Neutral Citation Number: [2020] EWHC 2353 (TCC)

Case No: HT-2019-000239

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

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

Date: 1st September 2020

Before :

MRS JUSTICE JEFFORD DBE

- -

Between :

DAEWOO SHIPBUILDING AND MARINE ENGINEERING COMPANY LIMITED	**Claimant**
- and -	
(1) SONGA OFFSHORE EQUINOX LIMITED **(2) SONGA OFFSHORE ENDURANCE LIMITED**	**Defendants**

- -
- -

Stuart Catchpole QC and John Denis-Smith (instructed by **Squire Patton Boggs**) for the **Claimant**
Simon Rainey QC and Mark Chennells (instructed by **Clyde & Co LLP**) for the **Defendants**

Hearing dates: 2 and 3 December 2019

- -

Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time of hand-down was 10.30am on 1st September 2020.

.....

MRS JUSTICE JEFFORD

MRS JUSTICE JEFFORD DBE:

1. This is an unusual case both in its factual background and the way in which these applications arise. The applications relate to two arbitral awards (in identical terms) dated 18 June 2019. The applications are for permission to appeal under section 69 of the Arbitration Act 1996 (and for the hearing of the substantive appeal if permission is granted) and to challenge the awards for serious irregularity under section 68. The parties addressed the section 68 application first but I have found it convenient to deal with the section 69 application first.

Introduction

2. In order to deal with this application, it is necessary to set out the background in some detail which I do below. In summary, however, the disputes arise out of two turnkey contracts dated 6 September 2011 for the design, construction and sale of two "semi-rigs".

3. In the arbitrations, DSME, the Builder under the contracts, advanced a claim for costs and extensions of time on the basis that the Songa companies (the Buyer companies referred to collectively as "Songa") bore contractual responsibility for alleged errors in the FEED documentation, where FEED is an acronym for front-end engineering design. Songa counterclaimed for unliquidated damages arising out of late delivery together with certain discrete claims. The hearing of a preliminary issue on that issue of contractual responsibility and consequent liability was held. DSME lost. In other words, DSME was found to bear the contractual responsibility for the alleged errors. DSME unsuccessfully sought permission to appeal the award out of time (see ***Daewoo Shipbuilding & Marine Engineering Co Ltd. v Songa Offshore Equinox and another*** [2018] EWHC 538 (Comm)). DSME then sought to amend its claim in the arbitrations to advance a claim for costs and extensions of time on the basis that Songa had failed to co-operate in the correction of the alleged errors. The same allegations were relied on as defences to Songa's counterclaims.

4. In both arbitrations, by a majority, the tribunal refused permission to amend, for the reasons that appear more fully below. This decision followed a two day hearing with written evidence and extensive submissions. Putting it in very short summary, the majority's refusal turned on their decision that DSME had agreed that if it lost the preliminary issue that would be an end to its claims.

The Arbitration Act 1996 and the law

5. The following sections of the Arbitration act 1996 featured in this application.

   (i) Section 33 General duty of the tribunal.
   "(1) The tribunal shall—

   (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

   (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined."

(ii) Section 68: Challenging the award – serious irregularity
"(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. …..

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –

(a) failure by the tribunal to comply with section 33 (general duty of the tribunal);

….."

(iii) Section 69: Appeal on point of law
"(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. ….

…

(3) Leave to appeal shall be given only if the court is satisfied –

(a) that the determination of the questions will substantially affect the rights of one or more of the parties,

…

(c) that, on the basis of the findings of fact in the award –

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

…"

6. Copious authority was cited to me on the interpretation and application of this section but the following cases and propositions derived from them seem to me to be of assistance in this particular case.

7. Firstly, section 69 can only be engaged in respect of a question of law. Self-evident though that statement may be thought to be, given the terms of the statute, the position was further analysed by Mustill J in *Vinanva Shipping Co Ltd. v Finelvet AG ("The Chrysalis")* [1983] 1 QB 503, a case under the Arbitration Act 1979, cited and followed by Ramsey J in *London Underground Ltd. v Citylink Telecommunications Ltd.* [2007] EWHC 1749. Mustill J identified that there were three stages in the decision making process:
"(1) The arbitrator ascertains the facts. This process includes the making of findings on any facts which are in dispute.

(2) The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached.

(3) In the light of the facts and the law so ascertained, the arbitrator reaches his decision."

8. It is the second stage of this process that is the proper subject matter of an appeal under section 69. As Ramsey J said at [59] the fact finding stage and the stage of applying the law to the facts are separate from the stage of ascertaining the law. However, an error of law may be inferred from the end result in the sense that the correct application of the law to the facts would inevitably lead to a different conclusion, as in *Davies v AHP Land Ltd.* [2014] EWHC 1000 (Ch) at [5].

9. Specifically, once the facts have been ascertained, whether there is a contract is a question of law or a mixed question of fact and law (*Covington Marine Corp v Xiamen Shipbuilding Industry Co. Ltd.* [2005] EWHC 2912 at [43]). It seems to me that the terms of the contract and their interpretation must similarly be a question of law or a mixed question of fact and law.

10. Secondly, at the leave stage, where s. 69(3)(c)(i) is relied upon, the section requires that the tribunal's decision on the question of law must be obviously wrong. In *HMVUK v Propinvest Friar Ltd.* [2011] EWCA Civ 1708 at [40], Arden LJ emphasised the importance of answering "the anterior statutory questions of section 69" before any statutory appeal is argued. At [34] she further identified the test as one of "being unarguable or making a false leap in logic or reaching a result for which there was no reasonable explanation". That is patently a high threshold test.

11. In *Braes of Doune Wind Farm (Scotland) Ltd. v Alfred McAlpine Business Services Ltd.* [2008] EWHC 426 (TCC), Akenhead J made the point that the test of obviousness is not only passed if the award is obviously wrong to a judge considering leave after half an hour of reading the papers. If it takes 4 hours for the judge to understand the submission and form that view, then the test is still met. In that case, however, the Judge formed an initial view that it was arguable that the arbitrator was obviously wrong in law and held a short oral hearing on both the issue of law and a jurisdictional issue. Following that hearing, he determined that the arbitrator was not obviously wrong. The case, therefore, illustrates that the length of the consideration of the issue is no indication that the decision is or is not obviously wrong.

12. DSME also sought to argue that each of its questions of law raised a point of general public importance so that the test for permission was the lower threshold of the decision being "at least open to serious doubt".

Factual background

The Contracts and the arbitrations

13. I am indebted to the judgment of Bryan J (referred to in paragraph 3 above) for a succinct summary of the factual background to the disputes between the parties and he will, I trust, forgive me for the plagiarism that follows.

14. As Bryan J set out, the disputes arise out of two turnkey contracts dated 6 September 2011 for the design, construction and sale of semi-submersible "Cat D" drilling rigs including those with hull numbers 3031 and 3032 ("the Semi-Rigs"). DSME was the Builder and Songa Offshore SE the original Buyer. The two contracts ("the Contracts") were novated, one to each of the Defendants.

15. The Semi-Rigs were to be built for Songa to enable them to perform long-term drilling contracts on the Norwegian continental shelf. The hull design was to be provided by Götarverket Arendal, a Swedish marine engineering and design consultancy, who were to provide the FEED documentation.

16. Although the relevant sections of the Contracts were not before this court, it appears to be common ground that each of the Contracts contained an arbitration clause which provided for arbitration in accordance with the LMAA rules with the seat in London. Article VII.2 (which is referred to below) provided:
"Provided that BUYER shall have fulfilled all of its obligations under this Contract (including but not limited to full payment of the Contract Price and settlement of any indebtedness to BUILDER), *delivery of the SEMI-RIG shall be duly made hereunder by BUILDER, and such delivery shall be evidenced by a Protocol of Delivery and Acceptance signed by the parties hereto, acknowledging delivery of the SEMI-RIG by BUILDER and acceptance thereof by BUYER."*

17. On 14 July 2015, DSME referred to arbitration disputes arising under the Contracts. The Tribunal, in due course appointed, comprised Sir David Steel, John Marrin QC and Stewart Boyd QC. Since there were two contracts, there were technically two arbitrations with the same tribunal. The two arbitrations have at all times proceeded together and for the purposes of this application I also deal with them together.

18. The disputes referred to arbitration arose out of time and cost over-runs in the construction of the Semi-Rigs. DSME alleged that the FEED documentation was defective and that this had caused the delays and cost-overruns. DSME's case was that, if such an error was notified within a specified 90 day period, then Songa bore responsibility for any additional costs, expenses and delays resulting from that error.

19. On 11 July 2016, the Tribunal ordered a trial of preliminary issues relating to the proper construction of the Contracts as follows:

    (i) Under [the Contracts], did DSME's right under Item 2 in the Yard Clarification List to notify Songa of errors in documents and/or drawings apply to errors in FEED (front-end engineering design) documentation?
    (ii) If so, then in the event that DSME duly notified such an error within the 90-day period, which party bore responsibility for any additional costs, expenses or delays resulting from such errors?

20. On 18 July 2017, the Tribunal issued awards in which it found against DSME on both issues.

The background to the hearing of the preliminary issues

21. It is the background to the trial of these preliminary issues which is central to what happened thereafter and the arguments on this application.

22. Prior to the reference to arbitration, there had been, as one would expect, correspondence between the parties as to the causes of, and responsibility for, the over-runs.

23. On 26 May 2015, and before the vessels had been delivered, DSME wrote to Songa referring to discussions held the previous week and saying that it seemed clear that the reason the parties were so far apart was the parties' respective views regarding the issue of design responsibility. DSME set out its position in some detail. The letter then continued :
"In the meantime, you mentioned that there is only a very limited period for the parties to find a suitable accommodation. However, as we mentioned from the beginning of the letter and you can see from our view set out above, the current difficulty and wide differences are attributable to the parties' different views regarding the design responsibility.

Therefore, DSME consider that the time has arrived for the difference with regard to design responsibility to be resolved.

DSME propose that for a quick resolution of the design responsibility issue, the parties refer the issue of design responsibility to London arbitration to be resolved as a preliminary issue on a very expedited basis and timetable.

DSME are strongly of the view that once the issue of the design responsibility has been ruled upon by an independent Tribunal, all other matters should be able to be discussed and be dealt with amicably thereafter on what is hoped would be a practical and commercial basis."

24. At this point, therefore, DSME's proposal was to refer only the issue of design responsibility to the arbitral tribunal in anticipation of all other matters then being resolved in the light of the tribunal's decision. That is not what happened, in that the broader dispute was referred to arbitration. However, this identification of the issue of design responsibility as the issue that would lead to resolution of the entire dispute was the genesis of what developed into the proposal for the hearing of the preliminary issue(s).

25. On 30 June 2015, Songa Offshore Equinox Limited (the party to the contract for Hull no. 3031) and DSME entered into an agreement designated as Addendum No. 2 to their contract. As I understand it, there was a like agreement in respect of Hull no. 3032. The Recitals set out that the semi-rig's sea trials had taken place and some defects had been corrected but that non-conformities remained which were identified in Annex A. Notwithstanding the Annex A items, Songa wished to take delivery "on the terms of this Addendum no. 2". Recital D then said:

"In addition, the Parties wish to address how they intend to proceed with certain other matters that are in dispute between the Parties so as to allow delivery of the Semi-Rig to proceed and these matters are addressed below."

