TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2008 – 04789

BETWEEN

KGC COMPANY LIMITED
NG GLOBAL LIMITED
LANDS EQUIPMENT INC **Claimants**

AND

INDUSTRIAL TRANSPORT LIMITED **Defendant**

Before The Hon. Madam Justice C. Gobin
Appearances:
Mr.F. Hosein SC leads Mr. Dass instructed by N.D. Alfonso for the Claimant
Ms. D. Peake SC leads Mr. Garcia instructed by Mr. R. Thomas for the Defendants

JUDGMENT

Background

1. This case arises out of a marine accident. On the 24th December, 2004 a self elevating barge (the Isabella) which was owned by the defendant (ITL), commenced operations for Trinmar in the field in the area of platform 24. The starboard leg of the barge slid and ended up embedded in a hole at the bottom of the sea. The leg could not be retracted and the defendant procured

the services of Hull Support Services to cut it off in order to tow the Isabella away. The severed leg sank into the seabed.

2. Between the 24th December, 2004 and 30th December, 2004, that is over a six day period, Trinmar through contractors A. R. Singh made two (2) unsuccessful attempts to remove the leg with the use of a crane barge T76. The defendant itself made efforts to hire a salvage company, Coastal Diving Services Limited to do the job, but its services were unavailable because of other ongoing commitments.

3. On the 28th December, 2004 the claimant KGC was contacted by the defendant about the hire of its crane barge ZT 100 in connection with the removal of the leg, and certain arrangements were made. On the 31st December, 2004 in the course of KGC's involvement in the removal effort, while the ZT 100 was attempting the lift, the leg tore away from the rigging causing the boom of the crane to whip back past the boom stop and to crash on Platform 24. The boom of the crane was badly damaged. The crane barge was put out of commission.

Identifying the Claimants and their financial claims

4. The claim is for damages arising out of this accident. It is brought by three claimants. First there is KGC who supplied the ZT 100. Then there are two entities – the 2nd claimant (NG Gobal), a company incorporated in the

BVI and the 3rd claimant L & S Equipment – a corporation incorporated in the United States which both claim to be its registered owners.

5. The ZT 100 is a barge on which is fitted a Manitowac pedestal mounted crane. This equipment (the barge and cane) was at all times chartered by KGC under the terms of a charter agreement dated 18th August, 2004 for 57 months with an option to purchase. The parties to the Charter agreement are NG Global as "Owner" and KGC "as charterer". There is no mention of L & S.

6. This is in part a subrogation action. The charter agreement provided for the parties to enter into a policy of marine insurance. On the 21st August, 2004 the Beacon Insurance Company (Beacon) issued marine policy No. Tu MHC 0034161. The Insured were the 1st and 2nd claimants. The second claimant only was named as the loss payee. Following the accident, a claim was made on the policy. Beacon paid the cost of repairs in one sum of USD 1,212,596.06. Beacon now seeks to recover this sum.

7. KGC essentially seeks damages for loss of profit for the commercial use of the ZT 100 in the sum of USD 3,510,000.00. NGC Global and L & S seek to recover USD 840,000.00 – income allegedly lost under the charter agreement, since KGC did not pay the monthly hire sum of $35,000.00 after the accident. That sum is the charter fee for 24 months for the period January

2005 to December 2006. NG Global seek a further sum of USD $125,000.00, being reimbursement of the deductible under the Marine Hull policy and USD $181,700.00, the amount deducted from payment by Beacon for dismantling and inspecting the damaged crane barge.

The Issues on the Pleadings
The Claimants' Case

8. The claimants pleaded that by a contract partly in writing and partly oral between the 29th December, 2004 and 31st December 2004 KGC agreed to supply the ZT 100 together with a crane operator and crew to assist in the removal of the Isabella's broken leg section from the seabed. The terms of the contract provided that the Defendant would plan, direct, supervise and execute the lift and that the crane operator provided along with the ZT 100 would act on instructions of the Defendant who would provide divers, workmen and supervisory personnel experienced in the field of marine salvage operations. The Defendant was also to provide such additional equipment and personnel as were required and which it deemed necessary, including the defendant's supply vessel "Kodiak Island" to assist in the process.

9. The claimants rely on an express or implied term of the hire agreement that the defendant would provide an adequate and comprehensive lift plan

which would include adequate, experienced and skilled operators and who would exercise the required due care and skill warranted by the exercise.

