



Neutral Citation Number: [2021] EWHC 1025 (Comm)

Case No: CL-2018-000356

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**COMMERCIAL COURT (QBD)**

Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 23/04/2021

**Before :**

**MR SIMON SALZEDO QC (sitting as a Judge of the High Court)**

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**Between :**

**(1) MR NICHOLAS ROBERTSON**

**Claimants**

**(2) MR GEORGE GREENWOOD**

**- and -**

**BEMBRIDGE HARBOUR IMPROVEMENTS  
COMPANY LIMITED**

**Defendant**

**MY 'TANGENT'**

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**Saira Paruk (instructed by Hill Dickinson LLP) for the Claimants**  
**Andrew Leung (instructed by Clyde & Co LLP) for the Defendant**

Hearing dates: 18, 19, 20 January 2021  
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**Approved Judgment**

**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 23 April 2021 at 10:30 am**

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**MR SIMON SALZEDO QC (sitting as a Judge of the High Court) :**

1. The Motor Yacht “Tangent” was moored at Bembridge Marina. On the evening of Saturday, 7 October 2017 she was observed on an even keel in flat water. On the morning of 8 October she was submerged at the berth. The principal question for me to answer is what happened that night to cause this casualty.
2. The Claimants, who were the owners of the MY Tangent (the “Vessel”), allege that the cause of the casualty was the inadequate maintenance of the marina by its owner, the Defendant, in breach of the Defendant’s contractual obligations under the Mooring Licence agreed between the parties. On this basis, the Claimants seek damages for the loss caused to them by the damage to the Vessel when she sank. The Claimants claim £165,964.40.
3. The Defendant denies any breach of contract and denies that the causal mechanism alleged by the Claimants operated. The Defendant has alleged a different causal mechanism starting from inadequate mooring of the Vessel contrary to the Claimants’ obligations under the Mooring Licence. On this basis, the Defendant counterclaims for costs it incurred in dealing with the casualty, quantified at £3,765.

**The trial**

4. The trial was heard over three days, remotely via Microsoft Teams. I had the benefit of a well prepared trial bundle in searchable PDF format. The Claimants were represented by Ms Paruk and the Defendant by Mr Leung. I received skeleton arguments from each party in advance of the trial and heard opening submissions and factual evidence on Monday 18 January 2021. Expert evidence was heard on Tuesday 19 January 2021. On Wednesday 20 January 2021 we reconvened in the afternoon, when I received written closing submissions which both counsel developed orally.
5. The Claimants served witness statements of 6 witnesses: the two Claimants (Mr Nicholas Robertson and Mr George Greenwood); the Vessel’s manager, Mr Peter Hewitt; Mr Jack Rushton, the manager of Wight Shipyard; Mr Adam Pethick, owner of AP Marine; and Mr Chris Turvey, the former Harbour Master at Bembridge Marina (the “Marina”). I was told that Mr Turvey was unable to appear for medical reasons and Mr Rushton was not required for cross-examination. The other four gave oral evidence before me. The Defendant called two witnesses: Mr Malcom Thorpe, director and 50% owner, with his wife, of the Defendant company and of the Marina itself; and Mr Gordon Wight the Defendant’s Operations and Safety Manager. There were no significant disputes as to primary facts and I am satisfied that all the factual witnesses were doing their best to assist the court with honest evidence.
6. By agreed directions made by Moulder J on 8 October 2020, each party was entitled to adduce the evidence of an expert marine surveyor on the issue of causation. The Claimants relied upon the opinion of Mr Chris Dunford and the Defendant upon that of Mr Adrian Stone. Both experts gave the court the benefit of their honest opinions as to the matters in issue, but they agreed about almost nothing and I will have to choose between their conflicting opinions. I refer to their evidence in more detail below.

