inspector.
>
> b) It is further admitted that it was an implied term of any contract between the Claimant and the Forum that the latter would take reasonable steps to see that the guidelines, so far as relevant, would be applied to any disciplinary proceedings in accordance with the law."

51. The Defendant further admits, in paragraph 73, that the Forum was required to exercise its disciplinary powers over the Claimant (including in determining the nature of any sanction imposed upon him) in a manner that was not arbitrary or capricious, such requirements being coextensive with any implied contractual obligations on the Forum in relation to the fairness of the setting up the disciplinary process.

52. In the subsequent paragraphs, the Defendant denies breach, whether of contract or of the requirements of natural justice, causation and the right to damages or any other remedy.

53. The claim for damages was supported by a schedule of loss which, with the Defendant's consent, was amended on 25 July 2019, between the end of evidence and the making of submissions. At the outset of the trial, I allowed an application by the Claimant to rely upon a witness statement of the Claimant's wife, Neelma Arshad Rashid and my ex tempore judgment in relation to that issue is attached as an appendix to this judgment.

54. On 12 March 2018, the Claimant applied for an interim injunction in mandatory terms pursuant to CPR 25.1(a) requiring OCIMF to reinstate his SIRE inspector accreditation but this application was dismissed by Mr Pushpinder Saini QC sitting as a Deputy High Court Judge. In the course of that application, OCIMF argued that it had found Captain Rashid guilty of dishonesty, as recorded at paragraph 16 of the learned Deputy Judge's approved judgment. He found that that could not be right by reference to the decisions which were communicated to Captain Rashid which suggest neither expressly or impliedly that there was ever a proper basis for a finding of dishonesty. In that regard, the learned Deputy Judge said this:

> "20. I must record that I find the approach of the Respondent a surprising one for a responsible regulatory authority to adopt. Although it is ultimately a matter for exploration at trial, it is difficult to see how it is consistent with basic rule of law standards and fairness for a regulatory body (even one operating in a private law sphere such as the respondent) to suggest an inspector has been found guilty of dishonesty in disciplinary proceedings when the decision actually communicated to him does not state any such serious finding.
>
> 21. The fact that they are described by the Respondent's counsel as informal proceedings does not seem to me to detract from that principle of fairness, particularly where an individual's professional reputation is at stake. I must record that one is left with the real concern that the applicant may have been found to have been dishonest by the disciplinary committee without ever having faced such a charge, and indeed without ever having been told of this conclusion, it appearing for the first time four months after the material decision and in responsive evidence to an injunction application."

These comments are pertinent to the decision which I have to make in this case. However, it is right to record that, in pre-trial correspondence, the Defendant confirmed to SL that it would not pursue an allegation of dishonesty or rely on any such finding by the disciplinary committee in support of its decision.

The issues

55. The trial of this matter took place between 1 and 4 July 2019, with submissions being adjourned to 29 July 2019.

56. In advance of the trial, the parties agreed a list of issues for the court to try. The list of issues first set out some common ground which has already been covered earlier in this judgment and then set out the key issues as follows (APOC refers to the amended Particulars of Claim and AD refers to the Amended Defence): [1]

> 1. *"Whether a contractual relationship came into existence between the Claimant and the Defendant on each occasion that the Claimant obtained his accreditation from the Defendant (either by way of initial application or renewal) in exchange for the consideration of the Claimant paying a subscription fee to the Defendant.*
>
> 2. *If a contractual relationship existed, whether it arose expressly or by implication.*
>
> 3. *If a contract arose expressly, whether the express terms of the contract are those set out in paragraphs 7 to 15 of the APOC.*
>
> 4. *If a contract arose by implication, whether its terms were those set out at paragraph 20 of the APOC or paragraph 72.2 of the AD.*

[1] The issues have been re-numbered so as to start from number 1.

5. *If a contractual relationship did not exist between the Claimant and the Defendant, whether the extent of the applicable principles of natural justice and fairness are as pleaded in paragraph 21 APOC or paragraph 73 AD.*

6. *Whether as a matter of fact:*

    a) *The Defendant failed to carry out its investigation into the Claimant fairly, transparently and in good faith by reason of the matters set out in paragraphs 27 and 29 APOC;*

    b) *The Defendant failed to adopt a fair and transparent process in determining whether to uphold the allegations and impose a sanction by reason of the matters set out in paragraphs 31 to 35, 40, 42 and 46 to 48 APOC;*

    c) *The Defendant failed to reach a properly reasoned decision based only upon consideration of the allegations that had been presented to it, by reason of the matters set out in paragraph 42 and 46 to 48 APOC;*

    d) *The Defendant failed to exercise its disciplinary function fairly and not capriciously and arbitrarily, by reason of the matters set out in paragraph 42 APOC;*

    e) *The Defendant failed to impose its power to impose a sanction in a manner that was fair and not capricious and arbitrary, and the sanction imposed was disproportionate, by reason of the matters stated in paragraphs 42.1, 42.4 and 46 to 48 APOC;*

    f) *The Defendant failed to adopt a fair and transparent appeal process that ensured that any appeal made by the Claimant was properly considered, by reason of the matters set out in paragraph 44, 46 to 47 and 48.3 APOC; and*

    g) *The Defendant failed to exercise the power pursuant to which the Claimant could be permitted to appeal fairly, and instead exercised that power capriciously and arbitrarily, by reason of the matters set out in paragraph 44, 46 to 47 and 48.3 APOC.*

7. *If so whether, as a matter of law, the Defendant was in breach of any implied terms of any alleged contract between the Claimant and the Defendant or was in breach of the applicable principles of natural justice.*

8. *If so, whether but for that breach/those breaches, the Claimant would not have had his accreditation permanently withdrawn by the Defendant.*

9. *If, but for the Defendant's breach(es), the Claimant would not have had his accreditation permanently withdrawn, whether the Defendant's breaches are sufficient for the Court to order the reinstatement of the Claimant's accreditation by way of a permanent mandatory injunction.*

10. *Further or alternatively, if there was any breach by the Defendant, whether the Claimant has suffered the pecuniary losses pleaded at paragraph 51 APOC.*

11. *If so, whether the loss pleaded at paragraph 51.2 APOC is already encompassed by that pleaded at paragraph 51.1 APOC.*

12. *If the Claimant has suffered the pecuniary losses pleaded at paragraph 51 APOC, whether but for the Defendant's breach(es), the Claimant would not have suffered those losses.*

13. *If the Defendant has committed any breach of the applicable principles of law causing the Claimant to suffer pecuniary losses, whether the Claimant is entitled in law to recover damages in respect of those losses.*

14. *If the Claimant is entitled to recover damages in respect of any part of his claim, whether any of his losses are too remote to be recoverable.*

15. *If the Claimant's losses are not too remote to be recoverable, whether he has taken adequate steps reasonably to mitigate those losses."*

The contractual issues

57. Issues 1 to 5 above cover the question whether there was a contractual relationship between the Claimant and the Defendant and, if so, what its terms were. However, in their closing submissions, the parties agreed that the existence of a contract would not make the duty on the Defendant more onerous in relation to the disciplinary process, and the principles of fairness and natural justice are the same whether or not a contract existed. As Mr Leiper QC submitted:

> "It must be stressed that, whether a contract exists or not, the applicable principles of fairness are the same … the existence of a contract is therefore only relevant to the issue of remedy – specifically, the availability of damages in the event of any breach by OCIMF."

In those circumstances it is probably unnecessary for me to decide issues 3 and 4. As to issue 5, in paragraph 21 of the Amended Particulars of Claim it is pleaded that, pursuant to the requirements of natural justice and fairness, the Defendant was required to exercise its disciplinary powers over accredited inspectors fairly, not capriciously or arbitrarily. It is further pleaded that this "required the Defendant to adopt a disciplinary procedure that was fair and transparent and which would only impose a sanction proportionate to any wrongdoing established against the Claimant." In paragraph 73 of the amended defence, the Defendant admits that it was required to exercise its disciplinary powers over the Claimant, including in determining the nature of any sanction imposed upon him, in a manner that was not arbitrary or capricious. The Defendant pleads that such requirements were and are coextensive with any implied contractual obligations in relation to the fairness of the setting up of the disciplinary process. It seems to me that the principal difference between the parties relates to whether the rules of natural justice and fairness required the Defendant to impose a sanction which was proportionate to the wrongdoing established or whether the sanction, even if disproportionate to the wrongdoing, must nevertheless be upheld if it was not arbitrary or capricious. Of course, if the findings of the disciplinary panel

of misconduct on the part of Captain Rashid are found to have been unlawful because the process was in breach of the rules of natural justice and fairness, then the sanction imposed will fall with the fall of the finding of misconduct. If, however, it is found that the findings by the panel were not unlawful, then the issue as to whether the sanction needed to be proportionate and, if so, whether it was proportionate will arise for decision.