26. Subsequent paragraphs of the Addendum recorded that the parties' rights in respect of certain disputed matters were reserved and that their disputes could be referred to arbitration. Clause 2.3 contained such a provision in respect of liquidated damages which had been deducted by Songa. Clause 5 (headed FEED claims reservation) recited DSME's case as to errors and omissions in the design documents which it asserted had caused delays and cost overruns. Clause 5.1 continued:
"… The Builder asserts a claim in this regard (the ***"FEED Claims"****), which the Buyer rejects in full, which encompasses:*

5.1.1 the Builder's claims for losses and schedule extension resulting from deficiencies in the design documents, including but not limited to those covered in the Builder's letter dated 26 May 2015 addressed to Songa Offshore SE.

5.2 It is agreed that notwithstanding the delivery of the Semi-Rig pursuant to the agreement evidenced by this Addendum No. 2, the Builder is entitled to pursue the FEED Claims against the Buyer in arbitration under the relevant provisions in the Contract and that both the Builder's and the Buyer's rights in this regard are fully reserved."

27. Clause 6 provides an undertaking that DSME would not, in connection with the FEED Claims, liquidated damages or disputed change orders (listed in an Annex to the Addendum) arrest the vessels or otherwise interfere with delivery.

28. Two notices of arbitration were sent by Stephenson Harwood, solicitors for DSME, on 14 July 2015 and simply stated that "disputes have arisen under the Contract" without any limitation to the FEED Claims.

29. The following day, 15 July 2015, DSME wrote to Songa referring to Addendum No. 2 and the referral to arbitration. The letter then referred back to the letter of 26 May 2015 and stated that DSME's position was that the determination of the issue of design responsibility would "assist with the resolution of what would otherwise be complicated, lengthy and expensive Disputes". DSME said that they, therefore, reiterated the proposal to refer a preliminary issue on the question of design responsibility and asked for agreement to that course. That course was not precisely what had previously been proposed but the difference is not material.

30. Ince & Co., on behalf of Songa, responded by letter dated 6 August 2015. They said that it was premature to discuss whether or not the determination of particular issues on a preliminary basis would be of assistance in the overall determination of the disputes and they first sought further particulars of DSME's claims. They made clear that they did not rule out the possibility of issues then being identified that were ripe for determination on a preliminary basis.

31. DSME's Claim Submissions in respect of Semi-Rigs 3031 and 3032were submitted on 16 and 20 November 2015 respectively. They sought declarations and/or payment in respect of costs and expenses and extensions of time in the case of errors in the FEED documentation of which timely notification had been given. No alternative claim based on lack of co-operation by Songa in resolving the alleged errors was advanced.

32. By letter dated 24 November 2015, Ince & Co requested an extension of time to 18 March 2015 (obviously an error and intended to be 18 March 2016) for Defence Submissions. The reasons given for the lengthy extension beyond 28 days included the need to address the pre-contract correspondence and factual matrix relied on by DSME and the need for expert input to address DSME's technical case.

33. Stephenson Harwood replied promptly on 27 November 2015. Their letter referred to the request for an extension of time for the Defence Submissions. Rather than agree to or refuse to agree to that extension, they turned again to the matter of a preliminary issue, referring to the letters of 26 May and 15 July 2015. The letter said that DSME had now, at significant time and expense, fully explained their case as Songa had required. The letter continued:
"Your letter refers to the need to incur significant time and expense in addressing extensive and highly technical material and obtaining specific input from experts. However, if your clients are prepared to agree to a preliminary issue on design responsibility, there will be no need for them to expend such time and costs at this stage. DSME would be prepared to agree to an order whereby your clients pleaded back on the issue of design responsibility only, with any need to plead back to the balance of the claim postponed by agreement.

We are also bound to say that the reference in your letter to the highly technical and expert aspects of the case fully justifies DSME's proposal of a preliminary issue on design responsibility. Put shortly, unless DSME's case on design responsibility is well-founded, the technical aspects of the case do not arise, and there is no need to spend the undoubtedly significant time and costs which would be required to investigate and resolve these issues." (my emphasis)

The letter then addressed claims in relation to two further Semi-Rigs with Hull nos. 3034 and 3035 where the surrounding facts were said to be somewhat different. It was proposed that the parties proceed with the issue of design responsibility on Hull nos. 3031 and 3032 first but:

"For the avoidance of doubt, the preliminary issue in relation to H.3031 and H.3032 remains potentially determinative of the references in the cases of H.3034 and H.3035, in the sense that DSME accepts that if its case on design responsibility in relation to the earlier hulls fails, its claim in relation to the later hulls would also necessarily fail."

34. Thus far it was abundantly clear that the preliminary issue as to design responsibility was being proposed by DSME on the basis that it was only if its case was well-founded that the technical issues would arise. In other words, if DSME's case were not well-founded, the technical issues would not arise. Further, the clear implication of what was said about the position in relation to Hulls nos. 3034 and 3035 was that if DSME's case on design responsibility in relation to Hull nos. 3031 and 3032 failed, its further claims would similarly fail.

35. That is how, in their response dated 11 December 2015, Ince & Co. interpreted the letter of 27 November 2015. Under the heading "Whether a preliminary issue will be dispositive of the claim", Ince & Co said this:
"You baldly assert that the undefined "design responsibility" preliminary issue will be dispositive if decided against your clients, thereby commending it for consideration as

a preliminary issue as it will dispose of any factual enquiry and hearing into how your clients constructed the vessels.

Again, until you properly identify what it is that you have in mind, it is hard to know whether a preliminary issue will be dispositive of the case or a substantial part of it. ….”

If the Respondents win on the preliminary issues and the Claimant’s claims fail, the Respondent’s counterclaims will still need to be determined with the same evidential enquiry into your clients’ handling of the construction of the vessels and the FEED aspects impinging on that construction…..”

36. The letter went on, in summary, to say that it was still premature to consider whether or not the hearing of a preliminary issue would be appropriate and contended that it would be more productive for Songa to work towards serving a full Defence and Counterclaim Submissions by 18 March 2016. DSME’s agreement was sought.

37. The correspondence before me does not relate what happened next, except that it appears that the Tribunal directed that Songa’s Defence and Counterclaim Submissions should be served by 18 March 2016 and full Defence and Counterclaim Submissions in respect of both Hulls nos. 3031 and 3032 were duly served.

38. Taking Hull no. 3031 as an example, the Counterclaim advanced a claim for over USD 37 million as unliquidated damages for wrongful delay in delivery of the vessel and other discrete heads of claim. In respect of delay in delivery, paragraph 400 alleged that delivery was seriously delayed due to widespread failings on the part of DSME which were set out in Section E above. Section E was headed “Alleged Delay and Cost Resulting from Errors”. The section started by addressing DSME’s case on delay which turned on the alleged errors in the FEED documentation and, it appears, at least one distinct matter involving the addition of sponsons and blisters. Songa pleaded that DSME’s case was wholly unparticularised and that all delay was to DSME’s account. Songa then set out its positive case as to what had happened in 4 periods leading to delay.

39. By letter dated 27 April 2016, Stephenson Harwood again raised the proposal that a preliminary issue should be determined. That, it was said, was because “the technical issues concerning the alleged defects in the FEED and the delays and cost overruns to which they led” were both highly complex and extremely wide ranging and only arose if DSME was correct on its case as to design responsibility. The letter continued:
“In our client’s view, the time has now come to grasp the nettle and for the Tribunal to direct a preliminary issue on design responsibility. <u>If our client’s case on that point fails, that will be the end of our client’s claim in this reference</u>. If our client’s case succeeds, the Tribunal will have to consider then how to proceed with regard to the balance of the technical issues in the case…..”

40. Later in the letter, Stephenson Harwood addressed the counterclaim. The letter said that the claim for damages for delay was untenable in the light of Article III.3. That Article was not in the extracts from the Contracts before me but is quoted elsewhere. It was headed “Conclusive pecuniary compensation” and in short provided that the liquidated damages for delay in delivery recoverable under Article III were the conclusive pecuniary compensation for “each particular event stated herein”. It was suggested that that issue could also form a preliminary issue. The “fact that the

preliminary issue [as to design responsibility] would be determinative of the claim" was repeated later in the letter.

41. On 31 May 2016, DSME served their "Reply and Defence to Counterclaim Submissions (Partial)" in respect of both vessels. In each document, paragraph 3 explained why it was a partial submission, namely that DSME intended to apply for the determination of certain preliminary issues relating to design responsibility and, if the Tribunal so ordered, the Counterclaim. The reference to the Counterclaim is explained by Stephenson Harwood's letter above. Nonetheless, this paragraph stated that DSME was responding to Sections A and B of the Defence Submission and to the Counterclaim. The paragraph continued:
"This Reply and Defence to Counterclaim is served without prejudice to DSME's right to serve a Reply and Defence to Counterclaim dealing with the balance of the Defence and Counterclaim following determination of such preliminary issues, or in the event that no order for the determination of preliminary issues is made."

The thrust of this paragraph, therefore, was that DSME was responding (in Reply and Defence to Counterclaim) to the matters that might arise on the hearing of the preliminary issues. Following the determination of the preliminary issues, DSME reserved the right to respond to the balance of the Defence and Counterclaim which included Songa's case as to the causes of delay.

42. The Defence to Counterclaim, at paragraph 62, admitted that the rig was delivered after the delivery date but averred that "DSME was entitled to an extension in the delivery date as pleaded in the Claim Submission at eg. paragraphs 31 and 94". It was, therefore, denied that DSME was in breach of contract. The balance of the Defence to Counterclaim set out DSME's case on the interpretation and effect of Article III and its defence to the few discrete heads of claim.

43. Although I do not believe I was taken to them, it is worth referring to the paragraphs relied upon by way of example. Paragraph 31 contended that, on the true construction of the contract, time did not run against DSME where DSME was unable to progress the project because of delay by Songa in rectifying defects in the design which had been duly notified to Songa. This was, therefore, what was stated to be DSME's defence to the counterclaim. It was entirely dependent on DSME's case that it was not responsible for defects in the FEED notified within the prescribed time where design responsibility (and responsibility for the correction of the defect) then lay with Songa. Paragraph 94 referred to Addendum no. 2 and specifically Article 5 as providing that delivery and payment were without prejudice to DSME's contentions in relation to defects in the FEED, as previously notified and "as pleaded herein". This paragraph thus added little but restated or reinforced DSME's case that its pleaded case as to the defects in the FEED provided it with a defence to a claim for damages for delay (whether liquidated or not). In this context, the reservation in paragraph 3 was also clearly related to this defence. If DSME was right on the issue of design responsibility, the technical issues would arise and would be more fully pleaded in reply and defence.

44. By letter from Stephenson Harwood dated 31 May 2016, DSME then made its application for the direction of the hearing of a preliminary issue. This was a lengthy document containing 78 numbered paragraphs:

    (i) Paragraph 8 read as follows:

"This application is based upon a consideration which has been apparent to DSME since the outset of this dispute: unless DSME is correct that it had a contractual right under the [contracts] to notify Songa of design defects within 90 days of contract award, with the result that the defects notified within that period are for Songa's account, the technical issues adverted to above do not arise. No matter how fundamentally defective the FEED was, if DSME bore unqualified design responsibility under the [contracts], these defects are irrelevant. Whatever delays and cost overruns resulted will be for DSME's account in any event. The issues concerning whether and how these defects resulted in delays and cost over-runs, and the calculation of the losses resulting, will never need to be determined and no legal consequences will attach to them." (Emphasis added)
I observe that this paragraph was as clear as it could be in stating that if DSME was responsible for defects in the FEED, then all delays and cost overruns were also DSME's responsibility. That necessarily must have included the delay in respect of which Songa had deducted liquidated damages and now claimed unliquidated damages (if the latter claim was open to it). That is emphasised by the statement that if DSME was wrong, the issues about how the defects resulted in delays and cost overruns never arose.