10. The claimants' case is that the accident occurred when in the course of executing ITL's plan which was being supervised by Mr. Terry Lampert and or Mr. David Brash of ITL, because of the failure and or inadequacy of it, the rigging attached to the lifting eyes "snapped", causing the crane boom of ZT 100 to springback, past the boom stop, landing in a crash.

The Defence

11. The Defendant denied any liability for the accident and claimed that the reponsibility for the entire removal operation fell to KGC under the terms of its agreement with it. Further, it claimed that KGC supplied the equipment as well as crew to execute the lift and that the barge captain of the ZT 100 was and remained in control of the crane barge and of the entire lift operation at all times. It accepted that the rigging attached to the broken leg "snapped" but alleged that KGC's crew was responsible for this. It agreed that the snapping of the rigging caused the accident, but claimed it was due to the negligent attachment of it and the application of too much force. All of this was caused by the negligence of the 1st claimant whose crew "failed to safely plan and execute the lift". I find that this statement in the particulars of negligence acknowledges that at the end of the day, the accident occurred because the lift plan itself was unsafe and inadequate. The defendant said

further it was entirely the responsibility of KGC to plan the lift and that KGC had represented, through its Manager Mr. Keith Arjoonsingh, that it had the necessary skill and expertise to safely carry out the operation.

No issue of contributory negligence

12. It is important to indicate that what is not an issue on the pleadings, is contributory negligence. The parties confirmed this in answer to a specific question and this narrows the factual issue I have to decide in so far as liability is concerned. I simply have to decide whether KGC or ITL was in charge of the operation.

13. The defendant suggests that to resolve the central issue I should start with the contents of the documents which relate to the transaction for the hiring of the ZT 100 which are the material requisition dated 29th December 2004, KGC's quotation dated 29th December 2004, the defendant's purchase order dated 30th December 2004 and two invoices. Counsel submits that these support the defendant's contention that KGC was to plan and execute the entire lift operation.

14. I have considered the contents of these documents and to the extent that they are of assistance on this issue at all, find that they do support the claimants' case. Those emanating from the defendant's side appear to have been prepared for invoicing purposes rather than for reflecting the terms of

the contract. It would be straining Mr. Lampert words on the material requisition – "for the hire of the ZT 100 to lift section off the bed of the sea" – to suggest that these words indicate that KGC contracted to plan and execute an operation which would require, as it turned out, highly technical engineering and scientific skills. The invoice appears to confirm that KGC was to supply a particular piece of equipment.

15. I find that the claimant's quotation which included an undertaking to supply a barge captain and crew did not expand the responsibility of KGC. That remained limited to the supply of the ZT 100 with the provision of hands to operate it in the conduct of what might be described as the purely mechanical side of the operation.

Finding – who was in charge

16. I find that ITL was in charge of the operation. In arriving at that conclusion, I have attached significant weight to the evidence of Mr. Terry Lampert that he, as an agent of the defendant together with Mr. David Brash, its managing director, planned the lift operation which involved several different components. I find that the activity of the ZT 100 and its crew was limited to one component of ITL's plan and even then Mr. Lampert assumed control of that part of it by giving directions.

17. Mr. Arjoonsingh, the managing director of KGC, who was not on site during the operation did call in with certain suggestions but these were confined to the crane's operations and concerns about them and they did not put him in charge of the whole business. The fact that Mr. Lampert and the defendant company parted ways in 2005, perhaps not on the happiest of terms, has not negatively affected my assessment of his credibility on this aspect of his evidence. Several years have intervened between that time and this trial. I find no untoward motive for his assuming responsibility for this accident, so many years after the event.

17. Mr. Lampert's evidence as to his overall supervision of the exercise is supported by the several written statements of the KGC's Captain and crew members which were made more contemporaneously with the event, indeed mere weeks following it, in the course of what I find was an independent investigation. Those statements have been largely reproduced in the witness statements. The original statements are in evidence and contained in the report of Mr. Peter Gruny (deceased). That they were made so many years ago and well before litigation was contemplated makes them more credible in my view. I am satisfied that the crane barge captain and crew were told of the start that Mr. Lampert was the person from whom they were to take instructions which they eventually followed.