58. For the Claimant, Mr Parker submits that the set up for SIRE accreditation and the requirements in relation to the conduct of inspections gave rise to mutual obligations on the parties with consideration flowing both ways whereby all the factors necessary for the existence of a contractual relationship were in place. Thus he submits:

    1) In order to obtain and maintain his SIRE accreditation, Captain Rashid was required to agree to the SIRE guidelines and the ethical guidelines and to pay an annual fee to OCIMF;

    2) The guidelines contain a "framework of rights and duties of sufficient certainty to be given contractual effect" with regard to the inspector's entitlement and ability to carry out SIRE inspections;

    3) The guidelines are expressed in terms of obligations both on the part of the inspector and also on the part of OCIMF. OCIMF's obligations included those contained in

        - section 2.5.4 of the guidelines ("**Existing inspectors – monitoring of reports**. Reports from all inspectors are subject to routine ad-hoc monitoring. The OCIMF Programme Manager, the OCIMF Training and Accreditation Manager and OCIMF Compliance Manager are responsible to undertake this.") and

        - section 2.6.7 ("SIRE Focus Group Disciplinary Committee, a committee of at least three representatives of the SIRE Focus Group will be formed. This committee will review the evidence in order to reach a decision as to what action should be taken.")

    4) The guidelines contain an express disciplinary process which OCIMF undertook to follow.

    So far as consideration for these mutual obligations is concerned, Mr Parker submitted that Captain Rashid agreed, having submitted his application to become a SIRE accredited inspector, that his accreditation was held subject to the guidelines and he paid an application fee and annual subscription fees. For their part OCIMF received the benefit of Captain Rashid's agreement to comply with the guidelines and the ethics guidelines and, more broadly, benefitted (directly and on behalf of its members) from the accreditation of individual inspectors such as Captain Rashid. He referred to Captain McGroggan's evidence where he referred to SIRE inspectors as being "the greatest asset of the SIRE programme (indeed the programme would not work without them)". He further referred to Mr Pascoe's evidence where he described the relationship between OCIMF and SIRE inspectors as "a symbiotic relationship" whereby "everybody benefits from it if it works well". Mr Parker submits that whilst the payment of the annual fee is conclusive, there was, in law, good consideration in any event from Captain Rashid's undertaking to comply with the SIRE guidelines.

Mr Parker referred the court to the decision of the Court of Appeal in *Modahl v British Athletic Federation Limited (No.2)* [2001] 1 WLR 1192 which he said was indistinguishable from the present case. My consideration of *Modahl* is set out in paragraph 61 below.

59. For the Defendant, Mr Leiper QC made various points in relation to the way in which the contract has been pleaded. Thus he refers to the Amended Particulars of Claim referring at paragraph 19 to various "express terms" of an alleged contract whereby it is clear that an express contract is intended to be relied upon. However, he submits that the pleading is deficient because no specific written or oral agreement said to give rise to the alleged express contract is referred to. In so far as an express contractual relationship is premised upon the signing by Captain Rashid of his application form to become a SIRE inspector, he submitted that this is not pleaded and the Defendant has not had an opportunity to consider such a case or plead to it in response. Equally, in so far as an implied contract is relied upon, Mr Leiper submits that a case based on implied contract has not been properly pleaded in the Amended Particulars of Claim either in circumstances where the contract referred to in the Amended Particulars of Claim is alleged to have contained both expressed and implied terms.

60. More substantively, Mr Leiper submitted that, contrary to Mr Parker's submissions, the present case is distinguishable from *Modahl* because there is no commonality between the inspectors and Captain Rashid had no need or expectation for other inspectors to be subject to the disciplinary process, indeed he had no interest in other inspectors at all; secondly given that the inspections are commissioned by commissioning members of OCIMF i.e. the oil companies, all accreditation does is facilitate the Claimant to enter into contracts with third parties; thirdly, the benefit of accreditation falls to OCIMF's members rather than to OCIMF itself.

Discussion

61. In my judgment, as submitted by Mr Parker, the present case is in fact on all fours with *Modahl v British Athletic Federation Limited* [2001] 1 WLR 1192. In that case the Claimant, a well-known British athlete, was accused of taking a banned drug following tests on a urine specimen provided in the course of an athletics meeting in Lisbon. In accordance with the rules of the International Amateur Athletics Federation ("IAAF") and of the Defendant, the Defendant being the governing body for athletics in the United Kingdom, the Claimant was suspended from participating in any competition. A disciplinary committee was convened which unanimously concluded that the Claimant had committed a doping offence and she was banned from competition for four years. She appealed to an independent appeal panel which concluded, on the basis of evidence that had not been available to the disciplinary committee, that there was the possibility that the samples had been degraded by bacterial contamination which could have affected the reliability of the test results. Her appeal was accordingly allowed and the ban lifted. The Claimant then brought her action for damages alleging breach of contract on the part of the Defendant on the basis that the Defendant had been in breach of an implied obligation to take all reasonable steps to ensure that those who sat as members of the disciplinary committee were free from bias and that the Claimant would have a fair and impartial hearing.

62. At first instance, Douglas Brown J concluded that there was no contract between the Claimant and the Defendant, that the disciplinary committee carried out its function conscientiously and fairly, that the independent appeal panel had only come to a

different conclusion because of the new material presented to it which had not been available to the disciplinary committee and even if there had been any bias on the part of two members of the disciplinary committee, that bias had not affected the decision.

63. On appeal a majority of the Court of Appeal found that whilst there was no question of there being an express contract between the Claimant and the Defendant, a contract would be implied from all the surrounding circumstances. Over many years the Claimant had accepted that if she entered athletics meetings under the Defendant's auspices (or those of the IAAF) she would be subject to the relevant rules, and it could properly be inferred that, in its turn, the Defendant accepted responsibility to administer those rules in relation to all who competed in the meetings, including the rules as to drug testing. The necessary implication from the Claimant's conduct in joining an athletics club, in competing at national and international level on the basis stated in the rules and in submitting herself to doping tests both in and out of competition was that she became party to a contract with the Defendant subject to the relevant terms of the rules. However, the Claimant's appeal was nevertheless dismissed because there had been no breach of the obligation on the Defendant to provide a fair hearing overall.

64. Latham LJ, having reviewed the authorities, stated as follows:

> "49. The importance of these authorities is that they establish that a court should not merely assume a contract to exist, but must consider all the surrounding circumstances to determine whether or not the contract can properly be implied. …
>
> 50. There is no doubt that over a period of many years the Claimant accepted that, if she entered meetings under the auspices of the Defendant or of the IAAF she would be subject to the relevant rules. Equally, it seems to me to be a proper inference that the Defendant in its turn accepted the responsibility to administer those rules in relation to all subject to its jurisdiction who competed in those meetings. I see no difficulty, therefore, in identifying with certainty the basic obligations undertaken by both the athlete and the Defendant. There is a benefit and a detriment to both. The benefit to the athlete is that he or she knows that every athlete competing will be subject to the same rules, and that to remain entitled to compete, both nationally and internationally, he or she must comply with those rules. The Defendant accepted the burden of administering those rules, and the benefit of having recognised athletes compete both in national and international events. The latter benefit has become the more significant over the years as, from the documents we have, it is clear that the Defendant obtained financial benefit in terms of sponsorship and media exposure for its events. I therefore see no difficulty in determining the consideration which each provides. Further, it seems to me to be clear that the athlete accepts the obligation under the rules whenever he or she enters a competition, or undergoes out of competition testing in order to be eligible to enter such competitions. The basic structure for a contract is, in my view, readily identifiable."

65. Mance LJ, in his judgment, drew attention to Chitty on Contracts (28th Edition at paragraph 1-034) where it was stated:

> "Contracts may be either express or implied. The difference is not one of legal effect but simply of the way in which the consent of the parties is manifested. Contracts are express when their terms are stated in words by the parties. They are often said to be implied when their terms are not so stated, as, for example, when a passenger is permitted to board a bus: from the conduct of the parties the law implies a promise by the passenger to pay the fare and a promise by the operator the bus to carry him safely to his destination … since, as we have seen, agreement is not a mental state but an act, an inference from conduct, and since many of the terms of an express contract are often implied, it follows that the distinction between express and implied contracts has very little importance, even if it can be said to exist at all."