(ii) Paragraph 9 stated that the issue of design responsibility was a short issue of contractual construction.

(iii) Section C, paragraphs 21 to 31 recited the correspondence between the parties on the proposal that there be a preliminary issue.

(iv) In section G, DSME addressed the Counterclaim. It was said that Songa had contended that the existence of the Counterclaim was fatal to the application for the hearing of a preliminary issue because the decision on the preliminary issue would not be decisive. DSME said that its primary submission was that the fact that the preliminary issue would be decisive of the claim was sufficient reason for it to be heard. DSME indicated (at paragraph 61) that it would be content for the issue of whether unliquidated damages were recoverable to form a further preliminary issue and that the exclusion of the claim for damages for delay would cut each counterclaim by over 90%.

(v) Paragraph 62 then said: *"Whilst, therefore, the preliminary issue would not be entirely determinative of the counterclaim, it would be determinative of the vast majority of the counterclaim."* I read that as a reference to the preliminary issue as to the recoverability of unliquidated damages and not design responsibility.

(vi) So far as the balance of the counterclaim was concerned (that is, the discrete heads of claim), DSME's position (at paragraph 63) was that they were the reverse side of the FEED claims coin.

(vii) The penultimate paragraph of the letter/submission read as follows:
"DSME has now served a Reply and Defence to Counterclaim in both references. The Reply is concerned only with the contractual arguments, on the basis that if there is a trial of preliminary issues, the work which would be required to provide a Reply on the technical issues, which would be substantial, would potentially be wasted. In the event that there is a preliminary issues trial and DSME is

successful at that trial, DSME will seek permission in due course to serve an Amended Reply covering also the technical issues. ...."

45. Read both in isolation and against the background of the previous correspondence, it seems to me again entirely clear that DSME's position was that, if it was not successful, the technical issues would not need to be addressed and there would be no Amended Reply. Since the claims were what was relied on in defence to the counterclaim, the same would be true of the Amended Defence to Counterclaim. There was certainly no suggestion that some other issues might arise which could form part of a defence but not be material in reply.

46. Ince & Co responded by letter dated 27 June 2016. The letter summarised briefly the reservations Songa had previously had as to the trial of a preliminary issue about design responsibility. The letter continued:
"That said, having considered the partial Replies served by DSME and the clarification of the issues on construction and rectification, it is now clear that preliminary issues on design responsibility and rectification will be wholly dispositive of DSME's claims if decided as Songa contends that they should be. Songa is accordingly content to accede to this course ....".

47. There followed further correspondence about the rectification issue which is not relevant to the issues in this application. By e-mail on 13 July 2016, Mr Boyd QC, as chairman, informed the parties that the Tribunal had concluded that there should be a trial of a preliminary issue with regard to the question of which party bore design responsibility (covering both issues of construction and rectification). The Tribunal asked the parties to formulate the terms of the preliminary issues. It appears that the parties did not do so and rather relied on parts of their pleaded cases.

The hearing of the preliminary issue

48. The hearing took place over two days in May 2017. The Tribunal made two interim awards on the preliminary issues dated 18 July 2017, one in respect of each arbitration and largely in the same terms. The Tribunal expressed the issues which were as summarised by DSME in the terms set out above. Having formulated the issues in this way, the Tribunal declared that DSME's right to notify Songa of errors in documents did not apply to errors in FEED documentation and that, if DSME did notify such an error within the 90 day period, DSME nonetheless bore responsibility for any additional costs, expenses or delay resulting from such an error.

49. As I have said, there was then an unsuccessful attempt to appeal these awards out of time.

The Amended Claims Submissions

50. On 6 April 2018, Ince & Co. wrote to Stephenson Harwood stating that the effect of the awards and the unsuccessful attempt to appeal was that DSME's claims were at an end leaving only Songa's counterclaim to be dealt with. Various proposals were made in respect of costs. Stephenson Harwood replied to the effect that they were no longer instructed and that Kim & Chang now represented DSME.

51. Kim & Chang responded on 18 April 2018 and for the first time there was an indication that DSME now wished to consider amending both its claims and its defence to counterclaim in the light of the awards on the preliminary issues. In a letter dated 5 June 2018, Kim & Chang gave notice to the Tribunal of DSME's intention to amend, explaining that the amended claim would seek an extension of time to the Delivery Date based on "Songa's breach of obligations in failing timeously to approve DSME's proposals to correct the errors in the FEED…", Songa's failure to co-operate with DSME in finalising the design, Songa's improper interference in the design process, and acts of prevention which, it was said, caused both critical and non-critical delays. The letter stated that the same matters would also be relied on as a defence to Songa's counterclaim. DSME did not intend to amend the Reply and Defence to Counterclaim to repeat the Amended Claim Submission at this stage but intended to do so once permission to amend was given.

52. I have no doubt that that position was utterly contrary to the position DSME had adopted to date. On this basis, the determination of the preliminary issues was not dispositive of DSME's claims and the technical issues would need to be gone into even though DSME had not been successful. The technical issues would need to be gone into on both the claims and counterclaims because the new claims would form the defence to the counterclaim, just as the original claims had done before they fell away as a result of the determination of the preliminary issues against DSME.

53. On 10 July 2018, DSME then sent to the Tribunal its Amended Claim Submissions. The Claim Submissions (in respect of Hull no. 3031) had tripled in size to 299 pages. It was referred to in the subsequent Award as being on a heroic scale.

54. The Introduction explained that the original Claim Submissions were included in Section B (with amendments marked) and that much of the balance provided the particulars which Songa had complained were absent from the original claim. Accepting the Tribunal's decision that DSME had "full design responsibility", DSME now pleaded (at paragraph C.35) that that included both the obligation and the right to change the design. The following paragraphs pleaded "Songa's express and implied obligations to co-operate and not to hinder the works" and "Implied obligations including Songa's obligations to co-operate and not to hinder or prevent DSME from carrying out the works in accordance with the agreed Contract schedule". DSME contended (at paragraph C.48) that, under the contract, in the event that Songa failed punctually, duly or fully to comply with its material obligation, the Delivery Date was automatically postponed and Songa was responsible for all costs and expenses incurred by DSME as a result.

55. The Amended Claim Submission then set out DSME's case on breach and delay leading to a claim in excess of USD 75 million and, in addition, just under KRW 149 billion. At paragraph A.33 it was pleaded that:
"Further and/or alternatively, DSME relies on the matters set out hereinbelow as a defence to Songa's Counterclaim.

DSME's claim included a claim (at paragraph Q.58) for the repayment of liquidated damages asserting that Songa was not entitled to make the deduction "having caused such late Delivery and thereby acted in breach of contract and/or on the basis that time was at large by reason of Songa's breaches."

56. The application to amend was heard on 14 and 15 March 2019. The majority awards (Sir David Steel and Mr Boyd QC) (referred to collectively below as "the Award") were published on 18 June 2019. Mr Marrin QC dissented and gave his Dissenting Reasons in writing (dated 13 June 2019).

The majority Award and the dissenting reasons

57. The first part of the Award set out the background to the hearing of the preliminary issue and recited the correspondence which I have referred to above.

58. The Award then identified five objections which Songa took to the proposed amendments. The majority found in Songa's favour on three of those objections. I deal with the detail of the Award below but summarise the decision as follows:

    (i) The application to amend, if granted would give rise to an abuse of process because DSME could and should have brought or at least intimated its further claims before the hearing of the preliminary issue.
    (ii) Songa withdrew its opposition to the hearing of a preliminary issue in consideration of DSME's promise not to make new claims. This was intended to be a binding and legally enforceable agreement. The parties thus entered into a binding agreement that if Songa consented to an order for the trial of a preliminary issue, and if the Tribunal decided that preliminary issue in favour of Songa, DSME would not make any further or different claims against Songa.
    (iii) The new claims stood no prospect of success because they were debarred by the terms of Addendum No. 2 under which the only claims which were reserved by DSME were the FEED claims (and not any claims for damages of the nature now sought to be advanced).

59. Turning to Mr Marrin QC's Dissenting Reasons:
    (i) He was in no doubt that the claims now advanced were not within the scope of the original Claim Submissions which made no allegations of breach against Songa.
    (ii) Mr Marrin QC agreed with the majority that Addendum No. 2 preserved some claims but precluded others. He appears to have agreed that the preserved claims were the FEED Claims. However, in his view, the definition of the FEED claims was wider than the claims or disputes already referred to arbitration. He gave the example of damage consequent upon alleged interference with the design process and the refusal to approve changes which he considered was comprehended by the FEED claims. He, therefore, took the view that some, at least, of the amended claims were within the scope of the FEED claims, had not been advanced before, and could now be "restored to life" by amendment.
    (iii) He was then not persuaded that the arrangements between the parties in respect of the preliminary issues were contractual or precluded DSME from seeking to amend if they were unsuccessful.
    (iv) He doubted whether there had been any intention to create legal relations and would have expected more formality if there was such an intention. At paragraph 26, he said that he would have found that the parties did not intend to create legal relations.
    (v) On the issue of abuse of process, he said this (at paragraph 17):

"Here, the parties reached an understanding as to the fate of DSME's claim but the Reply and Defence to Counterclaim was pleaded by agreement on a partial basis; and there was no discussion as to whether it would be open to DSME to advance alternative justifications for delay in the event that DSME lost on the preliminary issues."

(vi) Mr Marrin QC then addressed various factors relied on by Songa in support of the contention that DSME's application was oppressive and abusive. These included the interests of finality in arbitration and economy and efficiency in the conduct of the arbitration which weighed in Songa's favour. However, the issue that then seems to have outweighed these considerations for him was the impact on DSME's Defence to the Counterclaim:

"Beyond these, there is to my mind a further matter to be taken into account. It concerns the ambit of the Defence to Counterclaim. By its counterclaim, Songa claims liquidated damages in respect of some 487 critical days of delay. So far, DSME has, in defending that claim, sought to justify the delay solely by reference to its case, now rejected by the Tribunal, that Songa was responsible for the defects in the FEED. However, DSME now seeks to rely on its new allegations of breach in support of alternative defences to the counterclaim. These are, first, that time was set at large and, second, that the delay was attributable to Songa's breach. So much is clear from paragraph Q.58 of the Amended Claim Submissions. Yet, if Songa's argument on abuse is well-founded, DSME will be shut out from advancing these defences even though they were never mentioned, still less expressly abandoned, in the exchanges leading up to the order for the hearing of preliminary issues upon which Songa relies."

The questions of law

60. The questions of law which DSME contend arise and on which permission to appeal is sought were formulated as follows:

Section 1

1.1 Whether the correct approach to determining whether the proposed amendments would give rise to an abuse of process was to apply the rule as formulated in *Henderson v Henderson* or by reference to the test stated in *Johnson v Gore Wood* [2002] 2 AC 1.

1.2 Whether the grant of the proposed amendments in the DACS [the Draft Amended Claim Submissions] fell properly to be considered to give rise to an abuse of process in circumstances in which they constitute a proposed amendment and not the bringing of a new action.