## The facts

7. The Marina is on the east side of the Isle of Wight in a tidal estuary of the River Yar. It has around 380 buoy moorings distributed around a number of pontoons or walkways, radiating out from the land into the estuary. One such was pontoon E which was around 75 metres in length. At the outer end of pontoon E there was attached to it a short (8 metres) ‘hammerhead’ perpendicular to the main length of pontoon E. The outside of the hammerhead, furthest from the shore, was berth E19, where the Vessel was moored, portside to the pontoon. There was another, smaller, berth on the opposite side of the hammerhead (smaller because the shoreward side of the hammerhead was bisected by the main pontoon), which was E18.
8. The pontoon, including the hammerhead part, rose and fell with the tide. Boats moored to the pontoon would do the same. In order to keep the pontoon stable in one location it was connected by a pile guide to a pile. The pile was a 5 metre long vertical steel tube, with diameter around 300 – 326 mm, which was driven into the seabed. The pile guide was formed of galvanised steel with a timber capping; it was connected to the pontoon and took the form of a collar around the pile. Within the guide were 4 blocks or rubbing blocks (made of hard rubber or nylon/delrin) whose role was to permit the guide to move smoothly up and down the pile. Each block was 200mm long, 50 mm wide and 70mm deep and was attached to the guide with two recessed M12 high tensile bolts 145mm apart.
9. Mr Thorpe said that he and Mrs Thorpe purchased the Marina on or about 23 December 2011. It is common ground that the Defendant company was the owner and operator of the Marina at material times, so I assume that the purchase was legally made by the Defendant. There has not been any question but that Mr Thorpe’s actions and states of mind are attributable to the Defendant for all material purposes.
10. In May 2013, the Defendant employed Mr Gordon Wight and within two years he became Safety and Operations Manager. He was responsible for ensuring compliance with the Port Marine Safety Code. He delegated to the Defendant’s other staff the tasks of making weekly and monthly maintenance checks of “everything from the pontoon piles, to the electric points and visitor facilities.” Mr Wight also owned, together with his wife, his own boat, the “Taronga”, which was moored at berth E17.
11. The Claimants owned a vessel called the “Amethyst”, which had been moored at berth E19 of the Marina even before the Defendant’s ownership. The Amethyst was a Nimbus 350 Coupe of around 11m in length. For the year commencing on 1 April 2017, she was berthed pursuant to a Mooring Licence to which I will refer further.
12. In July 2017, the Claimants sold Amethyst and bought Tangent. Tangent was a brand new Axopar 37 Cabin with two Verado 300hp outboard engines. The Claimants hired the services of Mr Peter Hewitt to manage Tangent. It is common ground that an oral variation to the Mooring Licence was agreed so that Tangent could be moored at E19 in place of Amethyst and that it was otherwise on identical terms save that an additional fee was paid to reflect that Tangent was longer than Amethyst.
13. On the evening of 7 October 2017, Mr Hewitt checked the boats for which he was responsible in the Marina, starting with the Tangent at the far end of E pontoon. He had

recently added hazard tape to scare birds from the boat. Mr Hewitt satisfied himself that the boat was securely moored to the pontoon and observed that it was a calm evening.

14. Later that evening, Mr Wight was with his wife on board the Taronga at berth E17. They heard a flapping sound from the hazard tape. As they left for the night, at around 20:35, they walked onto the hammerhead and discussed the unusual design of the Tangent. Mr Wight noticed nothing amiss with Tangent or the pontoon.
15. At around 08:00 on 8 October 2017, Mr Hewitt received a telephone call from a fisherman who said he thought he had seen one of Mr Hewitt's vessels sinking. Mr Hewitt arrived at E pontoon at around 08:30 and saw that Tangent was sinking and slowly turning portside up. The tide was coming in strongly, driving Tangent against the pontoon. There was no wind.
16. Mr Hewitt telephoned Mr Wight, who arrived at E pontoon at around 09:00. In the meantime, Mr Hewitt pushed a piece of 2 x 4 between the boat and the pontoon in order to prevent the Vessel from hitting the pontoon and being damaged by it.
17. Mr Hewitt instructed Mr Adam Pethick of AP Marine Limited to assist. Mr Pethick enlisted the assistance of Wight Shipyard Limited. Mr Rushton of Wight Shipyard appointed MMC Diving Limited to assist with recovery. The Vessel's fuel vents were taped over before she was fully submerged and after that divers attached air bags and over the next two days sought to lift the Vessel, with partial success. On 9 October 2017, she was towed out of the Harbour, still partially submerged, to the Wight Shipyard, where she was lifted out of the water and drained. The only damage observed was water damage; there was no sign of any impact damage.
18. The insured value of the Vessel was £185,000, consisting of hull machinery and equipment in the sum of £137,000 and outboard motors for £48,000. The costs of salvage and recovery came to a total of £23,888.10. Quotations were obtained to repair the Vessel, including replacing the engines, furniture and electric wiring. One quotation was from Osmotech UK in the sum of £116,500 plus VAT, which (I infer) would have totalled £139,800 assuming VAT at 20% on the entire amount.
19. It seems that rather than the Claimants or their insurers contracting repairs, the Vessel was in fact sold to Mr Mike Ingram, the owner of Osmotech, for the sum of £30,000 by an agreement dated 31 January 2018 about which I will say more later in this judgment.
20. The Claimants settled their insurance claim by signing a "Form of Acceptance" dated 9 February 2018 by which they acknowledged a payment from insurers in full and final settlement of all claims in the sum of £163,888.10, based on "Cash in lieu of repairs" of £140,000 plus the salvage and recovery costs of £23,888.10.
21. Some time after the incident, the relevant pile was repaired by fixing a metal plate over the corrosion hole. On 18 May 2018, Mr Hewitt found another vessel in his care, the Jet Black, which was moored at the Tangent's former berth, was being pulled under water by the pontoon. The cause of the "Jet Black Incident" was that the repair welding had created a lip which resulted in the guide block getting caught on that lip.