Mance LJ pointed to the one distinction between express and implied contracts, namely the ease with which an express or implied contract may be established. He then said this:

> "103. In the present case, although the language of the defendant's rules has the contractual aspects to which I have drawn attention, there is no conversation or document which can be identified as constituting an express agreement. Any contract must be implied from conduct, in the light of the rules. The rules, in my view, contain a framework of rights and duties of sufficient certainty to be given contractual effect with regard to the athlete's entitlement and ability to compete. Consideration exists in the athlete's submission to the rules and to the defendant's jurisdiction, in the defendant's agreement to operate the rules and to permit the athlete to compete in accordance with them, and in both parties' agreement on the procedures of resolution of any disputes contained in the rules."

66. In my judgment, if, for athlete, one substitutes inspector and for the British Athletic Federation Limited one substitutes OCIMF, then all that was said by Latham LJ and Mance LJ can be seen to apply in the present case. Thus, OCIMF's rules contain a framework of rights and duties of sufficient certainty to have contractual effect with regard to the inspector's entitlement and ability to carry out SIRE inspections. Consideration exists in the inspector's submission to the rules and to OCIMF's jurisdiction and in OCIMF's agreement to operate the rules and permit the inspector to carry out inspections in accordance with them and in both parties' agreement on the procedures for resolution of any disputes in relation to the inspector's conduct in carrying out inspections. So far as the citation from the judgment of Latham LJ is concerned the inspector accepted his obligations under the inspection and VIQ guidance documents whenever he carried out an inspection and in submitting himself to regular audits of his inspections, the equivalent, if you like, of testing for athletes.

67. Furthermore, in my judgment Mr Leiper's three distinctions, even if accepted to be genuine distinctions, make no difference to the fundamental position. First, he refers to Latham LJ stating that the benefit to the athlete is that he or she knows that every

athlete competing will be subject to the same rules and that to remain entitled to compete both nationally and internationally he or she must comply with those rules. Thus, the effect of the rules in *Modahl's* case was to provide the athletes with a "level playing field" where no athlete had an unfair advantage over another by, for example, the taking of performance enhancing drugs. In contrast, Mr Leiper submits that there is no need or expectation for other inspectors to be subject to the disciplinary process and Captain Rashid had no interest at all in other inspectors. Thus, the commonality which existed in *Modahl* does not exist here. However, in my judgment, there is in fact a commonality between Captain Rashid and the other inspectors. The whole system of accreditation and vessel inspection depends upon all the inspectors providing reports which are reliable and can form part of the database. If any inspector does not abide by the rules and produces reports which are unreliable, the whole system breaks down to the detriment of all the inspectors, including those who abide by the rules. Thus, each inspector does rely on the other inspectors holding to the same high standards to which he is expected to conform in following the inspection and VIQ rules.

68. Secondly, Mr Leiper submits that accreditation facilitates an inspector to enter into contracts with third parties so that the contractual position arises between the inspector and the commissioning member. However, in my judgment, this does not preclude a contract between the inspector and OCIMF at the same time. Indeed, the situation is little different with athletes who may agree to compete in a competition in exchange for a fee with the event organiser. I see no inconsistency between there being a contract between an inspector and OCIMF – an umbrella contract, if you like – and mini-contracts between an inspector and the commissioning member in relation to the inspection of a particular vessel on a particular occasion.

69. Finally, Mr Leiper submits that the benefit falls to the members of OCIMF and not to OCIMF itself. Again, though, it seems to me that although, of course, benefit falls to the members of OCIMF, that does not preclude there being benefits to OCIMF as a whole as well. In so far as this submission was intended to suggest that there was lack of consideration moving from OCIMF, it seems to me that the argument manifestly fails. As Mance LJ said, consideration exists in the inspector's submission to OCIMF's rules and to OCIMF's jurisdiction, and in both parties' agreement on the procedures for resolution of any disputes contained in the rules. Furthermore since 2012 there has also been the annual fee. As a collective, the OCIMF members benefit from a system whereby vessels are inspected to a high standard and reliable reports emanate from such inspections and that collective is to be found in OCIMF. As Mr Parker submitted, OCIMF received the benefit of Captain Rashid's agreement to comply with the guidelines and the ethics guidelines and from him submitting himself to the rigours of accreditation including auditing and ongoing training.

70. Finally as Mr Parker submitted, the SIRE guidelines, at paragraph 2.6.5.1, which deals with unacceptable conduct during the course of an inspection, provides that:

> "It is essential that the inspector's conduct during the course of an inspection sets an exemplary example to the Master, officers and crew. As a representative of the submitting company and OCIMF, the inspector must at all times maintain a professional and cordial relationship with the Master, officers and ratings and must respect the authority of the Master." (emphasis added).

In my judgment the description of the inspector when carrying out an inspection as a representative of OCIMF is wholly supportive of the existence of a contractual relationship between OCIMF and its accredited inspectors.

71. In all the circumstances, I have no doubt that the Claimant is right in claiming a contractual relationship with the Defendant. Furthermore, in my judgment this is adequately pleaded in paragraphs 17 and following of the Amended Particulars of Claim. In my judgment, it was probably accurate to plead that:

> "On each occasion that the Claimant obtained his accreditation from the Defendant he did so pursuant to a contract that he entered into with the Defendant."

Even if this is wrong, though, it is enough for the Claimant to have pleaded that there was a contract in existence and in my judgment the claim is not defeated by a failure specifically to plead, in the alternative, an implied contract arising from the conduct of the parties. In paragraph 20 of the Amended Particulars of Claim, implied terms are asserted and in upholding those implied terms, an implied contract can equally be upheld on the basis of them of which the defendant has had adequate notice.

The Legal Framework

72. Issues 6 and 7 cover the substantive matters going to the question whether the disciplinary process ending in removal of the Claimant's accreditation was conducted unfairly and in breach of the rules of natural justice such that the Defendant was in breach of contract and the disciplinary process is void.

73. In my judgment, it is first appropriate to consider the legal framework as this provides the appropriate legal context for consideration of what occurred between 27 July 2017 and 25 October 2017 (although I do not omit Captain Cassels' decision to reject the Claimant's appeal of 7 December 2017).

74. The role of the court in relation to the conduct of disciplinary proceedings by a body such as OCIMF was set out authoritatively by Richards J in *Bradley v The Jockey Club* [2005] EWCA Civ 1056. Although the citation is from the Court of Appeal Lord Phillips MR (with the agreement of Buxton and Scott Baker LJJ) said at paragraph 18 that he had cited the relevant passages from the judgment of Richards J because "I am satisfied that they correctly state the law and do so with a clarity that I could not hope to better." Thus, with the endorsement of the Court of Appeal, the principles set out by Richards J were as follows:

> "37. That brings me to the nature of the court's supervisory jurisdiction over such a decision. The most important point, as it seems to me, is that it is *supervisory*. The function of the court is not to take the primary decision but to ensure that the primary decision-maker has operated within lawful limits. It is a review function, very similar to that of the court on judicial review. Indeed, given the difficulties that sometimes arise in drawing the precise boundary between the two, I would consider it surprising and unsatisfactory if a private law claim in relation to the decision of a domestic body required the court to adopt a materially different approach from a judicial review claim in relation to the decision of a public body. In each case

the essential concern should be with the lawfulness of the decision taken: whether the procedure was fair, whether there was any error of law, whether any exercise of judgment or discretion fell within the limits open to the decision maker and so forth. …

40. … The supervisory role of the court should not involve any higher or more intensive standard of review when dealing with a non-contractual than a contractual claim …

43. Of course, the issue in the present case is not one of procedural fairness but concerns the proportionality of the penalty imposed. To my mind, however, that underlines the importance of recognising that the court's role is supervisory rather than that of a primary decision maker. The test of proportionality requires the striking of a balance between competing considerations. The application of the test in the context of penalty will not necessarily produce just one right answer: there is no single "correct" decision. Different decision makers may come up with different answers, all of them reached in an entirely proper application of the test. In the context of the European Convention on Human Rights it is recognised that, in determining whether an interference with fundamental rights is justified and, in particular, whether it is proportionate the decision maker has a discretionary area of judgment or margin of discretion. The decision is unlawful only if it falls outside the limits of that discretionary area of judgment. Another way of expressing it is that the decision is unlawful only if it falls outside the range of reasonable responses to the question of where a fair balance lies between the conflicting interests.

The same essential approach must apply in a non-ECHR context such as the present. It is for the primary decision maker to strike the balance in determining whether the penalty is proportionate. The court's role in the exercise of its supervisory jurisdiction is to determine whether the decision reached falls within the limits of the decision maker's discretionary area of judgment. If it does the penalty is lawful; it does not, the penalty is unlawful. It is not the role of the court to stand in the shoes of the primary decision maker, strike the balance for itself and determine on that basis what it considers the right penalty to be.