18. On the other hand I reject the evidence of the defendant's main witness, Mr. Brash. I have not been impressed with his attempts to distance himself from involvement in the entire operation, nor by the fact that he has sought to down play the urgency and complexity of the operation to remove the leg at all. Three attempts, including two in a week by Trinmar itself, confirm that it was urgent, contrary to his claim. He sought to give the impression that this was a simple run of the mill lift operation which KGC was qualified to do and which it would have been done successfully had the crew exercised some more patience. This is obviously inconsistent with the evidence of his own expert, Mr. Antonio Donawa of Coastal Diving.

19. Mr. Brash's letter dated 6th January 2005 to the HSE Manager, Petrotrin and exactly one week after the accident, is significantly at odds with the account he has given in the proceedings. That letter indicates his own direct involvment in a Job Safety Analysis Tool/Box Meeting between Trindive, ITL and KGC, and details a co-ordinated plan involving these three parties. Indeed, he appeared to blame the change in weather and sea conditions for the accident. If KGC had been in charge of the operation then, and had planned it negligently, he would have said so, in the first report.

20. I reject his claim that on the day he and his father happened to be in the area and had only dropped in while KGC was carrying out an operation in which ITL had no significant part, and that he happened to take photographs.

Given the magnitude of the operation and its urgency, I prefer to believe he was there to supervise along with Mr. Lampert. His evidence that KGC was paid well in excess of the usual 7,000 USD cost of daily hire because it was to plan the lift is similarly rejected. I find that arrangements for the premium cost of hire of the ZT 100 were made directly with Mr. Brash by Mr. Arjoonsingh whose explanation for the increased fee arrangement I prefer. I find too that Mr. Brash, who was the person authorised to do so, agreed to forgive a judgment against KGC in order to negotiate a reduction in the fees.

The cause of the accident

21. I find that the lift operation was planned, supervised and executed by ITL. It was a plan outlined in Mr. Brash letter and detailed in Mr. Lampert's evidence, which turned out to be inadequate and unsafe. There is no clearer evidence of the inadequacy of this plan than that which was elicited from Mr. Donawa. The successful operation began with an inspection dive with Coastal's divers to determine how deep the leg was under the seabed and the angle at which it was lying. The plan was reviewed to determine levels of staffing and equipment required. Mr. De Silva, Coastal's Barge Captain produced three drawings.

22. Drawing 1 showed the plan for reducing excess weight and suction caused by the leg being buried. A point was identified that needed to be exposed for rigging to the leg base near the pad. Drawing 2 showed a rigging

plan for extracting the leg from the mud and the rigging on the leg with specific instructions for the crane barge. Drawing 3 showed the rigging to be placed on the leg, and detailed placement of slings and fastening the slings onto the leg from the water to the crane barge. Notably, Coastal's plan did not involve burning lifting eyes; instead a double choker hitch was used at two points, one close to the pad and one close to the other end. The plan also contained a detailed table showing the boom at different angles, radius, dynamic weight and height.

23. When Coastal's plan is compared to ITL's it is easy to understand why the accident occurred. Indeed Mr. Donawa specifically stated in his closing paragraph of the witness statement as follows:

> **"Based on the experience in executing a lift such as this one because of the length and weight of the leg and the fact that it was partly submerged in the mud, we could not simply attach a strap or slings near the top of the leg and then apply extreme force to lift the leg. This would not work as the crane would not be able to lift the leg and applying more and more force would only endanger our personnel".**

24. This provides the clearest condemnation of the ITL plan and demonstrates that Mr. Brash and Mr. Lampert under-estimated its complexity and the degree of technical expertise that was required. Having heard the evidence of KGC's barge captain and some members of the crew, it is clear to me that these gentlemen though skilled and experienced in their particular areas of

labour, would not have been able to plan and execute this kind of operation. Nothing in their training even where certification is actually required would have equipped them for this. At least two of the defendant's witnesses confirmed as much. I do not believe that a businessman of Mr. Brash's experience in the industry could have expected otherwise. I do believe he accepted the involvement of the crew members of the ZT 100 with the provision of the crane because his company and in particular Mr. Lampert was going to be in charge. The defendant hired a piece of equipment, which came with basic labour to operate it.