## **The Claim**

22. The Claimants allege that in breach of the contract between the parties, the Defendant failed to take all reasonable steps to maintain the facilities of the Marina in reasonably good working order, by failing to repair certain corrosion holes in the piles. The Claimants say that as the tide rose on the night of 7/8 October 2017, a corner of one of the rubbing blocks, alternatively one of the retaining bolts, caught in the corrosion hole in the pile adjacent to E19, so that pontoon E and the Tangent moored to it, were held down as the tide continued to rise, causing water to enter the Vessel, eventually sinking her.
23. The Claimants' claim against the Defendant was for damages in the sum of £163,888.10 plus "Loss of use of Mooring" based on the remaining days of the Mooring Licence in the sum of £2,076.30. I will explain later the basis upon which the Claimants put their claim for loss.
24. The Defendant's principal defence was that the causal mechanism alleged by the Claimants (and supported by their expert, Mr Dunford) did not operate and the more likely cause of the casualty, as described in full detail at paragraph 11 of the Defence and Counterclaim, was that the Vessel's own moorings and the arrangement of fenders on the Vessel and on the berth (for which the Claimants were responsible) interacted with the unusually low tide on 7 October 2017 to cause the Vessel to catch under the fenders when both the pontoon and the portside of the Vessel were grounded at low tide (but the starboard side of the Vessel was afloat) and thereafter to take on water as the tide rose. The Defendant also denied that it was in breach of contract and denied that the Claimants had pleaded a sustainable claim as to loss. As I have mentioned, the Defendant counterclaimed the sum of £3,765 on the basis that it incurred these costs as a result of the Claimants' breach of their contractual obligation to be "responsible for maintaining the vessel's mooring lines and fenders and ensuring they are suitable for such purpose."

## **Did the Defendant breach its contract with the Claimants?**

25. The first issue for my decision is whether the Defendant complied with its obligations under the Mooring Licence. Only one provision of the Mooring Licence was relied upon by the Claimants, namely the first sentence of clause 3.1.1 of the Defendant's "General Berthing Terms & Conditions" which were incorporated by reference in the Licence. Clause 3.1.1 provided:
  - 3.1.1 The Company shall take all reasonable steps to maintain security at the Premises, and to maintain the facilities at the Premises and in the Harbour in reasonably good working order. Subject to this, and in the absence of negligence or breach of duty on the part of the Company, Vessels, gear, equipment or other goods are left with the Company at the Owner's own risk and Owners should ensure that they have appropriate insurance against all relevant risks including public liability.
26. What is alleged is that by permitting the corrosion hole in the pile guide I have mentioned to remain unrepaired until October 2017 the Defendant failed in its duty to

“take all reasonable steps ... to maintain the facilities ... in the Harbour in reasonably good working order.”