Mr Higginson, who was counsel for Mr Bradley, cited ***Daly v Secretary of State for the Home Department*** [2001] 2 AC 532 in support of his submissions on the correct approach of the court towards the issue of proportionality. I see nothing in ***Daly*** that is inconsistent with the views I have expressed above. The importance of the court limiting itself to a supervisory role of the kind I have described is reinforced in the present case by the fact that the Appeal Board includes members who are

> knowledgeable about the racing industry and are better placed than the court to decide on the importance of the rules in question and decide the weight to be attached to breaches of those rules. I treat the Appeal Board as the primary decision maker since, although its function under Appendix J of the Rules of Racing is largely a review function, it is found that the penalty imposed by the disciplinary committee was disproportionate and, as it had power to do, substituted a penalty of its own as a proportionate penalty."

Although as stated by Richards J, *Bradley's* case was concerned with the proportionality of the sanction imposed, his comments in relation to the supervisory role of the court and the approach of the court to be taken apply equally to a consideration of the disciplinary process which led to the finding of misconduct in this case.

75. In the course of giving evidence, Captain Rashid was cross-examined by Mr Leiper in some detail in relation to the detail of the matters which formed the subject-matter of the Disciplinary hearing. However, on the basis that the role of the court is supervisory, there is no room for the court to re-try, and evaluate for itself, the issues which were before the Tribunal. For that reason, I do not refer further in this judgment to Captain Rashid's evidence in relation to the substantive issues which, on reflection, seems to me to be irrelevant, save in relation to the matters set out in paragraph 89 below.

76. In relation to the question whether the procedure was fair and whether there was any error of law, one of the central principles of natural justice is the principle "audi alteram partem". This was articulated by Popplewell J in *Dymoke v Association for Dance Movement Psychotherapy UK Limited* [2019] EWHC 94 (QB). In that case the defendant was a company whose purpose was to promote dance music psychotherapy in the UK, it being a small organisation of about 350 practising members. One of those members was the claimant, Miss Dymoke, who became a registered member in 2002 but whose membership was terminated in March 2016 on the grounds that there had been two conflicts of interest in relation to her dealings with a MA course in Dance Movement Psychotherapy at Edge Hill University for the academic year 2013/14, a course which had been accredited by the defendant. Miss Dymoke claimed that her membership had been terminated unlawfully on the basis that the process leading to the termination of membership, and the dismissal of her appeal from that decision, involved a breach of the principles of natural justice and of the defendant's published procedures on the handling of complaints. The thrust of the case was that the procedural unfairness involving breaches of ADMP's published codes vitiated the decision and that she should be reinstated. It was accepted on her behalf that if her claim succeeded it would be open to the defendant to undertake a further process of investigation and enquiry into the allegations in a way which did not replicate the allegedly flawed process previously adopted and to reach a fresh decision. There, as here, was a claim for breach of contract and, in the alternative, a claim based on the principle derived from *Nagle v Feilden* [1966] 2 QB 633 whereby the rules of natural justice must be observed, irrespective of contract, where a decision is made by a body with the requisite degree of power or control over a person's ability to work in a chosen field. It should be noted, however, that in *Bradley's* case (see paragraph 74 above) Buxton LJ suggested that a general and discriminatory rule preventing a certain category of people from practising a profession irrespective of their behaviour, competence or disciplinary record, with which *Nagle v Feilden* was

concerned, addresses a wholly different circumstance from that involved when someone who has been allowed into a profession breaks the rules of it: he said that, in his view, the Court of Appeal in *Nagle's* case would have been "astonished to think that their general observations could be used to undermine disciplinary decisions that were otherwise perfectly lawful."

77. In the course of his judgment, Popplewell J explained how the expression "natural justice" is to be understood. He said:

> "55. Care needs to be taken as to what is meant by 'natural justice'. In **Local Government Board v Arlidge** [1915] AC 120 Hamilton LJ described the phrase 'contrary to natural justice' as 'an expression sadly lacking in precision'. It is commonly treated as having two central principles:
>
> 1) The principle encapsulated in the Latin tag *audi alteram partem*, namely that the decision maker should afford to a person adversely affected by the decision a reasonable opportunity to be heard (which will generally also require sufficient notice of the nature of the matters under consideration by the decision maker);
>
> and
>
> 2) The principle that the decision maker shall not be a judge in his own cause and will be free from bias."

It is of course the first of those principles with which the present case is concerned. In particular, as it seems to me, the question is whether in the context of the agreement as to the scope of the disciplinary hearing and the issues to be considered, the panel went so far beyond the appropriate scope of the enquiry in relation to the questioning of Captain Rashid and the reasons for their decision that, although Captain Rashid was given a reasonable opportunity to be heard, he was not given sufficient notice of the nature of the matters which formed the focus of the decision to remove his accreditation. This was further addressed by Popplewell J as follows:

> "However, the rules of natural justice involve requirements which are flexible and fact specific in their application. They will often, but not always, require a person adversely affected to have an opportunity to be heard, depending on the circumstances … "

Then, having referred to some of the authorities including *Bradley* and *Modahl* Popplewell J went on to say:

> "59. Further guidance may be found in the line of cases considering the exercise of a discretion conferred by one party to a contract on the other. It is well established that such discretion must be exercised in good faith and not arbitrarily, capriciously or unreasonably in the public law sense of Wednesbury unreasonableness, i.e. irrationality: see for example the summary by Rix LJ in *Socimer International Bank*

Limited (in liquidation) v Standard Bank London Limited [2008] EWCA Civ 116."

It seems to me that the reference by Popplewell J to the rules of natural justice involving requirements that are flexible and fact specific in their application will require a person adversely affected to have an opportunity to be heard depending on the circumstances has this effect: that the rules of natural justice may well apply differently where, as here, the Claimant has been given a specific reassurance and, effectively, promise that the disciplinary hearing will be confined to particular issues or matters to which his answers are required. However, I would not go so far as to say that, where such an agreement has been reached, the disciplinary panel is prohibited from relying on any other matters. As I put to Mr Leiper in the course of his closing submissions, if, in the course of giving evidence to a disciplinary panel, an inspector admitted that, in the course of an inspection, he had committed a theft or had assaulted a crew member, a matter which emerged unexpectedly and without warning, it would surely be legitimate for the panel to take such a matter into account in making its decision. What would not be fair would be, having lured an inspector into a false sense of security by assuring him that the topics of interest to the panel would be confined to certain matters, he was then "ambushed" by questions going beyond the scope of the enquiry and in relation to which he had no fair opportunity to prepare himself and, if necessary, present evidence in advance of the hearing.

78. In relation to the right of a person faced with a disciplinary process to know in advance the allegations he has to meet, it is undoubtedly correct that there is no obligation on a body such as OCIMF to behave as if a court of law, for example a criminal court preferring charges against a defendant. In my judgment, the correct statement of the principle of the need to provide proper notice is, as Mr Parker submitted and for the reasons set out further in paragraph 80 below, to be found in the case of in *Re Lo-Line Electric Motors Limited* [1988] CH 477 where Sir Nicholas Browne-Wilkinson VC held (at 486 F):

> "Natural justice plainly requires that a director facing disqualification should know the charges he has to meet. I am far from suggesting that this requirement should lead to the technicalities associated with criminal charges but prior notice of such a fundamental shift in the Official Receiver's case should have been given so that Mr Browning could direct evidence to the point … the requirements of natural justice must depend on the circumstances of each case, and in my judgment a fundamental change of case from one alleging commercial dishonesty to one alleging crass commercial misjudgement is a change of a nature which requires wholly different evidence and prior notice should have been given."

79. Two further matters need to be addressed in relation to the legal approach to the case such as the present. First, Mr Leiper, in his closing submissions, addressed the question of how the principles of natural justice translate into specific standards against which OCIMF's actions should be judged by the court and in turn on the extent to which the court is permitted to interfere in OCIMF's decisions. He submitted that there is no appropriate comparison between OCIMF and bodies such as the GMC and the NMC which are public bodies which derive their authority from statute. Whilst those bodies control an individual's ability to pursue a particular profession, OCIMF is, by contrast, a small private body comprised of members which

does not control any individual's ability to pursue a profession. He submitted that the SIRE programme is one of many tanker inspection schemes in place worldwide and Captain Rashid has maintained a lucrative practice in the inspection of chemical tankers alongside his SIRE inspection work and he has been able to continue and maintain that practice. He submitted that the status of an individual inspector's accreditation through the SIRE programme does not affect his reputation or status on another programme or his status within the marine industry more generally.