1.3 Whether the proposed amendments fell to be refused on the ground that their grant would constitute an abuse of process by reason of alleged reliance on DSME's representations by non-parties (against whom it was not suggested that any attempt would be made to bring proceedings).

1.4 Whether, in deciding whether grant of the proposed amendments should be refused on the ground that their grant would constitute an abuse of process, such can properly be decided by analogy with the cases of *Aldi Stores Ltd. v WSP Group plc* [2008] 1 WLR 748 and *Otkritie Capital International Ltd. v Threadneedle Asset Management Ltd.* [2017] EWCA Civ 274l; [2017] CP Rep 27.

1.5 What is the proper effect of Rule 10 of the LMAA Terms 2012 on the rule of abuse of process as applicable to an application to amend submissions to introduce new claims.

1.6 Whether the proposed amendments in the DACSs properly fell to be refused on the ground that their grant would constitute an abuse of process.

1.7 If DSME's amended claims in the DACSs properly fell to be rejected on the grounds that grant would give rise to an abuse of process, whether such prevents DSME from relying upon the matters pleaded in the DACSs by way of defence to Songa's counterclaim.

Section 2

2.1 Whether the proposed amendments in the DACS properly fell to be refused on the basis that by (sic) the parties, in the course of the arbitration proceedings, entered into a binding agreement by which if Songa agreed to consent to, or not oppose, an order for the trial of a preliminary issue and if the Tribunal were to decide that issue in Songa's favour, DSME would not make any further or different claim against Songa.

2.2 Whether such binding agreement precludes DSME from relying upon the matters pleaded in the DACSs by way of defence to Songa's counterclaim.

Section 3

3.1 Whether Addendum No. 2 to the Contract precludes DSME from relying upon the matters pleaded in the DACSs by way of defence to Songa's counterclaim.

3.2 Whether Addendum No. 2 to the Contract precludes DSME from relying upon the matters pleaded in the DACSs by way of defence to Songa's counterclaim.

Section 3: Addendum No.2

61. Mr Rainey QC invited me to address section 3 of the questions first. He submitted that if I decided that leave should not be granted on the questions of law posed in that section, it would be unnecessary for me to determine the position in relation to the questions identified in the other sections.

62. That was a sensible approach and one which I gratefully adopt, albeit I address Sections 1 and 2 as well for completeness. Mr Rainey's point was that if the tribunal's decision on Addendum No. 2 is not one on which I would grant leave to appeal, the other ways in which the Tribunal approached the issue, and the other grounds of appeal, fall away. For the avoidance of doubt, where I refer to the Tribunal's decision/ Award in the balance of these paragraphs, I am referring to the majority.

63. DSME's argument on this issue, as put in its lengthy skeleton argument was as follows. DSME characterised the Tribunal's decision as being that the effect of Article VII.2 and Addendum No. 2 impliedly excluded all claims other than those expressly mentioned in Addendum No. 2. Taking that as the starting point for the argument, it is plainly a mis-characterisation of the Award:

(i) Firstly, the Tribunal expressly said that the description of clause 5.1 of the Addendum as an exclusion clause was inapposite. They regarded it as a clause

that preserved claims (by DSME against Songa). Mr Marrin QC took the same view.

(ii) Secondly, the Tribunal did not, as such construe Article VII.2 or the effect thereof. The Tribunal's point was that the reservation of claims was explained by the presence of Article VII.2 in the contracts.

(iii) What they said, at paragraph 67 of the Award was this: *"The parties to Addendum No. 2 (and also no doubt the financiers) clearly assumed that, without a reservation of claims, delivery of the rigs would amount to an acceptance by DSME [that Songa] had "fulfilled all its obligations under this Contract". It is debatable whether or not this was what Article VII.2 was intended to achieve, or whether it was simply a condition precedent to DSME's obligation to deliver. But it was clearly the assumption underlying Addendum No. 2, and the intention of both parties that Addendum No. 2 should reassure the financiers in their decision to pay the delivery instalment."* (The words in square brackets appear to be missing from the sentence.)

(iv) What is apparent from this passage is that the Tribunal's inference as to the parties' understanding of Article VII.2 served to explain and inform the construction of Addendum No. 2. Indeed, that is a further issue on which DSME argues the Tribunal was obviously wrong in law.

64. Having mis-characterised the Tribunal's decision in this way, DSME then submitted that the Tribunal was obviously wrong to hold that DSME's claim had no prospect of success on the question of the effect of Addendum No. 2 because the very fact that there was a dissenting view evidenced the fact that it had a real prospect of success. That submission is misconceived. This was a short point of construction. The fact that there was disagreement within the Tribunal on that point of construction evidences the fact that there were two arguable interpretations and not that the interpretation of the (majority) Tribunal was obviously wrong. Unless this was an issue on which the Tribunal could not properly as a matter of law come to a conclusion at this stage of the proceedings, there could be no error of law in the Tribunal doing so. On the contrary, and from the perspective of the proper conduct of the arbitration, it would have been perverse to permit the proceedings to continue on the basis of the Amended Claim Submission simply so that this argument could be addressed again at some later point.

65. DSME then argued that the Tribunal wrongly ascertained the law in three respects. As I understand it the thrust of this argument is that this led the Tribunal to the wrong conclusion on the issue of construction, paragraph 60 of the skeleton argument arguing that the correct application of the law to the facts would inevitably have led to a different conclusion.

66. The three respects in which the Tribunal is argued to have wrongly ascertained the law are that:

(i) the Tribunal wrongly took into account the negotiations leading up to Addendum No. 2 as a guide to construction.

(ii) The Tribunal wrongly ascertained the factual background.

(iii) The Tribunal wrongly ascertained the contract by reference to the (alleged) subjective intentions of the parties.

Mr Catchpole QC's oral submissions concentrated on these three alleged errors of law.

67. The first and third arguments are different aspects of the same point and DSME relies on the well-known decisions in *Investors Compensation Scheme Ltd. v West Bromwich Building Society (No. 1)* [1998] 1 WLR 896 and *Wood v Capita Insurance Services Ltd.* [2017] UKSC 24.

68. The Tribunal had before it and recited the evidence of Mr Steinsland, an officer of Songa's parent company, who made reference to discussions with Songa's financiers as part of the background to the entering into of Addendum No. 2. As recited in the Award, at paragraph 9, Mr Steinsland's witness statement recorded the concern of Songa's financiers about the FEED claims and the possibility of arrest of the vessels. He continued:
"After considerable negotiation with DSME and Songa's financiers from the end of May and through June 2015, this was dealt with in Addendum No. 2 which also contained a specific reservation for DSME's claims which were stated to be the FEED claims. There was no reference to breach of contract or non-fulfilment of obligations or default on the part of Songa in Addendum No. 2."

69. Songa makes the point that this evidence was not objected to and was not challenged.

70. DSME argues that evidence of negotiations is not admissible for the purposes of construing an agreement, not least where the content of those negotiations was not shared with DSME; that, in any event, the only concern of the financiers was the risk of arrest of the ship; and that the Tribunal thus wrongly took into account the perceived subjective intention of the parties.

71. In my judgment, the Tribunal made no such errors and certainly no obvious error of law in this respect. The authorities relied upon by DSME support the proposition that the interpretation of a contract is a unitary exercise which may have textual and contextual elements and the purpose of which is to ascertain the objective intention of the parties. That was what the Tribunal did here. The position of the parties, as evidenced by the matters I have set out above, is that Songa wanted delivery to take place (Recital C) but the parties wished to address how they intended to proceed with certain matters to allow delivery to take place (Recital D). One of those matters was the FEED Claims. They were dealt with under the heading "FEED Claims Reservation" (which itself indicated that the intention of the clause was to preserve claims that would otherwise not be open to DSME rather than operate as an exclusion clause). Those claims were described as those which the Builder asserted in respect of its allegations that the FEED documents "contained inherent errors and omissions, which the Builder asserts have caused it to undertake extra works resulting in delays and cost overruns, and that these delays and cost overruns are the responsibility of the Buyer". They were stated to include but not be limited to those in the letter of 26 May 2015.

72. The intention of the parties in relation to claims against Songa could be ascertained from these recitals and paragraph 5 alone and it was, on the face of it, that the FEED claims would survive notwithstanding delivery. The Tribunal's reference to Article VII.2 provided an (assumed) explanation as to why the parties thought it necessary to reserve or preserve those claims. The evidence of Mr Steinsland supported that interpretation in the sense of providing background as to how and why those issues arose. But the key point, to my mind, is that this was not the basis of or central to the Tribunal's decision which was based on the objective interpretation of the Addendum.

73. I note that Mr Marrin QC's approach was not substantially different but that he merely took a different view as to the meaning of "the FEED claims" which were preserved. With the greatest of respect to him, it seems to me that the definition of the FEED claims was the narrower definition preferred by the Tribunal. The claims that DSME asserted were those advanced on the basis that DSME did not have design responsibility for errors and omissions in the FEED documents if those errors and omissions were notified within the 90 day period. There was no claim in respect of errors or omissions in respect of which DSME alleged some breach on the part of Songa in co-operating in the remedying of those defects where that breach had led to delays and cost overruns. But, in any event, I can see no obvious error of law in the Tribunal's decision on this issue.

74. That serves to dispose also of DSME's argument that the Tribunal wrongly ascertained the relevant facts to be taken into account when reaching their decision. DSME argues – this time itself relying on Mr Steinsland's evidence - that the aim of the Addendum was to obtain delivery without the risk of DSME arresting the vessels. DSME argues that that is reflected in Clause 6 of the Addendum (which provided the undertaking that DSME would not arrest the ship in connection with the FEED claims, its assertions in respect of liquidated damages, and disputed change orders) and that the conclusion that the intention of the Addendum was to preserve the FEED claims is a logical non-sequitur. That argument is hopeless. The Addendum addressed both issues. The fact that it was also concerned with ensuring that the vessels were not arrested as well as preserving claims is an entirely logical sequence of clauses. Further, as Mr Rainey QC submitted, Clause 5 lost its teeth if it was open to DSME to assert further claims (not referred to in the Addendum) and arrest the vessels on that basis.

75. The second strand of DSME's argument is that the Tribunal was wrong in law in its approach to Article VII.2. DSME's case is that clause did not have the effect that the Tribunal assumed the parties considered it to have and that that assumption had no basis; clause 5 did not purport to settle or waive any claim by DSME; and that, in so far as the Tribunal held that clause 5 excluded any claim, the Tribunal "failed to give effect to the principle of law that any provision excluding liability must be expressly worded to have that effect". This second strand is, to my mind, merely a different way of expressing the arguments already articulated. I note also that Mr Catchpole QC in his oral submissions advanced the argument that the new claims fell within the reservation in respect of liquidated damages. That was a new argument and does not disclose any error of law by the Tribunal.

76. I conclude, therefore, that there is no question of law in the terms of question 3.1 on which the Tribunal was obviously wrong and that permission should not be granted on this basis. The case was argued before me in as much detail as if permission had been granted and it will be apparent from what I have said above that had permission been granted, I would have not have found that the Tribunal had made an error of law.

77. Permission to appeal was also sought on the grounds that question 3.1 raised a point of general public importance.

78. DSME relied on the statement of Mr Lee of Kim & Chang who contended, based on his own experience, that many Korean shipbuilders enter into similar agreements with their

buyers and that without an answer to this question, Korean and other shipbuilders would be exposed to uncertainty as to the scope of the disputes falling within an Addendum agreement when making delivery.