27. Mr Thorpe said in oral evidence that before the Defendant purchased the Marina “we made an inspection of all four marina areas and pontoons and we were aware that there were defects to do with a few of the piles. Not all, but some of them.” He said that “we therefore kept a close eye on these holes” and that he was of the opinion that they were getting no larger, and remained about a couple of hundred millimetres in width. Indeed “the holes on this pile are still a couple of hundred width”.
28. In around spring or summer 2012, Mr Thorpe received a copy of an inspection report dated 26 October 2011 that had been prepared by MDL Consultancy for another potential buyer of the Marina. The report ran to 25 pages. Extracting from it the passages that are material to the issues now in dispute, it stated:

#### **[p.6] Pontoon Guide Piles**

The pontoons are attached to the quay walls via wall columns (which appear to have been replaced in recent years) and to the Harbour bed by tubular steel mooring piles. It was reported however that at least one of the piles on the south side is ‘holed’ having suffered extensively from corrosion. To assess accurately an inspection over Low Water Springs would be necessary, it is likely that the columns and piles are suffering from Accelerated Low Water Corrosion (ALWC) which is an aggressive form of corrosion commonly found on steel structures centred around the low water level. Orange blooms of corrosion were observed on steel bracketry alongside the quay wall, indicating the presence of ALWC. Other forms of corrosion to the steel structures was observed with scaling and delamination to the intertidal and splash zone areas of both the wall columns and tubes.

Corrosion protection to steel elements can take the form of protective paints, anodes, repair plating or sleeves, or ultimately full replacement. Further evaluation would be required to identify the most appropriate repair methodology.

- *Budget cost for corrosion protection to piles £500 ea*

- *Budget cost for pile replacement £5,000 ea*

...

#### **[p.9] Pontoon Guide Piles**

The pontoons are anchored to the Harbour bed by tubular steel mooring piles. The piles are positioned to the inside face of the pontoons for the majority of the pier but are inset to the pontoons to the older and outer end of the pier. Corrosion is evident to both the inter-tidal and splash zones of the piles, a further detailed inspection is advised to ascertain the extent of ALWC as

referenced earlier in the report. At a minimum it is recommended that piles are cleaned and a protective coating (paint) re-applied.

- *Budget cost for corrosion protection to piles £500 ea*

- *Budget cost for pile replacement £5,000 ea*

...

#### **[p.24] Recommendations**

... (3) Accelerated Low Water Corrosion (ALWC) is a known problem which has been identified in the harbour. A detailed review of the steel elements of infrastructure (such as pontoon guide piles) should be undertaken to enable the most appropriate and cost effective repair methodology to be identified.

29. A table at the end of the MDL report detailed “Indicative year 1 capital spend” which was “deemed essential to enable safe and successful management and operation of the harbour”. This table had an entry for “Pontoon Guide Piles” against which was given a figure for “Cappex Yr 1” of £0, with a note stating “Assume zero expenditure Yr 1”.
30. Mr Thorpe said that the MDL report gave a fair representation of the harbour as at October 2011, but he viewed it as intended to justify a lower bid by the potential buyers for whom it was prepared. He said “We took note of bits and pieces in it, but we didn’t take any further regard after that.”
31. Mr Thorpe’s evidence was that there was a systematic maintenance programme in place by which the Defendant monitored corrosion holes. Mr Thorpe stated in his witness statement that “As part of the Harbour’s ongoing and routine maintenance programme, [the Defendant] instructed a welding company ... to undertake repairs to holes in the pontoon piles that were found within the Harbour in late summer 2017 that would need to be actioned during a period of very low tides.”
32. In oral evidence, Mr Thorpe was not able to give evidence of exactly how or when this maintenance was done. He said he was surprised that the Defendant had not been able to disclose any documentary records of such monitoring, but accepted that this was the case. In the end, Mr Thorpe referred Ms Paruk to Mr Wight to answer detailed questions about the programme of monitoring and maintenance.
33. Mr Wight said in his witness statement:

29. Part of my role as Operations & Safety Manager is to ensure that routine safety and maintenance checks are carried on all of the Harbour facilities. These checks include visual inspections of the pontoons and pile structures. I, or other BHA staff, carry out daily, weekly and monthly safety checks. The weekly checks are to check mooring of the vessels and safety checks. The monthly inspections which focus on the structure and wellbeing of the Harbour’s pontoons, fixtures and fittings. If issues are

identified and work required, Action and Job Details are raised. The works are then completed on a priority basis.

30. I can confirm that no concerns had been raised in relation the pontoon where the “TANGENT” was berthed, prior to the incident taking place. A weekly observation inspection would have taken place during the course of the week of the incident.