80. Whilst, of course, the court should be wary of drawing inappropriate comparisons between different bodies with different functions, this does not mean that a body such as OCIMF, even if it does have the attributes which Mr Leiper suggested (in fact, there was no evidence of other tanker inspection schemes and given that OCIMF claims to have in its membership all the major oil companies in the world, it is likely to have a dominant position in relation to the inspection of oil tankers) that certainly does not mean that OCIMF can do as it likes in relation to its disciplinary proceedings, nor did Mr Leiper suggest that was the case. Even if OCIMF does not control an individual's ability to pursue a profession, the fact is that Captain Rashid gained a substantial proportion of his income from the inspection of tankers through the SIRE scheme and the removal of his accreditation had the potential effect of depriving him of a substantial part of his income. OCIMF must have known of this potential effect of its decision on Captain Rashid and he therefore deserved to be treated fairly. Mr Leiper submitted that the decision in Lo-Line is irrelevant, but I reject that submission, and I find the dictum of Sir Nicholas Browne-Wilkinson (see paragraph 78 above wholly apposite to the present case.

81. The second point is this. Having referred to the principles of natural justice and the judgment of Popplewell J in *Dymoke's* case, Mr Leiper submitted that the principles are very broad brush and "the court's analysis of whether a private body has complied with them must (by necessity) be similarly broad brush, with the appropriate deference to the expertise of the particular panel determining a domestic issue within its own sphere." Whilst, of course, when it comes to the question of sanction, a court is very reluctant to interfere with the discretion of a panel comprised of men from within the industry who understand what is required of inspectors, I am not convinced that deference of the same kind is appropriate in determining whether the panel has complied with the rules of natural justice as previously defined. Those rules, as it seems to me, transcend the different forms of disciplinary process and I do not think that because the panel in this case came from within the industry and understood the requirements of inspectors in a way which the court cannot understand, that made the panel any better equipped to comply with the rules of natural justice. In fact, the opposite may be the case: there may be a temptation on the part of a panel such as this to steer its own course and follow its own lights which has the effect of transgressing the rules of natural justice in a way which is unlawful. The more pertinent argument was contained in paragraph 53 of Mr Leiper's written closing submissions where he said:

> "Here, while the disciplinary panel in this case were not legally trained individuals, they were professional men with extensive experience of internal disciplinary proceedings."

That is surely the better point: extensive experience of internal disciplinary proceedings is the better qualification for acting fairly and in accordance with the principles of natural justice than being an experienced marine captain with knowledge of the industry in general and oil tanker inspection in particular.

Application of the above principles to the facts of this case

82. In the present case, it seems to me that it is important, in considering the fairness of the disciplinary hearing which took place on 25 October 2017, to put that hearing into the context of all that had been said and done in the lead-up to the hearing. SL, appropriately and skilfully representing Captain Rashid's interests, had been concerned to tie down OCIMF in relation to the allegations which Captain Rashid was to face. Mr Pascoe could, of course, have responded by saying that whilst he could not and would not tie down the scope of the panel's enquiry, he could indicate that it would cover certain broad areas such as the carrying out of back to back inspections, fatigue and its effect on safety, the planning by Captain Rashid for inspections in terms of travel arrangements and so forth. However, had he done so, he would undoubtedly have been met with the objection that such allegations were so general and unspecific that Captain Rashid could not properly prepare for the hearing and present evidence to justify his conduct. Mr Pascoe did not do so, however: he was content to confine the scope of the enquiry to the matters set out in his emails of 13 and 18 October 2017 (see paragraphs 32 and 35 above and the outline of allegations sent on 20 October 2017). The four allegations set out in Captain McGroggan's Inquiry Report included an allegation that Captain Rashid had coerced a vessel crew to falsify log entries and had told an applicant inspector how to deceive submitting members and how to submit intentionally falsified SIRE reports. Allegations alleging dishonesty, coercion of crew members to falsify log entries and corruption of an applicant inspector to falsify SIRE reports would, of course, be anathema to all the principles upon which the SIRE programme is based. Such allegations would put the enquiry on to altogether a different plane. It must therefore have been a matter of considerable relief to Captain Rashid that these allegations of dishonesty and falsification and bullying were not to be pursued.

83. The Inquiry Report had been sent to all three members of the Disciplinary Panel in advance and before the agreement was reached with Mr Pascoe as to the limited scope of the enquiry. Captain Ashby's copy of the Inquiry Report indicates that he had looked through it quite carefully, highlighting certain passages (see further paragraph 84 below). It therefore seems to me that natural justice required that, at the outset of the enquiry, the panel members needed to be told in the strongest terms that they should put out of their minds anything they might have read suggesting impropriety of the kind reflected by allegations 3. and 4. Indeed, one might have thought that fairness would require the panel to be told positively that OCIMF did not consider those allegations to be justified so as to negative any prejudice which might have lingered in the minds of the panel from having read the Inquiry Report and seeing the allegations as originally framed. That did not happen however. Captain McGroggan said: "Captain Rashid's counsel have requested that we ask the focus group that [no] adverse inferences be drawn from any matter in the Inquiry Report outside of the four inspections in question." By putting it on the basis that this was at the request of Captain Rashid's counsel, Captain McGroggan thereby distanced himself from the position which he should have been taking namely: we, that is OCIMF, direct you not to draw any adverse inferences and it is OCIMF's position that those allegations should be regarded as unsubstantiated for the purposes of this Inquiry. It seems to me that, in opening the Inquiry in the way that he did, Captain McGroggan was not loyal to the assurance which Mr Pascoe had given on 18 October 2017.

84. Captain Ashby was the only member of the Disciplinary Committee who gave evidence at the trial. He had made three statements, one in relation to the interim

injunction application and two further statements for the purposes of the trial. In his second witness statement, he indicated having been sent the full Inquiry Report by Captain McGroggan on 24 September 2017 and he said: "I read the report briefly at this stage, for the chief reason of checking that there were no conflicts of interest from my perspective in hearing the case against Captain Rashid." He was questioned about this by Mr Parker who asked: "But did you read the whole report?" to which he replied: "No. I flicked through it, as I said in my witness statement. I glanced through it beforehand." Mr Parker then took Captain Ashby to his copy of the report which was in the documentation and which seemed to suggest that Captain Ashby had in fact read the report carefully, highlighting many important passages. In the summary, he had highlighted the words "and 43 separate potential anomalies" which had been identified in the previous 12 months and he had highlighted the important words in relation to each of the allegations including that the inspector had coerced a vessel crew to falsify log entries, that OCIMF was alleging that all four of the inspections had been falsified, the whole of allegation 3. and, in relation to the fourth allegation the words: "Has provided instruction to at least one applicant inspector … can be used to deceive submitting members". There were many other highlightings suggestive of a careful review of the whole of the Inquiry Report prior to the hearing. Nevertheless, Captain Ashby would not accept that he would have had any difficulty in putting the other allegations out of his mind. He said: "Not for me. I was quite focused that we were just focussing on the four vessels." He did not accept that even if focusing on the four vessels, it would be very hard completely to ignore something he had already read, to "unknow" something he already knew.

85. It was in relation to the Inquiry itself and the Committee's approach to the allegations made against Captain Rashid, that, in my judgment, Captain Ashby's evidence was distinctly troubling. The starting point is whether the decision letter of 30 October 2017 completely and accurately reflected the findings which the Committee had made. On 26 October 2017 at 09:43 Captain Ashby had sent to Captain McGroggan a summary of his notes regarding the decision with his co-committee members, Captain Mathy and Captain Sharma copied in. Captain Sharma responded that these notes had accurately captured their conclusions following the hearing. So too did Captain Mathy. As a result, Captain McGroggan drafted the decision letter based on the summary of Captain Ashby's notes and Captain Ashby responded: "Patrick, this has my approval." However, in paragraph 45 of his first witness statement, Captain Ashby said:

> "Although this letter did not expressly state that the Panel thought Captain Rashid had been dishonest (as we thought this would be unnecessarily rude), the letter did set out our findings referred to in paragraph 40 above as well as our findings that Captain Rashid had routinely failed to spend the guideline eight to ten hours on board each vessel."

In his second witness statement, Captain Ashby said:

> "43. I understand that it is now being suggested by Captain Rashid's lawyers that, because of my use of the word 'dishonest' at one point in my first witness statement in this case, this means the Panel had in fact made findings of dishonesty against Captain Rashid without communicating them to him, and that this made the disciplinary process inherently unfair. I confess that I do not really understand this allegation. In my mind, being 'dishonest' and 'lack of ethics'

effectively means the same thing and I don't think we could have been clearer in our decision that we considered Captain Rashid to have committed very serious breaches of OCIMF's ethical rules. Perhaps I could have used the word 'dishonest' in the decision letter but I don't see what this would have added. In my mind, it means the same thing as 'unethical' but is a bit more emotive and rude, so there was no need to use it."