79. DSME relied on two decisions in ***Equitas Insurance Ltd. v Municipal Marine Ltd.*** [2018] EWCA Civ 991 and ***HOK Sport Ltd. v Aintree Racecourse*** [2003] BLR 155 in support of the proposition that this sort of industry interest in an issue gives rise to a question of general public importance.

80. In the ***Equitas*** case, the award was concerned with the re-insurance of mesothelioma claims against employers and the ability of insurers, putting it in simple terms, to allocate claims to years. A question of general public importance was held to arise because the insurance and re-insurance industry were expecting to face claims for many years and the question of allocation was "a significant open question for many participants in this market". In ***HOK***, the judge considered that there was a point of general public importance in the question of the application of the then recent decision in ***South Australia Asset Management*** – a case on its facts concerned with claims against valuers and the effect of the downturn in the property market – to professional negligence claims more generally and, in particular, in terms of the relevance of scope of duty. Neither of these cases establishes any point of principle which assists in the present case and both are cases decided on their own particular facts.

81. In my view, there is no merit in the argument that a question of general public importance arises here. This is a bespoke agreement to achieve the outcome rehearsed in the Recitals. It is for the parties to achieve clarity in the drafting of any Addendum agreement of this nature. Any further judicial consideration of this particular agreement would only be of the interpretation of a particular bespoke clause against the background of the particular claims made by DSME. There is no point of general public importance.

82. DSME argues, in any event, under question 3.2, that the Tribunal was obviously wrong to find that the reservation of only the FEED claims (as set out in the original Claim Submissions) also precluded DSME's reliance on its amended claims as defences to the Counterclaim. DSME's primary submission is that this decision finds no support in the correspondence identified by the Awards and, as articulated in the skeleton argument, that the Tribunal's analysis "of the effect of Article VII.2 and Addendum No. 2 … to exclude impliedly those claims not expressly reserved by Clause 5.1, … did not support a finding that they excluded the right to plead any given factor or matter in defence to a claim by Songa".

83. At the same time, DSME say that the Tribunal's decision contained no analysis concerning defences and/or that the Addendum is silent on the issue. Mr Catchpole QC again made the point that the defences to the claim for liquidated damages are expressly preserved and are in essence the same as the defences to the claim for unliquidated damages. As I said above, the latter is a new point, does not disclose any error of law by the Tribunal and I doubt that it is within the scope of the application.

84. It is fair to say that the Tribunal's decision did not discretely address the issue of the effect of Addendum No. 2 on DSME's defences. That was because, although I have taken this issue first, the Tribunal addressed it as a further reason not to allow the

amendments. It seems to me self-evident, however, that, having decided that the amended claims were not reserved by Addendum No. 2, the Tribunal similarly considered that they were not reserved, so to speak, as defences. By their very nature they were, even when deployed as defences, claims that DSME was entitled to an extension of time, in the sense of a postponement of the delivery date, which would preclude Songa from claiming damages for late delivery.

85. There is no obvious error of law and, for the same reasons as in relation to question 3.1, no issue of general public importance.

86. I do not, therefore, grant permission to appeal on either of these questions of law and, as Mr Rainey QC submitted, that is sufficient to determine this application.

Section 2

87. In deference to the arguments of counsel, for completeness, and in case I am wrong thus far, I will deal with the further bases on which DSME's application was advanced.

88. Questions 2.1 and 2.2, in essence, articulate DSME's case that the Tribunal was wrong in law to find that the correspondence that led to the agreement to the hearing of a preliminary issue gave rise to a binding contract pursuant to which, in the event that they lost on the preliminary issue, DSME would advance no further claims and/or defences to Songa's counterclaim.

89. This was the aspect of DSME's case that seemed to me the most persuasive not least because finding that a contractual agreement arose in such circumstances is unusual. However, and although not the primary basis for Songa's argument to the contrary, I observe that this was a Tribunal of considerable experience and standing in the context of commercial law and it might be thought unlikely that they would make an obvious error of law on issues of contract formation. As DSME recognises in its submissions, the Awards themselves make clear that the Tribunal was well aware that an agreement to the hearing of preliminary issues would normally be an agreement to a procedural step with no contractual force. Equally, the majority considered that there could be circumstances in which there was a binding contract. Mr Marrin QC did not dissent. The majority considered that there were such circumstances in this case. Mr Marrin QC did not and considered that there was no intention to create legal relations.

90. To put DSME's position in context, it is I think helpful to recite how the case was put in written submissions because, despite its attraction, they expose the fallacies in DSME's case. At paragraph 37 of its written submissions, DSME says this:

"However:

a. The Tribunal went on to assert …. that "in truth the arrangement [for a PIH] made no sense unless DSME was not merely stating that it was its intention not to make new claims, but was actually promising not to do so if the Tribunal ordered the trial of preliminary issues." This was a false leap in logic and/or result for which there was no reasonable explanation …., which assumed what had to be proved, and the Tribunal identified no passage in the correspondence from DSME in which it made any such promise, let alone an offer to contract on that basis. The Tribunal identified no

authority supporting its finding that a contract was made. It was and is generally perfectly sensible for the parties to agree to a hearing of Preliminary Issues on the basis of the (then) currently pleaded case: that is what such hearings entail.

b. Immediately following the passage in the Awards cited above, the Tribunal stated … "That there was otherwise no outcome of the preliminary issues which could result in the very large saving of further time and expense which would result from a decision in favour of Songa." However, this was an illogical conclusion which was incorrect in law as to the effect of the preliminary issues: the outcome of the preliminary issues did indeed have the effect which DSME had stated in correspondence would be the outcome if unfavourable: the claims pleaded were rejected and the then pleaded case failed."

91. The premise of all of DSME's proposals for the hearing of a preliminary issue on design responsibility was not merely that it would determine that issue or even merely that the current claims would fall away. On a fair and natural reading of the correspondence, the premise of all the proposals was variously (i) that if DSME had full design responsibility, the technical issues did not arise and would not have to be pleaded out or determined; (ii) that if DSME had full design responsibility, it had no claims and "whatever delays and cost overruns resulted will be to DSME's account"; (iii) that if DSME had full design responsibility, it had no defence, in principle, to the counterclaims (at least those for damages for late delivery) save for the argument that the counterclaims for unliquidated damages were contractually precluded by the provision for liquidated damages and (iv) that "how the alleged defects resulted in delay and cost overruns would not need to be determined".

92. Once those aspects of the correspondence are identified and highlighted the false leaps of logic which DSME claims the Tribunal made fall away. Of course one of the consequences of a decision unfavourable to DSME was that the pleaded claims and correlative defences were rejected but DSME had represented as clearly as it could that a finding against it on the preliminary issues would have the consequence that the technical issues and the causes of delay would not have to be gone into. The effect of the Amended Claim Submissions would be the precise opposite, as would the entitlement of DSME to rely on the same matters in defence.

93. DSME then argues that the Tribunal failed to identify the precise offer and acceptance and/or that the terms of the alleged agreement were insufficiently certain and, in particular, that the correspondence contains no offer or promise not to make new claims (or advance new defences). It is trite law that in commercial negotiations the parties may reach a binding agreement without there being a single offer and acceptance and the nature of the agreement (and its certainty) can be seen in the propositions set out above.

94. I note that, in the context of any offer made by DSME, DSME seeks to place reliance on the reservation in paragraph 3 of the (Partial) Reply and Defence to Counterclaim which it describes as reserving "the right to plead further matters" so that there could not be a clear offer not to make further claims. Paragraph 3 has to be read in context, the context is fully set out above, and I have already indicated how I read that reservation. DSME was, at this point, seeking to persuade Songa to agree to the hearing of a preliminary issue on design responsibility (and possibly on the effect of Article III). As DSME repeatedly said, it was only if it was right on the issue of design

responsibility that the technical case (both in Reply and in Defence to Counterclaim) would need to be pleaded out fully. In consequence, DSME only pleaded its case on contractual issues including design responsibility and Songa's entitlement in principle to claim unliquidated damages. What DSME was, therefore, reserving was the right to serve "a Reply and Defence to Counterclaim dealing with the balance of the Defence and Counterclaim" following the determination of the preliminary issues or if there was no order for the hearing of preliminary issues. In other words, DSME was reserving the right to plead to the parts of the Defence and Counterclaim that it had not yet pleaded to and not generally reserving the right to plead other claims (which would not properly be part of a Reply) or other defences (which were new claims relied on as defences).

95. DSME further submits that since the Tribunal did not expressly address the issues identified by Mr Marrin QC – namely that Songa did not seek any assurance from DSME that it would not advance fresh claims or suggest that DSME would be precluded from seeking an extension of time on other bases – demonstrate that the Tribunal failed properly to ascertain the law since both these issues were relevant to the formation of a contract (citing ***Covington Marine Corp v Xiamen Shipbuilding Industry Co Ltd.*** [2005] EWHC 2912 (Comm)). I cannot accept that the majority of the Tribunal was either not aware of the need for there to be an intention to create legal relations or did not consider that issue – the recognition that this was an unusual case where the agreement was contractual rather than procedural at the very least demonstrates that they did. Indeed, at paragraph 42 of the Award, the Tribunal expressly recognised that DSME's principal argument was that procedural matters are not intended to give rise to legally binding obligations. The Tribunal went on to consider that distinct issue and reached a conclusion on the facts and on its objective interpretation of the correspondence.

96. It was not incumbent on the Tribunal to recite and address every issue that pointed one way or the other. That is, in reality, DSME's submission and it does not disclose any obvious error on a question of law (in answer to either of DSME's questions 2.1 or 2.2).

97. Accordingly, I would not have granted permission to appeal on this basis.

98. DSME once again contends that this is nonetheless an issue of general public importance. That is said to arise from the fact that this is an arbitration conducted under the LMAA rules which provide[1] that a party has a right to refer all disputes at whatever time they arise. There is, therefore, it is submitted, a general public interest as to whether, in the absence of agreement by way of a consent order, a party proposing the hearing of preliminary issues may be found to have entered into a binding contract on terms that it may not amend its pleadings. In my judgment, there is no such question of law of general public importance. The Tribunal reached a decision on the facts of this particular case which it recognised gave rise to a result which was "less usual but not unknown" and no more than that.

Section 1

99. DSME took these issues first perhaps on the basis that the Tribunal itself said (at paragraph 35) that even if the arrangement fell short of a legally binding agreement, the

[1] rule 10 of the 2010 terms and rule 12 of the 2017 terms

arrangement should only be set aside for some compelling reason and there was no such compelling reason. That, they said, required some brief explanation and that explanation lay in the abuse of process to which the amendment would give rise if permitted.

100. DSME's question 1.1, in effect, contends that the Tribunal erred in law in applying the test in *Henderson v Henderson* rather than *Johnson v Gore Wood*, the latter case not being referred to in the Awards. This question was, in DSME's submission, integrally linked to its question no. 1.6 as to whether permission for the amendments should have been refused as giving rise to an abuse of process. In reality all of questions 1.1 to 1.5 are sub-issues arising under question 1.6 and seek to challenge each aspect of the Tribunal's reasoning.