26. The plan that was implemented by ITL was precisely what Mr. Donawa described as unsafe. On ITL's instructions, divers had previously cut the leg and burnt holes to attach rigging. From Mr. Brash's photographs it is clear to see that these holes were extremely close to the top end of the 90 foot long, hollow leg. Given the length and weight of the leg alone, it would seem that a little knowledge of basic science or physics would have alerted to the possibility of the leg material ripping free of the rigging, if the eyes were placed too close to the top. When one adds to that, the dynamic conditions, the amount and weight of water in the hollow leg, the padding at the bottom and the mud cover, the accident seems to have been almost inevitable.

27. In the course of the case, after the close of the evidence, I had indicated that I had reached the point of accepting that the ripping of the eyes on the leg

caused the accident but I was having some difficulty in finding what actually caused the eyes to rip. While in their pleadings, the claimants claimed and the defendant admitted that "the rigging snapped", both Mr. Lampert and Mr. Brash agreed that the metal ripped from the eyes through to the top of the leg. In the circumstances I shall assume that is what they meant when they agreed that the "the rigging snapped", they both agree there is no issue. But as I understanding it the rigging itself did not break, rather it tore through the metal, breaking free of the load.

28. I accept the evidence of Marco Nunes (Materials Engineer) that the burning of the eyes reduced the capability of the leg material to withstand impact loads and too, while Mr. Donawa stopped short of identifying the placement of the eyes so close to the open top of the leg, I infer from his evidence that this together with the reduced capability was the immediate cause. In any event on closer consideration, I think the question I was seeking to answer at that time was too narrow. Whatever the immediate cause of the ripping of the eyes, the accident is more broadly and appropriately attributable to the inadequacy and unsafety of the defendant's lift plan. The evidence of Mr. Donawa clearly establishes this.

Findings on Relevance of Manitowac manual and in charter agreement limiting use of ZT100

29. While I have decided the main issue in the claimant's favour, out of deference to senior counsel for the defendant, I indicate my findings on the relevance of the evidence relating to the contents of the Manitowac Operators Manual. Senior Counsel took great pains to establish that the Operators Manual mandated that safety in the crane operations was a matter for the operator. Counsel elicited from several of the witnesses, evidence which confirmed what according to the manufacturer was the best practice to minimise the risk of loss and damage to the equipment and injury to persons including those operating Manitowac cranes.

30. In the light of the consensual position that contributory negligence is not an issue, I am forced to conclude that this evidence is irrelevant. The manual cannot assist on the question of who was in charge of the lift operation. Had it been the case that KGC contributed to the injury to the ZT 100 by allowing it to be operated in a manner which was unsafe and contrary to the safety procedures set out in the manual, it may have been otherwise. The facts which allege the failure of KGC to operate the crane barge safely in the defendant's 'particulars of negligence', are pleaded in the context of it being KGC as opposed to ITL that was in charge of planning and executing the entire lift. The finding that ITL planned the lift, removes the need for further consideration of the alleged breaches of the safety guidelines in the manual.

31. The same may be said of another issue raised in the defence, that a term of the charter party limited the use of the ZT 100 to erection work only and within its rated capacity. Again this was not raised in the context of KGC contributing to its own loss. It is therefore not a matter on which the defendant can rely to meet the case of negligence and I find too that this is irrelevant to the question of liability.

The Reply - Credibility of the claimant

32. That conclusion notwithstanding, the reply filed by the claimants to meet the defendant's claim in this regard, has introduced a matter which has had significant impact on the claimants' overall credibility and more relevantly on the quantum of damages. It appears that the claimants thought it necessary to file a reply to address the alleged breach of the term restricting use of ZT 100, primarily with a view to laying the foundation for the production of a memorandum which they claim (in the reply at least) had one effect of amending the Charterparty.

33. That amendment dated 30th November 2004 purported to allow "all types of lifting in the marine industry so long as such lifting is within the rated capacity of the equipment". KGC and the Owners claim it was necessary to amend it to confirm that the equipment could be used to perform work outside the Charter agreement. It is necessary to go into some detail because

my view of this aspect of the matter has influenced my approach to the claimants' evidence of alleged financial loss.

34. The reference to this document in the reply was preceded by statements which provided some background to the permitted use of equipment of the ZT 100. They told of previous agreements between the owners and Vickers Marine, and with others and of an earlier one with KGC. Essentially they sought to establish that the ZT 100 was, since well before the August 2004 Charterparty, used for "inter alia rigging, erection, piling salvaging with the owners permission". The Vickers Marine agreement was not attached.