This was taken up by Mr Parker in cross-examination. He asked Captain Ashby if he accepted that the decision letter accurately captured his decision and he said that it did. He was asked if it contained the complete and full reasons and he responded: "Yes, in my opinion." He was taken by Mr Parker to the fourth paragraph of the decision letter and there was then this exchange:

"Q: So it is right, isn't it, that the Committee did not make any decision about whether the times stated in the four SIRE reports were accurate?

A: We didn't, no exactly.

Q: Save for the particular points raised in the six determinations which feature below, you didn't make any determination as to whether the times were accurate?

A: Yes, and the reason we decided that was because of the times there was a lot of discrepancy. No matter which times were right, they still didn't allow sufficient time for a full inspection to have been completed. … that's why we used the words 'regardless of which times were correct' because of for that reason.

Q: Well you say that but actually you didn't make or nowhere does it say in this letter that you decided that even if Captain Rashid had spent 7 hours or 7.5 hours inspecting the Maran Hellen you didn't make any finding that that was not enough time to carry out a proper inspection of that particular vessel.

A: We do say that the times were insufficient to complete an inspection.

Q: And where does it say that?

A: Somewhere (pause) … no correct.

Q: So just to be clear, you didn't actually, the Committee didn't carry out any assessment of whether the inspection times stated in the inspection report for each of the four vessels was actually long enough to carry out a proper inspection.

A: We asked questions to see if they were.

Q: But you didn't make any decision as to whether it was or not.

A: Yes well, when we were deciding on the outcome we did, in deliberation.

Q: There's no reference in the decision letter to that effect.

A: No there isn't."

I then asked this question:

"Are you saying that you based your decision on deliberations which you had and conclusions you came to which were not then reflected in your reasons?

A: This summarises our main points.

Mr Justice Martin Spencer: What you just told me is that in your deliberations you came to other conclusions which are not in these reasons.

A: Correct, yes."

Mr Parker then resumed his questions:

"Q: But can I ask you this, Captain Ashby. Can you look at your witness statement behind tab 5, please, in file B. Keep C2 to hand but look in file B, behind tab 5. At page 97, paragraph 37 you say: 'Captain Rashid did accept that even based on his own timings, he had spent less than the guideline eight to ten hours. In those circumstances [you] did not consider it was necessary to go through all the detailed evidence to determine which were correct.'

A: Yes

Q: You then said 'We might have done this had the only issue been precisely how long these four inspections were. It's only a guideline.' As you put it:
'Very occasionally [although we wouldn't accept that] it might be possible for an inspector to conduct a competent inspection in slightly less than eight hours. However, Captain Rashid made a series of further statements which revealed far more serious matters than this …'
Then you set them out, but even there you don't say that you had actually decided that the time recorded in each of those four SIRE inspection reports was not enough time to carry out a proper inspection?

A: I don't say it in here no.

Q: If you had really made that conclusion, you would have put it in your witness statement wouldn't you Captain Ashby?

A: Yes I probably, I would have done but we did … I didn't put it in my witness statement it's in my handwritten notes which were accompanying the witness statement.

Q: Certainly if you had made that decision, you would have ensured that it was put in the decision letter that was sent to Captain Rashid?

A: As I say, I don't consider that the decision letter has to include everything necessarily.

Q: And the truth is you didn't make any decision of that kind.

A: A decision of what kind?

Q: You did not make that decision, you did not make a decision that the times in the SIRE reports were not long enough to carry out a proper inspection of each of these four vessels?

A: Not in the letter, no.

Q: You didn't do that at all.

A: We did in the enquiry. If you look at my handwritten notes which all say less than seven hours on them. …

Q: You certainly made no decision … sorry, according to what is said in the letter of 30 October, you had not reached any decision that Captain Rashid had deliberately falsified the times of his inspection reports.

A: We didn't come to that conclusion but we considered it was a possibility as I put in my witness statement, that he had falsified …"

86. What seems clear from this evidence is that, in the course of their deliberations, the Committee completely lost sight of the allegations which it had been agreed would be faced by Captain Rashid and which he had come prepared to answer. It is worth reminding ourselves of those allegations which were that, in respect of each of the four vessels in question,

    1. he spent less time on board conducting his inspection than he had claimed in the SIRE report and

    2. the time actually spent on board was insufficient to conduct a proper SIRE inspection,

    these allegations being derived from allegation 2 in the Inquiry Report which had stated: "Inspector has misrepresented the time spent on board to complete at least four SIRE inspections within the last 12 months … OCIMF alleges that all four of these inspections have been falsified." If the Committee had focused on these allegations, it would have made findings in relation to each of the four inspections as to how long Captain Rashid had in fact spent on board each vessel, whether he had deliberately stated different times in his SIRE reports so as to indicate that he had spent longer on the vessels than he had actually spent and whether, in each case, the time actually spent on board was insufficient to carry out a proper inspection. The necessity of the Committee to make findings as to how long Captain Rashid had been on board each vessel is illustrated by the use of the word "actually" where the allegation states: "The time *actually* spent on board was insufficient to conduct a proper SIRE inspection." However, as Mr Parker pointed out to Captain Ashby, no such findings were made in the decision letter: the decision letter did not address the allegations which had been so carefully formulated in advance as a result of the pre-Inquiry correspondence between the parties. That alone raises the question whether the process was fair.

87. The way in which this Inquiry went wrong emerges from further evidence which Captain Ashby gave the court. There was the following exchange:

> "Mr Justice Martin Spencer: There's something else I want to ask you, which arises out of something you said earlier. You gave me the very strong impression that your approach to this was to hear the evidence first and then decide in your deliberations what misconduct the Captain was guilty of.
>
> A: That's correct.
>
> Mr Justice Martin Spencer: That's correct?
>
> A: That's exactly how we have done all the disciplinary hearings, and I have done quite a few for OCIMF. That's what we do, is we ask the evidence, we go away, deliberate and then come back.
>
> Mr Justice Martin Spencer: Those deliberations, or that misconduct might be something that's never been alleged before?
>
> A: It could be, yes. It could be what we heard on the day.
>
> Mr Justice Martin Spencer: So rather than, as it were, let the Captain know what the charges are against him and answer those, you let him give evidence generally and then decide what the charges are afterwards?
>
> A: No, we know what we are investigating, which was the breach of the SIRE training guidelines and VIQ."

Even accepting that a disciplinary hearing of this kind does not carry the rigour and formality of a court hearing or even of disciplinary hearings before such bodies as the GMC and the Nursing and Midwifery Council, I found these answers from Captain Ashby to be fairly astonishing. I remind myself of the dictum of Sir Nicholas Browne-Wilkinson in *Re Lo-Line Electric Motors* that natural justice plainly requires that a director facing disqualification should "know the charges he has to meet." Equally it was a breach of the rules of natural justice, of principles of fairness, and of the implied terms to be implied into the contract between Captain Rashid and OCIMF that the Committee should adopt the approach reflected in the passage of Captain Ashby's evidence which I have cited.

88. The dangers of that approach and the difficulty into which it has got the Defendant in this case is illustrated by the way in which the Committee then approached the findings which they in fact made. Take, for example, the SIRE report for the Maran Hellen where Captain Rashid had recorded the time that he had disembarked as 17:00. At an early stage, Captain Rashid acknowledged and accepted that this was an error and he had mistyped 17:00 for 16:00. The issue for the Committee was therefore whether Captain Rashid's evidence that he had made a simple error was correct or whether he deliberately recorded 17:00 when he knew that in fact it was 16:00. No reasonable committee could possibly make a finding of misconduct based upon a simple error of this kind. Recognising this, Captain Ashby, when asked about the matter by Mr Parker, asserted that the Committee had come to the conclusion that

Captain Rashid deliberately falsified the time of 17:00 knowing perfectly well it was 16:00. But as Mr Parker pointed out to Captain Ashby in cross-examination, and as he accepted, there is no reference to that in the decision letter. As Captain Ashby acknowledged, the decision letter did not reflect any such finding and he and his fellow Committee members had accepted that the decision letter accurately captured the Committee's deliberations and determinations. This is not a semantic dispute over whether "unethical" means "dishonest". This is not a question of whether Captain Rashid failed to follow the spirit of the SIRE guidelines. This is a pure question of dishonesty, whether Captain Rashid deliberately falsified the time that he disembarked the Maran Hellen in the SIRE report. It is hardly surprising that the Deputy Judge, Mr Saini QC, was so disturbed by this suggestion (see paragraph 54 above). The Defendant, in the light of Mr Saini's remarks, eschewed any reliance on dishonesty for the purposes of this trial, yet it found its way back into the evidence in the way that I have described. This was wholly unfair on the Claimant.