101. I start, therefore, with the decision in *Johnson v Gore Wood & Co.* [2002] 2 AC 1 in which Lord Bingham set out the principles at 30-31 as follows:
"It may well be ..... that what is now taken to be the rule in Henderson v Henderson has diverged from the ruling which Wigram V-C made, which was addressed to res judicata. But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present, the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceedings involves what the court regards as undue harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should, in my opinion, be a broad, merits-based judgment which takes account of the public and private interests involved but also takes account of all the facts of the case, focusing attention on the crucial question whether, in all circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. ... it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask where the abuse is excused or justified by special circumstances. ..."

102. I observe, firstly, that the Tribunal referred to the rule in *Henderson v Henderson* as being founded on the need to preserve the integrity of the legal process. They said that it was the process which was to be protected from abuse not an individual party. That may be a questionable proposition in the light of *Johnson v Gore Wood* but that is not

sufficient for DSME's application to succeed. Having made that statement, the Tribunal took this approach:

(i) They placed reliance on the representations of DSME to the Songa companies (or specifically their parent companies) that a decision against DSME on the preliminary issues would put an end to its claims, which representations had been relied upon to their disadvantage.
(ii) They further placed reliance on the lack of a satisfactory explanation as to why "the new claims were not brought forward earlier".
(iii) In the absence of such an explanation, they found *"that the failure by DSME to state that it had further claims up its sleeve when applying for a preliminary hearing is a compelling reason why there should not now be an amendment on a huge scale leading to a potentially prolonged and costly further hearing."*
(iv) They considered that "the slightest inquiry" before the application for the hearing of a preliminary issue would have brought the relevant facts to light.
(v) In that respect, the Tribunal saw an analogy with the cases of ***Aldi Stores Ltd. v WSP Group*** [2007] EWCA Civ 1260 and ***Otkritie Capital International Ltd. v Threadneedle Asset Management*** [2017] EWCA Civ 274 which they described as cases where there was a conscious decision not to mention possible further claims at a case management conference and further claims stopped.
(vi) The Tribunal concluded that, in the present case, the failure was not perhaps conscious or deliberate:
"… but it was certainly the result of a failure to make the reasonable inquiries which could and should have been made before making a serious representation to the tribunal about the state of the case, and which was calculated to influence the decision of the tribunal and the opposite party."(paragraph 38; my emphasis).

103. It is against that background that DSME's criticism of the absence of reference to *Johnson* v *Gore Wood* and the submission that the Tribunal applied the wrong tests in law has to be viewed.

104. I refer further below to the nine propositions that Mr Catchpole QC advanced orally but, in summary, relying on the decision in *Johnson v Gore Wood*, DSME's submissions were these:

(i) the onus of proving abuse is on the party alleging it. In saying that there was no compelling reason to set aside the arrangement between the parties, the Tribunal reversed the burden of proof. To my mind that takes one part of a sentence out of context. It is clear from the explanation the Tribunal then proceeded to give, and which I have summarised above, that there was no such error of law.
(ii) As I understand it, it is submitted that the Tribunal had no regard to the fact that there was no public interest in the issue. That is one aspect of or factor in the reasoning in *Johnson v Gore Wood*. It does not preclude the finding of an abuse of process.
(iii) There will rarely be a finding of abuse unless the later proceedings involve what the court regards as unjust harassment of a party. It is on this basis that DSME submits that the Tribunal's statement that it is the process that must be protected and not the individual party is wrong in law and thus that the Tribunal wrongly ascertained the law. There is nothing in this point. There is nothing in *Johnson v*

Gore Wood that departs from the proposition that "abuse of process" is concerned with exactly what it says, namely abuse of the process and that there is both a public and private interest in preventing abuse of the process. Unjust harassment is to be found in the representation as to the consequences of a finding unfavourable to DSME of the hearing of the preliminary issues and in what DSME did once it had lost. Having acceded to the course repeatedly advocated by DSME, Songa and the Tribunal would, if the amendments were allowed, now find themselves in exactly the position that DSME represented they would not – that is the position of having to investigate at great time and cost a complex technical case and the causes of delays and cost overruns.

(iv) The Tribunal failed to take into account that the issues raised by DSME were relevant to its defence to Songa's counterclaim and DSME had expressly reserved the right to plead its defence more fully. I repeat what said about this reservation above.

Question 1.2

105. Irrespective of these submissions, DSME raised what might be described as a threshold question in question 1.2, that is that the Tribunal erred in law in its application of the concept of abuse of process to amendments sought to be made in the same proceedings rather than in commencement of further proceedings.

106. It is necessary for me to address in a little more detail how the argument on that issue developed. *Johnson v Gore Wood* was indeed a case in which the issue of abuse of process arose in the context of a further set of proceedings and was one in which the same claims were made against the defendant by a different but associated claimant. The passages which I have quoted above, therefore, referred to further proceedings. There was no consideration of or reference to further claims sought to be made in the same proceedings by amendment.

107. DSME's starting point appeared to be that an abuse of process could only arise where there were fresh proceedings. As I have mentioned, in his oral submissions, Mr Catchpole QC identified nine propositions in respect of abuse of process. I do not set them out in full but, as a starting point, he submitted that for the principles in *Johnson v Gore Wood* to be applicable there had, as a minimum, to be (i) a first and second set of proceedings and (ii) a final determination of issues in the first set of proceedings and (iii) an attempt to re-litigate matters dealt with or which ought to have been dealt with in the first set of proceedings. So far as that third point is concerned, he emphasised that the second set of proceedings had to involve the same facts and matters and that the Tribunal's decision was patently wrong because it had never been suggested that the issues DSME was now seeking to raise should have dealt with in the first set of proceedings, that is, as part of the preliminary issues hearing.

108. As his fourth proposition, however, Mr Catchpole QC appeared to concede that the principles could apply where there were two sets of proceeding within the same action and where there had been a final determination in the first such set of proceedings. He referred to the decision of Mann J in in ***BT Pension Scheme Trustees Ltd. v British Telecommunications plc*** [2011] EWHC 2071 (Ch) where there was a series of hearings of preliminary issues and the judge refused to permit a party to withdraw a concession made in one hearing in a later haring. That, however, could not, in his submission, save

the Tribunal's award because it could not be relevant to claims or issues raised by amendment which by definition had not been finally determined in the first set of proceedings.

109. Mr Catchpole QC's free-standing eighth proposition was that the principles of abuse of process did not apply to amendments and he placed reliance on the decision of Jackson J (as he then was) in ***Ruttle Plant Hire Ltd. v Secretary of State for the Environment, Food and Rural Affairs*** [2007] EWHC 1773 (TCC).

110. Songa argued that there did not have to be two completely distinct sets of proceedings and pieces of litigation or, as in this case, arbitration. Again, without I trust doing any injustice to the argument, Songa contended that Lord Bingham in *Johnson v Gore Wood* expressly did not seek to list all the circumstances in which an abuse of process might arise. The decision did not, therefore, exclude the possibility of such an abuse arising in the same proceedings. Songa relied on the decision of Mann J in the ***British Telecom*** case in support of that contention and as an example of a case where the court had found an abuse to have arisen at a different stages of the same proceedings.

111. The ***British Telecom*** case was one in which the parties had agreed a list of issues for trial and the judge had proceeded to hear and determine the first four issues. When the case was restored for further directions, as Mann J noted at [2], it became apparent that the second defendant Secretary of State wished to raise an issue which was not on the list. The other parties contended that that was not open to the Secretary of State because of a concession previously made. The concession was recorded in the document containing the list of issues, under issue no. 12, where the Secretary of State's position on that issue was set out, and it was supplemented in a skeleton argument. Mann J held that the Secretary of State was not entitled to resile from the concession. He carried out a detailed analysis of how the concession had come to be made and he concluded that the issue of post-transfer date acts (now raised by amendment) were clearly in mind and that the concession was deliberate and made with eyes wide open. At [44] he observed that the parties had intended the list of issues to be exhaustive and that in negotiating the issues they had indicated the questions they did not want or need to have answered. Once the court had then embarked on answering the questions, the parties had started to erect an edifice on agreed foundations and the party who made the concession could not lightly decide *"after the agreed building has started, that he does not like the design of position after all, and would like the building moved over to the left, or constructed according to a different design."*

112. Mann J did not consider that the matter amounted to res judicata but he would, in the alternative, have found that the doctrine of abuse of process would operate to bar the Secretary of State from taking the conceded point because it could and should have been raised before. At paragraph 61 he concluded:
"The amendment point was contemplated, and was clearly not sought to be invoked in relation to post transfer date bulk transfers. That was a conscious decision on which the other parties were entitled to, and did, rely, to their prejudice on the matter referred to above. If the point was going to be taken it ought to have been taken at that point. All parties intended that the list of issues should be conclusive. That means that matters which must have been known to the parties as potential issues, but which were not to be litigated because a position was conceded, should be taken conclusively not to be issues. Once the litigation, based on that position, has started, and a decision issued

which depends on it, it becomes too late to raise the point thereafter – it should have been raised before."

113. It can be seen that there were aspects of that decision that cut both ways. On the one hand, the judge was clearly prepared to rely on the doctrine of abuse of process to refuse an application to amend. There is a clear analogy to be drawn between the concession and the stance adopted by DSME in this case that the preliminary issues would dispose of the need to address the technical issues and delays and costs overruns. On the other hand, in that case, the post-transfer date issue was one that was within the contemplation of the parties; in the present case the breach allegations were not, not least because they had never been adverted to by DSME. I note also that it does not appear that any authority was drawn to the judge's attention other than *Johnson v Gore Wood*.

114. It was Mr Rainey QC who had, very properly, drawn my and DSME's attention to the decision of Jackson J in ***Ruttle Plant Hire Ltd. v Secretary of State for the Environment, Food and Rural Affairs***. In that case, the judge stated in terms at [36] that "the rule in *Henderson v Henderson* cannot be invoked in order to prevent a party from pleading at a later stage in litigation issues which might have been pleaded earlier." That case had not been drawn to the attention of the Tribunal and had not previously been relied upon by DSME. Mr Rainey QC maintained that the abuse here arose on very particular facts (and was a finding of fact); he relied on the arguments above; he submitted that the introduction of the fresh claims by amendment would, in reality, amount to a new action; and, if necessary, he argued that the ***Ruttle Plant Hire*** case was wrongly decided on this issue.

115. At this stage, neither party had drawn either the Tribunal's or my attention to the decision of the Court of Appeal in ***Tannu v Moosajee*** [2003] EWCA Civ 815 or subsequent authorities in which that decision has been cited. In that case, the claimant brought proceedings in the Queen's Bench Division for a sum of £110,000 as a debt. The defendants' case was that their relationship with the claimant was not that of debtor and creditor but of partners. The judge held that there had been a partnership but that it had been dissolved. He directed that the affairs of the partnership be wound up and that there should be a taking of accounts in the Chancery Division. In those proceedings, there was a dispute as to whether the claimant was able to take a particular position on the £110,000 in light of the decision in the Queen's Bench Division. On appeal from the Master, Lloyd J held that the claimant was not entitled to take that position relying on *Henderson v Henderson.*

116. Each member of the Court of Appeal gave a judgment. Mummery LJ held that the point had not been canvassed or decided below and could now be properly raised. Dyson LJ noted that Lloyd J had applied the principle of abuse of process at different stages of the litigation but did not suggest that that was wrong per se. However, he considered that Lloyd J's approach was too rigid and that he had not made the broad merits based judgment required. Arden LJ agreed with both. At [40] she said that *"Whilst it might be unusual to apply the principle in Henderson v Henderson in relation to separate stages of the same litigation, it is not conceptually impossible."*

117. The decision in ***Tannu*** preceded ***Ruttle Plant Hire*** and was a decision of the Court of Appeal but does not appear to have been cited to Jackson J. It was relied upon and followed by Coulson J in ***Seele Austria GmbH Co v Tokio Marine Europe Insurance Limited*** [2009] EWHC 255 (TCC) in refusing to allow amendments. I address this decision in some detail below.