35. The reply did not stop there. It went on to refer to a Charterparty dated 14th July 2003 made between L & S Equipment Inc., NG Gobal and Mike Ryan of Ryan Marine Offshore Services as agent for L & S Equipment Inc. for the hiring of ZT 100. It stated "the prior charter agreement contained no restrictions regarding the use of ZT 100 or its equipment and was at all material times utilised by the third parties as a heavy lift crane for inter alia rigging, erection, piling, salvaging and transportation of equipment. A copy of the prior charter agreement was annexed.

36. Under cross-examination and in the face of suggestions that the amending document was manufactured to support his case, Mr. Arjoonsingh for KGC sought to explain its origin. It came about because he needed it to

specify that he could use it for pile driving, because that is what his industrial contracts required. This evidence had to be rejected as the purported amendment did not mention "pile driving" at all.

37. The reply and the attachment did not weaken Mr. Arjoonsingh's credibility only. It caused me to question the credibility of all the claimants when they were considered against the record of the admiralty proceedings No. A4 of 2004 between KGC and the 2nd claimant. The record of these previous proceedings was admitted into evidence by consent. One attorney on record in this action acted in the earlier proceedings for KGC against the Owner. The facts now set out in the reply are fundamentally inconsistent with the cases advanced by both the 1st and 2nd claimants when they opposed each other back then.

38. In the previous proceedings KGC was relying on the very agreement of 14th July 2003 (annexed to the reply) signed by Mike Ryan as agent for L & S and NG Global. NG Global was strenuously denying it, saying he was not their agent and not at all authorised to execute that agreement on their behalf. In the instant case in his evidence Mr. Van Warren Perkins for NG Global in commenting on the admiralty proceedings repeats that Ryan was not their agent and was not authorised to sign on their behalf. In 2004 Mike Ryan whom the reply now accepts as agent of 2nd and 3rd claimants swore an affidavit in which he annexed a draft of the Vikers agreement. It expressly

restricted the uses of the ZT 100. The statement in the claimants' reply that the Vikers agreement did not limit the use of the crane barge appears to be misleading.

39. Indeed KGC was complaining in 2004 even before those proceedings about the limitation on use of the equipment, but NG Global was refusing to budge. NG Global claimed then that their authentic agreement with KGC of 2nd July 2003 (not the one attached to the reply) restricted the use of the equipment. They were strangers to the agreement of 14th July 2003. In that case NG Global claimed that KGC had breached the Charterparty of 2nd July 2003 by using the vessel for pile driving in breach of an express term. When the admirality litigation was eventually settled according to Mr. Van Warren Perkins, it was an integral part of the settlement that a new charter party would be entered. On the same day that the admirality action was settled, the new charter agreement was executed.

40. Significant it once again limited the use of the equipment to erection work only, as did the former. Pile driving continued to be excluded under the new Charter agreement. I can only infer that NG Global's position on allowing pile driving remained unchanged. What is pleaded in the reply is not merely inconsistent with what was claimed in the earlier proceedings by at least two of these claimants, it is irreconcilable. It is so much so that it has lead me to conclude that the amendment of November 2004 was

manufactured after the accident and for the purpose of this litigation, to assist the claimants' case. This severely damages the claimants' credibility. It is one thing for parties to settle litigation and to resolve issues. It is quite another to simply present in Court proceedings a case which is materially inconsistent with one filed previously. It does leave the Court with the impression that these claimants would conveniently ignore facts or fabricate a case. That they would do so when the Court record is there to prove otherwise impresses me even less.

41. My finding that the "amendment" was manufactured for this case leaves the original terms of the charter party between KGC and NG Global intact at the date of the accident. Clause 15 restricted the use of the ZT 100 to erection works. As I have said this is not relevant to the issue of liability, I do find it relevant to the issue of damages. I would be slow to indirectly order the defendant to compensate one of these claimants for loss arising out of a breach by it of an agreement between themselves. The reliefs claimed by them may not be the same but this is still one case. I must surely be entitled to factor into any assessment of KGC's claim for example that a pile driving contract would have exposed the equipment to arrest by the Owners who are joint claimants here, as it had actually been before. That would have put an end to its income earning capacity.