89. As the evidence at trial showed, each of the matters which formed the basis for the decision of the Disciplinary Committee, as set out in their decision letter, could and would have been addressed in advance by Captain Rashid's lawyers with potentially decisive answers. Thus:
    1) The OCIMF guideline of eight to ten hours is no more than that, a guideline. Statistics for the inspection of vessels of the deadweight tonnage of the four vessels in question show an average inspection time of just over eight hours which would imply that a significant number of such vessels are inspected in less than eight hours across the board of inspections by all the SIRE accredited inspectors. The consequence is that it cannot be misconduct simply for an inspection to be less than eight hours, per se. Any suggestion that Captain Rashid was routinely inspecting in less than eight hours would go outside the parameters of the disciplinary hearing which was confined to the four particular inspections and would involve a comparison between Captain Rashid's inspection times and those of other inspectors.
    2) The travel arrangements for the inspection of the Maran Hellen did not indicate that Captain Rashid planned to allow only six hours because he was able to demonstrate that a booked flight did not mean that he would necessarily catch that flight. Captain Rashid's evidence was that he was able to get himself on later flights if he needed to, but to book the earlier flight enabled him to catch that flight if it was late. It is difficult to understand how the Committee could have translated the booking of a flight into planning an inspection for only six hours.
    3) The finding that the time recorded for departing the Maran Hellen was confirmed as being incorrect was nonsensical as a basis for a finding of misconduct when Captain Rashid had confirmed that it was incorrect simply because a typing error had been made. It was always Captain Rashid's case that he had disembarked at 16:00, not 17:00 and he produced the evidence of Mr Awan to confirm this.
    4) The failure to state that the inspection of the Algosea had been carried out in two parts may have been an omission which contravened the SIRE guideline but it is difficult to understand how it could amount to misconduct unless, in some way, the failure was shown to be a deliberate attempt to deceive or mislead the commissioning member.
    5) Captain Rashid's statement that he did not need to spend as much time on board vessels which he had previously inspected would not necessarily be against the principles that every vessel inspection should be treated as if it is a

first inspection. This was an allegation which could easily have been met had it been made in advance. Simply for an inspector to know the geography round the ship would make the inspection quicker and Captain Rashid was adamant that he followed the principle of treating each inspection as if it was a first inspection. It was simply his explanation for why some inspections may have taken less than the guideline eight to ten hours and was translated and exaggerated by the Committee into a practice which contravened the principles of SIRE.

6) Finally in relation to the carrying out of back to back inspections, this again goes outside the parameters of the inspection of the four vessels which were the subject matter of the enquiry. It would involve a consideration of the frequency with which Captain Rashid carried out back to back inspections, a comparison with other inspectors in this regard and a consideration of the reasons which lay behind the need for a back to back inspection, for example a change in the berthing schedule of the vessel in question and a last-minute request from the commissioning member to change the itinerary. It is difficult to see how the Committee was in any position to make a decision about the risk which Captain Rashid posed to third parties whilst driving personal or hired cars on public roads: did they even enquire whether Captain Rashid did this or used taxis or was given a lift by a third party (as in the case of the Maran Hellen with Mr Awan)? Again, the factors relied upon by the Committee were all ones which Captain Rashid should have had an opportunity to consider in advance and prepare himself for, through his solicitors.

In the circumstances, I do not accept the Defendant's submission that causation is not made out because that OCIMF would have reached the same determination and imposed the same sanction on Captain Rashid.

90. Having heard the evidence in this case and having considered the voluminous documentation, I have reached the firm conclusion that the process which led to the removal of Captain Rashid's accreditation was deeply flawed, wholly unfair on him and a serious breach of the principles of fairness and natural justice as espoused in the authorities to which I have referred. In the circumstances I have no hesitation in declaring that the Defendant acted unlawfully and in breach of contract in withdrawing the Claimant's accreditation.

Remedy

91. It is accepted by the Defendant that, in the light of the above finding, Captain Rashid is entitled to a declaration, but not a mandatory injunction requiring OCIMF to reinstate Captain Rashid's accreditation. The principal issue over remedy, however, concerns the claim for damages.

92. The claim for damages is divided into three main parts:
    (1) Loss of income: this in turn is split between the period to the end of 2018 (broadly, past loss) and from 2019 to 2024 (broadly, future loss);
    (2) Expenses;
    (3) General damages for loss of reputation.

Of these, by far the most significant is the claim for future loss of income, amounting to either £1,373,242 or £1,236,221 depending on which of the two alternative bases in the amended schedule of loss is accepted.

93. The expenses claimed relate to legal fees and expenses arising from answering the allegations and attending the hearing. These amount to £29,674 and, having been admitted as a matter of fact in the counter-schedule, I find proved. Although the Defendant has not admitted liability for these sums, I find that they are liable for them.

94. So far as damages for loss of reputation are concerned, the basis for this is principally communications which Captain McGroggan had with third parties as part of his investigation but also the allegation of dishonesty which was propounded in open court upon the application for an Interim Injunction and a slide contained in Captain McGroggan's 2018 training course on ethics which referred to Captain Rashid's case, although not Captain Rashid by name. Additionally, in the schedule of loss, there is reference to Captain Rashid's "mental anguish and suffering" which thus appears to form part of his claim for damages to reputation.

95. Damages for loss of reputation is dealt with in McGregor on damages (20th Edition) as follows:

"b) Loss of future reputation, of publicity, of credit
4-020
Loss of reputation generally makes for a non-pecuniary loss but it may also involve a pecuniary one for which damages may be awarded in contract. As Hallett J said in *Foaminol Laboratories v British Artid Plastics*:

> "A claim for mere loss of reputation is the proper subject of an action for defamation, and cannot ordinarily be sustained by means of any other form of action … [but] if pecuniary loss can be established, the mere fact that the pecuniary loss is brought about by the loss of reputation caused by a breach of contract is not sufficient to preclude the plaintiffs from recovering in respect of that pecuniary loss."

It is thus established that a claimant can recover for such a pecuniary loss in three particular types of case:
(1) where the wrongful dismissal of an actor[51] causes him loss of publicity;
(2) where there has been a failure or a mismanagement of the advertising of the claimant's business; and
(3) where the defendant fails to honour the claimant's drafts thereby causing him loss of credit, or otherwise fails in breach of contract to sustain the claimant's financial credit.
This head of damage may be recoverable in other types of case; that these are likely to be few is suggested by the fact that in the three established types of case the loss was particularly contemplated by the parties to the contract. There is, however, one important development. For long it was accepted—erroneously, it had previously been submitted in this work—that the House of Lords in *Addis v Gramophone Co,* had laid down that there could be no recovery for financial loss through loss of reputation arising from an employee's wrongful dismissal. Now in *Mahmud v Bank of Credit and Commerce International SA*, the House has held that in principle damages may be awarded for such loss caused by breach of a contract of employment where the breach is of the implied term of trust and confidence."

96. In my judgment, the claim for damages for loss of reputation fails on both factual and legal grounds. In relation to the legal grounds, as Hallett J (as she then was) said, "A claim for mere loss of reputation is the proper subject of an action for defamation, and cannot ordinarily be sustained by means of any other form of action." Nor do I consider that this case falls within any of the three categories for recovery of pecuniary loss. So far as the factual grounds are concerned, I am unconvinced that the evidence establishes any actual damage to the Claimant's reputation. No witness has been called to establish that Captain Rashid's reputation has been damaged, and in any event any publicity arising from the hearing before Mr Saini QC would be covered by privilege. Captain McGroggan was entitled to make the enquiries that he did when investigating this matter, and damages cannot arise from the information imparted in the course of those enquiries, and certainly not outside a claim in defamation.

Loss of income

97. In the following paragraphs, the reference to currency is to Canadian dollars. The evidence in relation to loss of income comes principally from the Claimant's wife, Neelma Arshad Rashid ("Mrs Arshad"). At paragraphs 15 of her witness statement, she summarises Seashore's accounts. Her evidence shows that in 2016, Captain Rashid contributed $530,424 in SIRE income, reducing to $423,951 in 2017 and $0 in 2018. Over the same period, the income from CDI inspections was $141,022, $183,955 and $191,867. Thus, at first blush, it would appear that the Claimant has been able to mitigate Seashore's loss to a certain extent by increasing his CDI inspections. In 2016, the cost of sales for Captain Rashid's inspections was $230,886 and the income from his SIRE and CDI inspections was $671,446, the costs thus running at 34.38%. In 2017, the cost of sales was $255,552 and the income from the Claimant's inspections was $607,905, the costs thus running at 42.03% in that year. In 2018, when no SIRE inspections were carried out by Captain Rashid, the cost of sales was $47,083 in respect of CDI inspections of $191,867, only 24.54%. This implies that CDI inspections are better "value for money" than SIRE inspections.