118. It was further relied on by Andrew Baker J in ***Gruber v AIG Management France SA*** [2019] EWHC 1676 (Comm) in a decision concerned with the proper scope of a trial of quantum issues following a judgment on liability. At [11], the judge set out a summary of the principles of abuse of process including:
"g. The doctrine is not restricted to cases where the alleged abuse comes in a separate, later action. It is possible to conclude that a claim or defence not initially raised ought properly, if it was raised at all, to have formed part of an earlier stage within a single action at which at least some matters were finally determined.

h. It is a strong thing to shut out pursuit of a point not actually decided previously against the party raising it; and it may be an even stronger thing to do so in relation only to different stages of a single action. I would though add, as to the latter, that much may depend on the nature of the stages involved. Here, the parties had their final trial of all issues, not merely, for example, a decision on preliminary issues or a summary judgment decision on some particular claim or defence or a final determination of an individual point as part of dealing with some other interlocutory application. If the doctrine be available, as indeed it is, in the context of a single set of proceedings, the potential for it to apply on the facts where those are the circumstances plainly may arise more readily than during the interlocutory life of the process."

119. Before this reserved judgment was drafted, Songa became aware of the decision of Zacaroli J in ***Tina Lorraine Kensell v George Alexander Khoury*** [2020] EWHC 567 (Ch) in which he relied on the decision in ***Tannu*** and considered the cases that followed it, namely ***Seele Austria*** and ***Gruber***, to be rightly decided on the issue of the applicability of the concept of abuse of process to different stages of the same action.

120. In ***Kensell v Khoury***, Zacaroli J said this:
"47. So far as the authorities are concerned, the proposition that the Henderson principle can be invoked even at a later stage in the same proceedings is now clearly established by Tannu and the line of subsequent cases that have applied it. Contrary to Mr Hutchings' submission, the weight to be afforded to Jackson J's decision in Ruttle is itself diminished by the fact that the earlier Court of Appeal decision in Tannu was not cited to him.

48. So far as the point of principle is concerned, I do not see why the existence of a broad discretion in the context of an application to amend is a reason to preclude altogether the application of the Henderson principle within the same action. A finding that a new claim would amount to an abuse must lead to the claim being disallowed, as a rule of law, and not merely as an exercise of discretion. If a new claim would amount to abuse, therefore, the mere fact that it is sought to be introduced in circumstances where the court has a broad discretion is not sufficient reason to preclude the application of the Henderson principle.

…

63. For these reasons, while I consider that the Henderson principle is capable of being engaged upon an application to amend made after the strike-out of the original claim in the same proceedings, it is likely to be appropriate to apply it in more limited circumstances than if the earlier judgment was given after a trial (for example on a preliminary issue) at an earlier stage in the same proceedings."

121. Having become aware of this case, Songa made further submissions, DSME responded at considerable length, and Songa replied (all in April 2020). DSME then served rejoinder submissions in May. This further round of submissions totalled over 40 further pages.

122. Although it may have taken some time to get there, Songa, therefore, now submits that there is clear authority that the *Henderson v Henderson* type abuse of process can apply at different stages of the same proceedings and can be material to an application for permission to amend, not least one following the trial of a preliminary issue.

123. In its April submissions, at paragraph 3, DSME summarised its position on the *Henderson v Henderson* principle as developed in *Johnson v Gore Wood* as follows:
"a. The principle is a principle to obtain finality in litigation;

b. The principle applies to prevent litigation of an issue which has been decided by a previous Tribunal, or of an issue relevant to the determination of that issue which ought to have been raised at the time of such determination;

c. The principle does not apply to new issues not decided upon by a Tribunal previously where those are not issues within the scope of the issues previously determined;

d. The principle relates to such issues which have been decided, as opposed to being a principle concerning pleadings."

124. Sub-paragraph b., it seems to me, added a gloss to the previous formulation of DSME's propositions, namely that the issue that ought to have been raised was relevant to the issue that was, in fact, determined, or it may be another way of expressing the same facts and matters point. Sub-paragraphs c. and d. further do not seem to me properly to reflect the broad merits judgments advocated in *Johnson v Gore Wood.* The principle DSME seeks to identify at c. makes no sense because the very point is that a party should not be vexed twice – if new issues ought to have been raised before, a party ought not to be vexed a second time with issues that ought to have been raised the first time. If it is intended to reflect the gloss, then, in my view, there is nothing in *Johnson v Gore Wood* that limits such issues to ones that were relevant to the determination of the issues, in fact, determined. The nearest I can see to that, but which in my view states a far broader proposition, is the statement of Lord Bingham at 23E, citing from *Greenhalgh v Mallard* [1947] 2 All ER 255, at 257, that the abuse may cover "issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them". Principle d. is, with respect, difficult to follow but seems to be a further formulation of Mr Catchpole QC's submissions at paragraph 108 and 109 above.

125. Songa, in response, asserted that the gloss was a new case and not open to DSME, leading to DSME's further May submissions. DSME's case was there explained or

summarised somewhat differently again. DSME noted that it had been accepted at the oral hearing that there may, in exceptional circumstances, be an abuse of process if an issue is sought to be raised in a subsequent stage of proceedings where there had been a final and binding decision on that issue at an earlier stage of the proceedings. However, DSME then stated that the fundamental issue "was and remains" that abuse as contemplated in *Johnson v Gore Wood* can only arise in principle where either the issue was argued and finally decided at a previous hearing "or ought to have been argued in that hearing because, had it been argued, it would have affected the outcome of the trial of the issue which were finally determined at that hearing". That repeated and developed the gloss which was now formulated as being that the issue in question ought to have been raised at the previous hearing because it would have affected the outcome of the trial of the issue or issues that were finally determined at that hearing.

126. It is unnecessary for me to determine whether this is a new way of DSME putting its case or a permissible variation on a theme. By this stage, DSME had, in effect, answered its own question at 1.2 in terms that the amendments could be considered to be an abuse of process despite the absence of fresh proceedings, and I repeat that I cannot see the basis for the gloss, in either of its formulations. The variations in how DSME has expressed its case serve to demonstrate the validity of Lord Bingham's view that it is impossible to list all the circumstances in which abuse of process may arise.

127. In any event, the main thrust of DSME's April submissions was that the authorities now relied on by Songa are, in fact, all examples of cases where the issue sought to be raised at a later stage had been already been determined and/or was within the scope of the issues determined so that it would be an abuse to revisit it.

128. The key point seems to me to be that the submission so formulated ignores the fact that an abuse of process may arise (albeit does not necessarily arise) where the issue could and should have been raised at an earlier stage and that the authorities to which my attention has now been drawn support the proposition that that may be the case at different stages of the same proceedings as well as in subsequent proceedings and that an abuse of process may properly be found to arise in the context of proposed amendments. The question of whether the issue or issues then raised have been determined or were within the scope of the matters to be determined or were relevant to the matters to be determined is all part of the broad merits based judgment of the facts and go to question 1.6 rather than the threshold question.

129. Although DSME seeks to place reliance on the decision of Coulson J (as he then was) in ***Seele Austria***, and seeks to contrast that case with the present case, it seems to me that the ***Seele Austria*** case, in fact, provides a close comparable. For that reason, I quote from it and consider it at even greater length than in DSME's April submissions:

    (i) As Coulson J recited the case had a long and rather unfortunate history. It concerned a claim against insurers by specialist contractors who had designed and installed glazing which was defective and had to be replaced at great cost. There was a dispute as to the scope of the indemnity and the (single) deductible for design liability or (multiple) deductibles for workmanship defects. By the time the matters reached Coulson J, there had been a trial before Field J and an appeal to the Court of Appeal. The defendant accepted that design errors were a single occurrence with a single deductible and the Court of Appeal decided that

workmanship defects in each window represented a separate occurrence with a separate deductible. The claimants then sought permission to amend to plead that the majority of defects were design defects and not workmanship defects.

(ii) Coulson J noted (at [44]) that Field J had described the trial before him as the being in respect of "a set of issues designed to determine whether the claimant is entitled to be indemnified". He further found that the issue as to whether the defects were a matter or workmanship or design was an issue before Field J and before the Court of Appeal and had been decided. The decision that the defects were ones of workmanship or design could not be opened up.

(iii) Coulson J addressed that primarily as a matter of issue estoppel and he considered the three arguments advanced as to when an issue could nonetheless be opened up. At [92]-[93] he said this:

"92. ... I am conscious that the CPR encourages the parties and the court to try and find ways in which the underlying disputes between the parties can be resolved in the quickest and most cost-effective way possible, having regard to the overriding objective. This means that there has been an increase in the number of cases which are resolved by way of preliminary issues, sub-trials and the like. In those circumstances, it is possible to see how a potential issue might slip through the net early on, and be decided as it were by default, only for it to become of great significance and relevance at a later date. In such circumstances, I could see that a court may baulk at the potentially draconian consequences of the issue estoppel principle.

93. However, I am satisfied that this is not such a case. The "design v workmanship" issue was on the pleadings and was the subject of evidence. It was decided by both Field J and the Court of Appeal without any indication of dissent from either side, and without any suggestion that the issue was, in fact, something to be determined at a later date. In those circumstances, I think it would be wrong to allow the matter to be litigated all over again."

(iv) The judge then went on to consider the *Henderson v Henderson* abuse argument (at [97]) expressly on the basis that he was wrong that the "design v workmanship" issue had been raised or was part of the claimant's cause of action. That paragraph is important because it makes it plain that the context of the decision Coulson J came to on abuse was that (contrary to his preferred analysis of the facts) the issue had <u>not</u> been raised or decided in the previous hearings before Field J or the Court of Appeal.

(v) He then concluded that the issue could and should have been raised:

"99. In my judgment, there can also be no doubt that (on the assumption that it was not) the issue should have been raised both before Field J and before the Court of Appeal. ... The parties wanted to have one hearing on liability/policy matters, so that they could either be in a position to resolve the dispute without a further hearing or, failing that, have a hearing simply devoted to the figures. It was therefore the parties' clear intention to have a hearing of all issues of liability before Field J. Although, as a matter of form, that hearing was a trial of 13 defined Issues (as opposed to a sub-trial on liability), I am in no doubt that this would have been regarded by the parties as a distinction without a difference, because those 13 issues were regarded by both parties as the issues that arose between them on liability."

(vi) It was no part of the reasoning on this matter that the issue ought to have been raised because it was relevant to the issues actually determined. What was

important was the parties' intention to have all liability issues determined. Whilst it is the right that in this arbitration, the hearing of the preliminary issues was not expressly characterised as a hearing on all liability issues, it was proposed by DSME as a hearing that would dispose of the issues of responsibility for the design errors and, if disposed of unfavourably to DSME, of the need to address the technical issues, the delay and the cost overruns.