31. I was aware of some steel corrosion to the lower sections of five piles within the Harbour following my own visual inspections during the season. This corrosion had caused some holes to form in some of the piles. This is a common occurrence for steel structures in the marine environment but the nature and size of the holes were not a priority as they did not pose an immediate risk to the safe mooring of the vessels. There was no plan to fix the holes during the season and a decision was taken to repair the holes during the quieter winter season when vessels were not at the berths.

34. In oral evidence, Mr Wight confirmed that by the time of the incident he had been fully aware of the pile corrosion holes for about four years and there were five of them. He said that the holes were not referred to in any of the maintenance reports because he already knew about them. Indeed, he had discussed them with Mr Thorpe and a decision had been taken some years before the incident that they would take action if it ever reached the stage where there was a likelihood that the blocks on the pile guide might get caught in the corrosion holes. The reason that he considered them not to be an urgent issue in 2017 was that the hole in the relevant pile guide was no more than 100mm in length whereas the size of the block on the pile guide was 200mm in length, so there was no risk that the block could get caught in the hole. Mr Wight accepted that there was no record of monitoring of the length of the holes, but stated that he kept them in his head.
35. Mr Wight also said that if the Tangent incident had not occurred at all, then he believed that the holes would still have been the way that they were, because there was no appreciable risk. He went on to make it clear that the decision to repair the holes was taken after, and in response to, the Tangent incident, a fact which was, to put it mildly, not clear from the Defendant’s witness statements.
36. Thus, the essential facts are these:
- i) Mr Thorpe was aware from 2011, and Mr Wight from at least 2013, that there were significant corrosion holes in some of the piles.
  - ii) Mr Thorpe and Mr Wight were aware that the existence of such holes gave rise to a risk that a pile guide block could snag in a hole and that very risk was discussed between them from time to time over the period 2013 to 2017.
  - iii) It was obvious that the corrosion holes were likely to increase in size, a point that was emphasised in the MDL Report.



- iv) Mr Thorpe and Mr Wight considered it a matter for their judgment to determine when the holes had reached a size that posed a risk that ought to be eliminated pursuant to their contractual duty of care.
  - v) Mr Thorpe and Mr Wight failed to make any records of their monitoring of the holes and were not able to give any evidence of their detailed consideration other than an assertion that they were nowhere near big enough for the entire block to catch in the hole. This was on the basis that the hole was some 100mm wide (as Mr Thorpe said) and the blocks were around 200mm wide.
37. For this purpose, I will assume in the Defendant's favour that the hole in question was no wider than 110mm, which is the minimum dimension supported by either expert, and is admitted in the Defence. I will also assume in their favour that the other four holes were no larger than this one, as to which I heard no evidence.
38. However, in the absence of records, and with only very vague witness evidence, I am not prepared to assume either that the holes did not increase in size in the period between 2011 and 2017 or that Mr Thorpe and Mr Wight had any sufficiently detailed understanding of what size they were at any particular time. Where a person has a contractual duty of care, they are unlikely to be given the benefit of any doubt as to their compliance with that duty if they fail to keep records appropriate to the nature of the duty: see by analogy per Males J in *UBS AG v Kommunal Wasserwerke Leipzig* [2014] EWHC 3615 (Comm) at [896].
39. I therefore find that the Defendant did not take all reasonable steps to monitor the corrosion holes. However, its obligation was not to monitor, but to take all reasonable steps to maintain the facilities in the Harbour in reasonably good working order. The question remains whether repairing the corrosion holes before October 2017 was a reasonable step such that it was a breach of contract to omit to take it.
40. The way that the Claimant put the case in closing submissions was to argue that by failing to monitor the situation, the Defendant's decision not to repair could not have been a reasonable one and it followed that the Defendant had failed to take all reasonable steps to maintain. This submission did not grapple with the point that what mattered is whether repairs were reasonably required to maintain the Harbour in reasonably good working order. Even if the Defendant's decision not to repair was taken on an unreasonable basis (as I have held, in effect, it was), that has no significance if a proper process of decision making would have led to the same outcome.
41. The Defendant's submission was that an event where a guide snagged in the corrosion hole would have been an unforeseeable freak accident and that it was reasonable for the Defendant to determine that repairs were not necessary.
42. On the issue of what would have appeared reasonably necessary to a reasonable Harbour owner, expert evidence was not ordered or adduced. Both parties proceeded on the basis that this question could be answered by the Court as a matter of common sense, presumably on the basis that no particular professional expertise is required to own a Harbour. Given that was the common approach of the parties, I will decide the issue on that basis.