98. On behalf of the Defendant, Mr Leiper has made the point that the underlying documents which form the foundation for the accounts have not been disclosed, and the Defendant has therefore been unable to challenge those figures. However, the figures are derived from accounts which have been prepared by accountants who I think I can assume are reputable and who would have wanted to satisfy themselves of the accuracy of the figures. I am therefore prepared to accept the accounts at face value, as I was urged to do by Mr Parker.

99. Of course, any loss of income to Seashore is only the starting point. That would then need to be translated into loss of income for the Claimant. His income was twofold: first, a salary paid by Seashore; secondly dividends received as a shareholder. Nothing has been said about the Claimant's personal liability to pay tax on his income, so I do not take that into account.

100. In her witness statement, Mrs Arshad asserts that, had his SIRE accreditation not been withdrawn in October 2017, the Claimant's fee earning contribution in 2017 and 2018 would have been at least the same as in 2016 which was $440,560 for both SIRE and CDI inspections. His actual contributions in 2017 and 2018 were $352,353 and $144,784 respectively. She asserts that the Claimant's salary from Seashore would have been $100,000 in 2017 rather than $72,000 and his dividend $50,000 instead of

$40,000, a shortfall of $38,000. Alternatively, on the basis that the dividend payments would have been equal to the Claimant and Mrs Arshad, the shortfall is $33,000. In relation to 2018, Mrs Arshad asserts that the Claimant's salary would have been $170,000 (instead of $48,000 actually paid) and, on the alternative basis, the dividend would have been $60,000 instead of $40,000 an overall shortfall in 2018 of $142,000.

101. Given that Mrs Arshad accepted in evidence that the dividend payments to herself and the Claimant would have been equal, I accept that the alternative basis which assumes equal payment of dividend is the correct one. I do not accept that, in 2017 and 2018, Captain Rashid's salary would have been any more than it was in 2016 on account of SIRE inspections. The proposed increased salary payments are, in my judgment, too speculative and self-serving. The salary in 2016 was $72,000 and it remained $72,000 in 2017. As Mr Leiper submitted, the salary for 2017 would (or should) have been decided at the beginning of the year, before the removal of the accreditation was known, rather than at the end of the year when Seashore's income was known. I accept that the dividends would have increased, however, as suggested. I further accept that the reduced salary paid in 2018 was as a result of the reduced income anticipated in 2018 as a result of the loss of accreditation.

102. The loss for 2017 is therefore $5,000 (dividend only) and the loss for 2018 is $44,000 ($24,000 for loss of salary, and $20,000 for loss of dividend).

103. For the purposes of this claim, losses from 2019 have been treated as future loss. Those losses have started with the $170,000 salary claimed for 2018, and then projected an increase of 20% each year until 2024 when Mrs Arshad estimates the Claimant will have recovered the position. In my judgment, this is hopelessly speculative and makes little logical sense. If, after restoration of his accreditation, the Claimant will recover the position by 2024, one would have expected the losses to have tapered off by that date, not to have increased year by year and then suddenly stopped. Nor do I accept the claim relating to loss of contracts which would have been entered into by Seashore with large oil companies such as Shell for inspecting tankers consequent upon the Claimant's loss of accreditation: again, I find this too speculative in the absence of concrete evidence to this effect.

104. A further factor to be taken into account in relation to future loss might relate to whether the Defendant, having had its first attempt to remove the Claimant's accreditation fail on legal grounds, will try again, but this time using a fair legal process and, if it does, whether that will result in the re-removal of the Claimant's accreditation. Having thought about this, I have come to the conclusion that it would be wrong of me to take this into account: it would involve making a judgment on the merits of an alternative substantive case against the Claimant, and this I cannot do.

105. The solution I have reached is to accept that, as asserted by Mrs Arshad, the Claimant will have regained the lost ground by 2024, and that, from a starting point of loss of $40,000 in 2019 (using $44,000 for 2018, but allowing for some recovery of the ground in 2019 as a result of this judgment and reinstatement of the Claimant's accreditation), this reduces by $8,000 each year as the ground continues to be recovered year by year.

106. Based upon the evidence of Captain McGroggan, the Defendant further submitted that the Claimant had failed to mitigate his loss by seeking alternative employment.

However, I reject this contention. First, there is, in my judgment, a world of difference between a man seeking land-based employment after finishing his career at sea - effectively starting afresh, as Captain Rashid did when he became an Inspector - and someone in Captain Rashid's position who has already built for himself a second career and who is 20 years or so older. Secondly, I accept that Captain Rashid has attempted to find alternative work, as he stated in his evidence, and in my judgment the attempts he has made have satisfied his duty to mitigate.

107. On the above basis, the loss of income is assessed as follows:
(1) 2017: $5,000
(2) 2018: $44,000
(3) 2019: $40,000
(4) 2020: $32,000
(5) 2021: $24,000
(6) 2022: $16,000
(7) 2023: $8,000
Total: $169,000.

Using an exchange rate of $1 = 57.495p, the loss of income is £97,167.

108. On the above basis, damages are assessed in the total sum of £126,841.

109. I do not consider that it is appropriate to grant a mandatory injunction as I am sure that a reputable body such as OCIMF will abide by the spirit of this judgment and reinstate Captain Rashid's accreditation. However, should they not do so, I shall give the Claimant liberty to apply.

APPENDIX

Case No: HQ18X00935

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 July 2019

Before :

Mr Justice Martin Spencer

- -

Between :

Arshad Rashid	**Claimant**
- and -	
Oil Companies International Marine Forum	**Defendant**

- -
- -

Matthew Parker (instructed by **Signature Litigation**) for the **Claimant**
Richard Leiper QC, Natalie Connor
(instructed by **Oil Companies International Marine Forum)** for the **Defendant**

Hearing dates: 1st July 2019

- -

JUDGMENT

MR JUSTICE MARTIN SPENCER Monday, 1st July 2019
(14.24 pm)

Ruling by MR JUSTICE MARTIN SPENCER

1. I have an application on behalf of the claimant for permission to rely on a witness statement of Mrs Rashid which was served on 26 April 2019. The situation is that by an order of Master Gidden made on 1 November 2018, provision was made for the service of witness statements on 18 February 2019, and paragraph (b) of paragraph 4 said:
"Oral evidence will not be permitted at trial from a witness whose statement has not been served in accordance with this order or has been served late, except with permission from the court."
(c):
"Any supplemental witness statement shall be exchanged and served by 4.00 pm on 18 March 2019."

2. The order further provided for the service of a schedule of loss by the claimant by 4.00 pm on 18 March, that is the same date as any supplemental witness statement, and service of a counter-schedule by 27 March; that is nine days later.

3. In the event, by consent, those dates were put back so that the service of the initial tranche of witness statements was on 26 March instead of 18 February, and service of the supplemental witness statements was agreed to be by 26 April rather than 18 March, together with the service of the schedule of loss.

4. Mrs Rashid's witness statement was served effectively as part of the supplemental witness evidence on 26 April, together with the schedule of loss and the claimant now seeks permission to rely on that evidence. It is submitted on behalf of the defendant that the service of this witness statement was not in accordance with Master Gidden's order as amended by the parties, and the failure to serve her statement in the initial tranche of witness statements is a serious or significant one, on the basis that the effect is to increase the value of the claim significantly so far as future loss is concerned.

5. It is further submitted that there has been no proper reason offered for the default, that the application is not supported by a witness statement and that the justice of the case is such that I should refuse permission.

6. In my judgment it is appropriate that Mrs Rashid's evidence should be admitted. It was flagged up by Mr Rashid's statement that there would be further evidence supporting the schedule of loss, and it is quite normal that a schedule of loss should be served, supported by evidence at the same time, and in my judgment, the provision for supplemental witness statements was apt to include the service of additional witness evidence to support the schedule of loss.

7. No specific prejudice is relied upon in the sense that the defendant is embarrassed by this evidence in dealing with it at trial now on 1 July 2019, and it is the case that the defendant has had this witness statement and this schedule for a significant time.

8. Had the defendant needed more time to serve a counter-schedule, or to serve evidence in response, it would clearly have been afforded that time, but no adjournment is sought, and I can see in those circumstances no real prejudice to the defendant in meeting this claim. The justice of the situation demands that the claim by the claimant should be presented as it truly is and not on some artificial basis which would be the case were Mrs Rashid's evidence to be excluded.

9. The explanation is that she is effectively the accountant for the company that was set up by Mr and Mrs Rashid, has the detailed knowledge to be able to attest to the schedule of loss and the calculations therein, and it is it is appropriate that if the defendant wants to challenge those calculations, she should be the witness put forward for them to do so, having the detailed knowledge which forms the basis of those calculations. It is therefore also in the interests of justice and in the interests of the defendant that the person who presents this evidence should be Mrs Rashid.

10. In those circumstances, I will allow the application.