42. The defendant raised another issue regarding the relationship the 2nd and 3rd claimants which I agree can fairly be said to be confusing and which relationship threatened to cause some duplication of their claims. In so far as KGC is concerned, its claim is made as hirer who lost the use of the ZT 100 and alleged profit from loss of use. That is straightforward enough. In relation to NG Global and L & S, both claim to be owners of the ZT 100. The bare boat charter agreement was made between KGC as Charters and NG Global as owner. The marine policy named NG Global as the loss payee – not L & S. For some unexplained reason Beacon payed the claim to Sam Zito, on behalf of L & S as owners of the crane barge, and a receipt and subrogation form was purportedly signed by all three, with Sam Zito signing on behalf of NG Global.

43. What further clouds the issue of ownership and raises further issues of credibility is the inconsistency regarding claims of ownership in the admiral proceedings. There, a defence was filed in behalf of NG Global and it was specifically denied that L & S was the owner. A certificate showing otherwise was put in by KGC on affidavit. When that matter was settled, the new charterparty failed to indicate L & S as the owner. Mr. Van Warren Perkins' evidence on this issue has not been particularly helpful; it has served only to add to the confusion.

44. As unsatisfactory as the state of the evidence on this issue remains, I have been assured that the claims are not to be treated severally. For that reason, there is really no prejudice to the defendant so long as there is no double recovery and there is nothing to be gained from my trying to resolve this issue. For the purposes of this case, I shall treat the second and third named claimants as the joint owners of the ZT 100.

Evidence of Mr. Peter Gruny

45. In the course of processing the insurance claim of KGC and NG Global, Beacon contracted the services of marine surveyor Mr. Peter Gruny to assess the loss and damage to the ZT 100. Mr. Gruny prepared three (3) reports between 2005 and 2006, but unfortunately passed away before he could file a witness statement. The claimants served a hearsay notice to admit Mr. Gruny's several reports and sought leave under Part 33 to have the matters contained in the reports admitted as expert evidence. The defendant does not dispute Mr. Gruny's expertise but claims that his findings are biased. The parties agreed to have me consider the reports and to attach such weight as I saw fit at the end of the day.

46. There are three reports. The first dated 15th March 2005 is a Draft report in which Mr. Gruny indicates visits made after the accident and includes several statements from KGC crew members. The report contains observations as to the extent of the damage to the crane barge. The reports

contain information provided by Mr. Gruny of his own factual observations of the damage to the ZT 100 and further includes a compilation of various quotations from various suppliers which establishes the cost of the repairs. This is the only evidence on these critical issues. I am satisfied that having regard to Mr. Gruny's experience and his expertise I should allow the reports in so far as they reflect the extent of the damage and the cost of repairs. I will disallow that portion of Mr. Gruny's report of 15th January 2005 which purports to make findings as to the cause of the accident. As to the evidence of his observations made at the Coastal lift in May 2005, I will disallow this as the claimants have through their witness, Mr. Edward Legendre had the opportunity to elicit first hand evidence in any case.

47. In the light of the contents of Mr. Gruny's reports of 14th March 2005 and 18th January 2006, I find the claimants' case proved as to the extent of the damage to the equipment and the cost of the repairs. To settle the claimant's claim, Beacon paid, on Mr. Gruny's recommendation, the sum of USD 1,212,596.00 to NG Global. I accept Mr. Warren Van Perkins evidence as to the sum of the deductible and find that the owners are entitled to the sum USD of 25,000.00, as well as the sums deducted for inspecting and dismantling the equipment in the sum of USD 181,700.00. The claimants' claims do not end there. There is still the matter of the owners' loss of income and KGC's profit.

KGC's case/Damages/Loss of Profit

48. In ***The Kingsway 1918 p.344*** Pickford LJ cites the following passage from **the Argentino** -

> ***"a ship is a thing by the use of which money may ordinarily be earned, and the only question in this case of a collision seems to be, what is the use which the shipowner would for the accident would have earned by use of her – it is on this principle above that it is habitual to allow in ordinary cases damages for the time during which the vessel is laid up under repair in addition to thecost of the repairs itself".***

I see no reason why I should not adopt this approach in this case.

49. The claimants' case is not that the crane barge was a total loss or that it was irreparably damaged. In these circumstances, the owners are entitled to the cost of the repairs to reinstate it to its pre-accident condition and KGC as charterer is entitled to the loss of profit it would have earned from the commercial use for a period sufficiently reasonable to allow for repairs and this ought to include the charter fee if I accept that KGC's income was sufficient to cover it. There is no question of both KGC and the owners separately recovering this sum. If KGC recovers it as part of its loss of income, then its payment over to the owners is a matter between themselves.