43. I have said that the relevant corrosion hole was at least 110mm wide. It was also at least 500mm in vertical length, indeed, the Defence avers it was 550mm long. In the context of a tubular pile which as I have said was 5 metres long, with diameter around 300 – 326 mm, this was a significant hole. As the Claimants emphasised, the holes were known to be increasing in size, as any corrosion hole would be liable to do. The holes, including the relevant hole, had been in existence to the Defendant's knowledge since at least 2011. If the Defendant had been monitoring as it claimed to have been, then it would have been open to it to adduce evidence that the relevant hole had taken an unexpected turn for the worse in 2017, but no such suggestion was made. I therefore assume and find that the relevant hole was similar in winter 2016/2017 to the state it was found to be in after the incident in October 2017.
44. It was the function of the piles to form a stable vertical against which the guides could rise and fall as the tide ebbed and flowed. They would be subject to contact every day with the moving rubbing blocks, which would be invisible beneath the surface of the water.
45. As I have set out above, the Defendant did actually realise that there was a risk of the blocks snagging in the holes, but formed the view that the risk was not immediate because the width of the block remained greater than the width of the hole.
46. In my judgment it was a risk patent to any reasonable harbour owner in the position of the Defendant that holes of this magnitude might interfere with the proper working of the pile guide, because a block could snag by its corner, or could be dislodged at one end so that it would present its shorter edge to the hole, or exposing a fixing bolt which might snag in the hole. The Defendant's own evidence was that repairs to the corrosion holes would be required at some point in time: it was a question of when, not if. While it might have been reasonable to postpone repairs while the holes were smaller, as they are bound to have been in 2012, it was not reasonable to postpone them further in winter 2016/2017 when at least one of the holes had reached dimensions of at least 500mm by 110mm.
47. This conclusion is reinforced by a comment made by Mr Stone on Mr Dunford's report (upon which Ms Paruk relied on this issue) that photographs which appeared to show the width of the hole as 145mm could not be "an accurate representation" because "If the hole was this big the pile would certainly fail with everything that has happened." If the hole could not be permitted to reach 145mm in width without certain failure, then permitting it to continue to expand for another season when it was already at least 110mm was not reasonable.
48. The Defendant cited *The Elli and the Frixos* [2008] 1 Lloyd's Rep 262 (aff'd [2008] 2 Lloyd's Rep 119) for the proposition that there may be some latitude about when, where and how reasonable steps were to be taken in a different context of "due diligence" to maintain a chartered vessel. The Claimants did not dispute that as a general principle, and cited *Rhodia International Holdings Limited v Huntsman International LLC* [2007] 2 Lloyd's Rep 325 for the proposition that an obligation to take "all reasonable endeavours" may be more stringent than an obligation to use "reasonable endeavours". Neither of these authorities concern the same wording as the Mooring Licence in this case. In any event, my decision does not turn on any fine nuance of the wording of the obligation.

49. I find and hold that the Defendant did breach its contractual obligation to take all reasonable steps to maintain the facilities in the Harbour in reasonably good working order by failing during the winter of 2016/2017 to repair the corrosion hole to the relevant pile.