(vii) Having reached that point, the judge then undertook the broad merits based approach to the facts and asked himself (at [103]): *"How much was all this within the claimant's control, and to what extent would the defendant be gaining some sort of unfair advantage if the amendments were not now permitted."*

(viii) So far as the first question was concerned, the judge said this (at [104]):
"… The "design v. workmanship" issue could and should have been raised by the claimant: indeed, it was plainly and obviously in the claimant's interests to raise it at an early stage. Apparently, because the claimant felt that it had a better argument (to the effect that workmanship was one event), it did not pursue the design case with very much vigour and its evidence on the point was best described as thin. But that was entirely a matter for the claimants; it was part of the tactical decisions that it took two years ago. …."

(ix) Similarly, in this arbitration, whether to raise the breach case was entirely within DSME's control.

(x) On the issue of a windfall advantage to the defendant, Coulson J said that the defendant had fought and won a liability hearing and that it would be inappropriate to allow the claimant to open up the design v workmanship issue at this stage. I observe again that that was said in the context that the issue had not already been raised and/or decided.

(xi) Coulson J next turned to the issue of whether it made any difference that the abuse of process argument was raised in the same, and not subsequent, proceedings. He concluded that it did not. He said that his reasons were the same as at paragraphs 91-93 in respect of issue estoppel. Since the premise of this part of the decision was that the issue had not been raised and decided, it seems to me that the judge's view must have been that the facts that there had been no suggestion of an issue to be raised at a later date and that the issue in question had not slipped through the net were equally relevant in this context.

(xii) On the latter point, he said this:
"107.Again I accept that, where certain issues are dealt with by the court in advance of others, genuine mistakes may occur, where it would be unfair and unreasonable to prevent one party from raising an issue on the merits which, for whatever reason, has not been the subject of a clear determination before. ***Tannu*** *and* ***Aldi Stores*** *are good recent examples of such a case. But at the same time, the court should be astute to prevent a claiming party from putting its case one way, thereby causing the other side to incur considerable expense, only for the claiming party to lose and then come up with a different way of putting the same case, so as to begin the process all over again. … I have no doubt that, on the basis of the facts as I have summarised them in Section D above, it would be wrong and unfair to allow the claimant in these proceedings to go back to go back to square one and attempt to run a case which could and should have been raised years ago.*
"108.Therefore, even if it is "unusual" for ***Henderson*** *abuse to arise in the same proceedings, then I consider that, on the facts of this case as set out in Section D above, it is appropriate for those principles to apply here. It would be plainly*

> *oppressive for the defendant to be vexed again with this issue, on which it has already been successful."* (my emphasis)

130. Drawing the threads together, the Tribunal was clear that the new claims ought to have been investigated and raised before. The particular circumstances of this case were that DSME had repeatedly represented that the preliminary issues, if decided against them, would put an end to their claims. The fresh claims, which sought to recast the design defects claims as claims for damages for breach of an obligation to co-operate in remedying the defects, were patently an attempt, as Coulson J put it, to go back to square one and, having lost, come up with a different way of putting the same case. That was utterly inconsistent with what had been DSME's position. At the conclusion of its May submissions, DSME repeats its submission that an abuse of process can only arise where the new issue ought to have been raised at the previous trial because it would have affected the outcome of that trial and DSME says that that is because the abuse is the attempt retrospectively to change the outcome of the trial. That is an apt description of what DSME sought to do in the arbitration by seeking to advance their claims on a different basis which engaged the technical investigation that they had throughout said could be avoided on both their claim and Songa's counterclaim.

131. I have no difficulty in seeing why on a broad merits based approach the Tribunal reached the conclusion that it did. But more importantly, I can identify no obvious error of law in the Tribunal's approach (whether as formulated by DSME in questions 1.1, 1.2, 1.3 or 1.6) and its decision was then one on the facts of the case.

Question 1.4

132. Question 1.4 also raises a discrete point. It is DSME's position that the Tribunal wrongly drew an analogy with the decisions in the *Aldi Stores* and *Otkritie* cases.

133. In *Aldi Stores* the issue was whether a claim against a different defendant was an abuse of process. DSME is right to say that, contrary to the Tribunal's description, this was not a case where the claimants took a conscious decision not to mention a new claim at the case management stage or where the new claim was stopped. The Court of Appeal found that Aldi had not acted improperly and that the new defendants had not made their position clear even though they knew that a claim against them might be pursued. At [29] to [31], Thomas LJ made a number of observations as to how Aldi and the other parties ought to have conducted themselves. In particular, he considered that the possibility of further proceedings ought to have been raised with the court so that the court would, at the least, be able to express a view as to the proper use of its resources and the efficient and economical conduct of the litigation: *"It may be that the Court would have said that it was for Aldi to elect whether it wished to pursue its claims in the proceedings, and if it did not, that would be an end of the matter."*

134. In the *Otkritie* case, the Court of Appeal dismissed an appeal against a decision to strike out a second set of proceedings where the claimant had in the first set of proceedings failed to seek case management directions as to how it should proceed against the defendant on the second claim. The claimant's conduct was in breach of what were referred to as the Aldi Guidelines.

135. It seems to me, therefore, that, although the Tribunal's description of the *Aldi* case may be inaccurate, the analogy with the Aldi guidelines was not wrong in law.

Question 1.5

136. A further discrete issue is raised by question 1.5. Rule 10 of the LMAA Rules provides as follows:
"Notwithstanding the terms of any appointment of an arbitrator, unless the parties otherwise agree, the jurisdiction of the tribunal shall extend to determining all disputes arising under or in connection with the transaction the subject of the reference, and each party shall have the right before the tribunal makes its award (or its last award if more than one is made in the reference) to refer to the tribunal for determination any further dispute(s) arising after the commencement of the arbitral proceedings. When and how such dispute is dealt with in the reference shall be in the discretion of the tribunal."

137. As Mr Rainey QC submitted, this rule is concerned with jurisdiction and the right to refer disputes is not untrammelled. The tribunal cannot decline jurisdiction because the dispute matter was not within the compass of the original reference to arbitration but there may nonetheless be a valid objection to the hearing of a further dispute in the extant arbitration. Even if the contrary is arguable, there is no obvious error of law in the Tribunal's reasoning.

Conclusion and question 1.7

138. In summation, in its skeleton argument, DSME submits:
"A broad, merits-based judgment is required which takes account of the public and private interest involved and also takes account of all the facts of the case (Johnson v Gore Wood at 31D. The Tribunal did not purport to undertake such an exercise. ...."

That submission is hopeless. The merits based judgment is exactly what the Tribunal undertook. There was no obvious and express error of law and nor could it be inferred that there was such an error from the outcome.

139. As I have set out above, Mr Marrin QC's primary reason for departing from the majority was the view he took that DSME should not be shut out from relying on its new claims as defences to the counterclaim (by way of grounds for an extension of time or postponement of the date for delivery). I have explained above why I do not regard that as unfair to DSME or as a reason which outweighs the majority's reasons for regarding the new claims as an abuse of process, whether relied on as claims or defences. In those circumstances, it cannot, in my judgment, be said that there was any obvious question of law on which the Tribunal erred and on which permission should be granted. That deals also with question 1.7.

140. There is similarly here no question of law of general public importance. DSME relies on the importance of establishing the correct test for abuse of process and the Tribunal's treatment of the defences to the counterclaims. The argument on the correct test for abuse of process turns on DSME's dissection of the Award to try to identify discrete errors – if there are no such errors or no obvious errors, there is no public interest in a general discussion of the subject by the court. The treatment of the

defences to the counterclaims turns entirely on the specific facts of this case and raises no broader issue.

Section 68: serious irregularity

141. DSME's position can be shortly stated. DSME says that at the time of the application to amend the Claim Submissions, there was no application before the Tribunal to amend the Reply and Defence to Counterclaim. There was, therefore, no discussion about and no submissions were made as to, the difference between an application to amend the claims and an application to amend the defences to counterclaim. The Tribunal has not, therefore, heard, and has given DSME no opportunity to be heard on, the issue of amendment to its defence to counterclaim before reaching its decision in paragraph 69 of the Award that the proposed amendments "may not be invoked in defence of Songa's counterclaims". That was contrary to the Tribunal's duties under section 33(1)(a) and (b) of the Arbitration Act 1996 and thus falls within the closed list of categories of serious irregularity in section 68.

142. As I have set out above, the Draft Amended Claim Submission made it clear that the claims were relied upon as a defence to Songa's counterclaim. On the face of it, therefore, that issue was before the Tribunal on the application for permission to amend the claim.

143. DSME had already indicated that it would make corresponding amendments to the Reply and Defence to Counterclaim but only intended to do so once it had permission to amend the claim. The obvious point was that DSME intended to wait to see if its application was successful before embarking on a further lengthy document. That in itself made it plain that the two categories of amendment were inextricably linked.

144. Further, and in any event, in paragraph 10 of its Reply Skeleton argument on the application to amend, DSME did make an application to amend the defence to counterclaim:

"It follows from the fact that the Respondent's defence and counterclaim submissions advance a positive case as to the causes of delay that DSME's Reply and defence to Counterclaim submission shall need to be amended in due course to reflect the points in the Amended Claim Submissions. To that extent, DSME seeks permission for such amendments. The Respondents' objections cannot form a proper basis for refusing DSME permission to defend the Counterclaim advanced by the Respondents. (At this stage draft submissions have not been advanced, in part because one would expect that Respondents' Defence and Counterclaim to be amended in the light of the Amended Claim Submissions).

145. In its skeleton argument, DSME turned the point around relying on the fact that Songa had not sought a decision on the defences rather than on its not having made an application to amend. However, DSME accepted that, at the hearing before the Tribunal, Mr Catchpole QC had recognised that the Songa was submitting that DSME should not only be prevented from amending the claims but also from amending the defences to the counterclaim.

146. The relevant passages in the transcript of 15 March 2019, pages 146-149 are revealing. They demonstrate that this issue was before the Tribunal and that DSME did have the opportunity to address the issue. The submission made by DSME was that the counterclaim remained, that the claims amended arose out of the same facts and matters as the counterclaim, and that the issues (raised by the amended claims) would always have been in issue on the counterclaim. The thrust of that submission was to rely on the argument that the issues arose in defence to the counterclaim as a reason to allow the claims. The submission continued:

"But as I understand what my learned friends are saying in this hearing is that not only should we not be allowed to pursue our claim for the amended claim, but that we should not be allowed to pursue that as a defence to their counterclaim.
That is their case, and that is a remarkable submission. And although many of their arguments, I submit, don't go to whether or not you should be allowed to pursue a defence, for example limitation wouldn't arise, but that is their case. I will come back to that in a moment."

147. To the extent that the matter was returned to it was in a passage which reads as follows: *"What should not happen, in my submission, is that you have applications made ... where another party seeks to shut out someone, certainly from running bona fide claims, or, going beyond that, running a defence to a substantial claim on grounds, not that this has been decided before or some kind of genuine abuse, but because of something that was said in the course of submission during a procedural debate*."

148. I have dealt with the background and the section 69 application first and in some detail because, once that background is understood, the scope and nature of the arguments on the application for permission to amend becomes clear as does the complete lack of merit in DSME's application under section 68. The issue of whether the new claims could be relied upon as defences was in play; it was relied on by DSME as a reason to permit amendment of the claims; and DSME had a proper opportunity to address both the application advertised in its skeleton argument and Songa's opposition. There was no serious irregularity and the application should be dismissed.