50. Somewhat surprisingly, this crane barge has never been recommissioned. KGC did not repair it and the owners took a decision it seems not to do so.

The claimants' substantial claim for losses is calculated on a period of disablement of 24 months commencing on the date of the accident and continuing for six months after the date of settlement by Beacon and receipt by NG Global of the cheque for repairs. The claimants have wrongfully in my view included in this period the entire time that it took for Beacon to investigate and settle the claim – eighteen months.

51. I accept as Mr. Arjoonsingh said that Mr. Gruny indicated that 6 months was a reasonable time for the repairs in the face of what appeared to be fairly substantial damage. Further, I find that time-frame would have allowed for sourcing and shipping of parts, arrangements for Manitowac personnel to visit and for the eventual recertifying and recommissioning of the equipment. The 6 month period I am prepared to allow must run from the date of the accident. The time which elapsed between the submission and processing of NG Globals'insurance claim is separate and irrelevant to KGC's contractual duty to affect the necessary repairs as well as its duty to mitigate its loss.

52. To better explain this, I repeat that this was not a claim that the crane barge was irreparably damaged or constructively lost. There is nothing in KGC's pleading which suggests that it made any attempt to repair the crane barge or that it took any steps independently of Beacon to do so. It has not pleaded that for any reason it deferred its contractual obligation to effect repairs. Had such been pleaded the Court may have had to consider the

reasonableness of such deferment and whether this would enlarge the period allowable for repairs. So for example, in ***Dodd Properties Ltd. and Anor v. Canterbury City Council and Others 1980 1WLR 433***, the court considered reasons including commercial wisdom, financial stringency and impecuniousity.

52. In this case nothing of this sort is raised. Under cross-examination Mr. Arjoonsingh somewhat casually admitted that he did not do the repairs. It is not KGC's case that it was awaiting NG Global's cheque from Beacon. It could have had no expectation that the proceeds of the claim cheque would be applied to the repairs. It claimed no agreement in that regard. On the contrary, under clause 16 (b) of the charter party, KGC expressly agreed that any insurance claim would be paid to NG Global while it remained liable for repairs and for the charter fees during the period the equipment was being repaired . Mr. Perkins reminds of this in his witness statement that "strictly speaking, KGC remains liable to repair the vessel".

53. KGC did absolutely nothing in relation to the repairs for 18 months other than to pursue the claim with Beacon, from which it had nothing to gain. It appears it surrendered its right as well as disregarded its responsibility to repair the crane barge and for all intents and purposes effectively accepted the total loss of the crane barge as between itself and the owners. If KGC could not exercise the option to purchase the barge, in the circumstances its

inability to do so had less to do with the accident than with its and the owners' decision and deliberate inaction.

54. It is not for me to pronounce on liability as between KGC and the owners, but it seems that the onerous (to KGC) terms of the Charter party notwithstanding, after the accident the owners assumed control of the damaged vessel, accepted a substantial cheque for repairs when it became available, then took a decision to abandon it rather than to restore it. In the absence of a pleading on the part of KGC that it could not for financial or other good reason, effect the repairs itself, within 6 months from the date of the accident, I can see no reason to extend the time for loss of profit or loss of use to anytime beyond 30th June 2005.

Findings on KGC's pleading and evidence of Special Damage

54. A claim for loss of profit in relation to a commercial chattel is one for special damage and ought to be pleaded with the requisite degree of particularity. KGC's pleading has fallen woefully short in this regard. It states somewhat vaguely it was unable to fulfill its obligations under contracts and suffered loss in the sum of $3,510,000.00. On the evidence it is difficult to pinpoint exactly what KGC lost. The pleadings give the impression it was unable to fulfill its contractual obligations with Land and Marine Services (a 12 month time charter of the ZT 100 at $7,000. (USD per

day) as well as a spot hire arrangement with Trinmar for pile and erection works.

55. The first observation I make is that there is no independent evidence to corroborate KGC's claims. The charter agreement purportedly signed by Land and Marine which was tendered by Mr. Arjoonsingh is not sufficiently cogent evidence to support the existence of this, especially in the light of my finding that the November amendment was manufactured by the claimants for this litigation. The same applies to alleged "tenders" as opposed to contracts from Trinmar. Further, in the case of Trinmar, the relevant evidence of a successful "tender" if it is to be accepted as a contract and I am reluctant to do so, was dated early January 2005, after the accident. The services of ZT 100 could not have been contemplated for inclusion in that tender, especially when no steps were going to be taken by KGC to effect repairs.

56. It is obvious too that if the ZT 100 was contractually committed to Land and Marine Services since November 2004 and substantial prepayments had already been collected by Mr. Arjoonsingh, then it would not have been available for Trinmar works. When Mr. Arjoonsingh was confronted with these obvious weaknesses in his case for damages he volunteered that he had about three crane barges at any given time which would have been available for different jobs. This hardly assists me on what specific loss flowed from the disablement of the ZT 100 after the 31st December 2004.

57. I find that contrary to what was pleaded KGC did not lose the alleged lucrative contracts. Had it lost the Land and Marine contract, the substantial payment would have had to be returned. There is no evidence of this. Instead Mr. Arjoonsingh said "he made efforts to secure a substitute crane barge and hired others". He could not find one of similar capacity to the ZT 100 until mid 2005. This does not establish that he lost the contract, rather it confirms that from about July 2005, KGC was returned to the pre-accident position in so far as the fulfilment of its contractual obligation to supply a barge of the capacity of ZT 100 was concerned but with its continued obligation under the contract with the owners to pay the charter fee.. That he hired others of lesser capacity between January to July suggests that he had a contract to fulfil and was substituting the ZT100, albeit with something that was not entirely suitable.

58. Since the contracts were not lost, the measure of damages should boil down to the increased costs, if any, that were reasonably and necessarily incurred for the hire of a suitably equipped substitute barge for the period 1st January 2005 to 30th June 2005. The evidence on this is regrettably unclear. Mr. Arjoonsingh produced a spread sheet the aim of which was to proof alleged loss for a period of 24 months, calculated in part on an increase in daily expense from USD 2,000.00 with the ZT 100 to USD 7,000.00 for substitute vessels.

59. The calculation is preceded by a vague and general statement that Mr. Arjoonsingh approached World Wide Equipment and has continued to charter crane barges from the company "to this day to undertake contractual work awarded to KGC". Further he states that "over the years" he rented the following crane barges which he identified. The difficulty with this evidence is that it does not provide with sufficient particularity, the information that I require. The absence of documents which relate to a specific period of hire more relevant to the loss for the period in question compounds the difficulty.

62. Further, the spread sheet '**M**' which Mr. Arjoonsingh attached to his witness statement and which purported to support the calculation of the losses sustained by KGC in this claim is based on daily operational expenses of USD 2,000.00 per day, not USD 7,000.00 the alleged increased daily expense. Indeed he said the spreadsheet was prepared to assist the Court on the calculation. This raises further issues as to credibility. My reading of the spread sheet suggests that the operational expenses following the accident remained unchanged. If as I have found, KGC did not lose the contracts, then the spread sheet ought to have indicated the difference in the projected income with ZT 100 and the actual income and costs from use of the substitute vessels. The absence of documents to support either however would still have left the Court in doubt as to the reliability of this evidence.

63. KGC also annexed a document purporting to show a highly lucrative contract with Trinmar entered into in the year 2007, which is obviously and wholly irrelevant to this claim. This evidence must have been put before me either in error or for the purpose of underscoring the level of income which KGC's contracts generate. It has however failed to cloud the issue of the extent of the actual loss KGC suffered while the crane barge was laid up between 1st January 2005 and 30th June 2005. What little evidence might be considered relevant is rejected because of this claimant's lack of credibility. On the whole both on the pleadings and on the evidence led, I find that KGC's claim for loss of profit has not been established, save for its liability under the charterparty.

Disposition

64.

(1) There shall be judgment for the claimants.

(2) The defendant shall pay to the 2nd and 3rd claimants the sum of USD 1,519,296.06.

(3) The defendant shall pay to the 1st claimant the sum of USD 280,000.00.

I shall hear the parties on the calculation of interest and on the issue of costs but am inclined to order the defendant to pay the claimants prescribed costs unless I am persuaded otherwise.

Dated this 28th September 2012

CAROL GOBIN

JUDGE