### **Causation**

50. For the Claimants' claim to succeed, they must establish that the Defendant's breach of contract was the cause of their loss. To this extent, they have a burden of proof in relation to causation. Similarly, if the Defendant's counterclaim is to succeed, it would have the burden of establishing a causal nexus between the Claimants' maintenance of the Vessel's mooring lines and fenders and the casualty and this would be the Defendant's burden of proof. If I conclude that neither party has proved any causal mechanism on the balance of probabilities then both claim and counterclaim would fail.
51. I have already set out a broad outline of the parties' respective cases as to what caused the Vessel to sink. Each of the cases incorporated some potential alternative details. Subject to the point I have determined in the Claimants' favour as to breach of contract and the question of the Claimants' loss, there was no dispute that if either party proved the causal mechanism that it contended for, then the other party's liability would follow in principle. Importantly, neither party and neither expert suggested that any other causal mechanism could explain the events of 7/8 October 2017 apart from the rival explanations put forward by the parties.
52. It seems to me that in these circumstances, for practical purposes I am required to choose between the parties' respective cases, unless I conclude that both are so unlikely that I can make no finding about the true cause of the incident.
53. The parties' respective cases were supported by the expert evidence of Mr Dunford and Mr Stone. Their Joint Memorandum states that "The parties were unable to reach agreement on any of the issues discussed." It goes on to refer to the supplemental reports for the experts' respective positions. Expert witnesses who have been directed to produce a joint memorandum should take note that it is of more assistance to the Court if they make every effort to identify any points of agreement and, where no agreement is possible, to identify with particulars the scope of the disagreements.
54. Whilst, as I have mentioned, both experts gave their honest opinions, Mr Stone tended to be bombastic and combative and relied heavily on his instincts and the strength of his beliefs as opposed to analysis. A striking example of this was when he gave sustained incorrect evidence about the impact on his measurements of the length of a magnet at the end of his tape measure. I will explain the context later in this judgment. It may be understandable that a witness – even an expert - might make a mistake in the heat of cross-examination as to whether the magnet would require addition to or subtraction from the measurement shown on the tape. However, Mr Stone's stubborn insistence on answers that were plainly wrong did suggest that he was more concerned to maintain the opinion he had given than to give proper consideration to the questions being asked of him. On the other hand, Mr Dunford – unlike Mr Stone – did not visit the Marina and had to rely on measurements taken by others, in particular, Mr Kelvin Euridge of Beazley who attended the site (together with Mr Stone) on behalf of the Claimants' insurers and made reports dated 24 October 2017 and 10 July 2018.

55. I will start with the Claimants' theory and the main objections to it, then consider the Defendant's theory and the objections to that, before reaching a conclusion. In what follows, I will address the principal points made by counsel in closing submissions rather than trying to decide every one of the multifarious issues upon which the experts disagreed.
56. It is common ground that the tide on the day of the incident was the lowest astronomical tide of the year. At the bottom of this low tide, the pile guide rubbing block would have been below the corrosion hole in the pile. It would have risen with the tide against the part of the pile including the hole. After the incident, the relevant block was found to be missing. The mounting holes in the guide were free from corrosion, which, Mr Dunford says and I accept, suggests that the mounting bolts were lost at a fairly recent time, though not necessarily during the incident itself.
57. As Mr Dunford also says, and I accept, while the corrosion hole was too narrow for the full width of the block to fit in, one end or a corner of it could have done so, as could one of the mounting bolts, if it remained in place while the block was pushed out of position or lost altogether.
58. The first objection to the Claimants' theory is the Defendant's assertion that the corrosion hole did not show the kind of marks or damage that would be expected if it had come into sustained contact with the rubbing block or bolt under the forces to be expected while holding down the Vessel.
59. There were good quality colour photographs of the corrosion hole itself taken on 10 October 2017. Mr Dunford said in his first report that these showed deformed edges leading out of the pile, showing that an object had been pulled hard up against it and then outwards. In written comments on that statement, Mr Stone said that the photograph showed uniform corrosion deposits around the hole indicating no form of recent contact and that the marks were "historical". In oral evidence, Mr Stone accepted that the photographs showed compression damage to the top edge of the hole and he said it could have been caused by "flotsam, sticks, anything" or "anything floating around the harbour that's caught within the pile". Mr Stone went on to say "Anything can get caught in these piles if it's got a hole. Anything can be caught in there, you know, a can, anything floating, wood anything."
60. Mr Leung addressed this matter in detail in his closing submissions. While he accepted that there were marks described as "peening" which were consistent with compression damage, he sought to point out inconsistencies in Mr Dunford's evidence about the nature and likely origins of the marks that were observable around the hole. Despite Mr Leung's valiant efforts, I am in no doubt that the photographs did show patterns suggestive of deformation arising from some kind of impact. As Mr Stone said, they could have been caused by "anything". I reject Mr Stone's opinion and Mr Leung's submission that they could not have been caused by any part of the rubbing block or a retaining bolt; I accept Mr Dunford's opinion that they could have been. Accordingly, the presence of these marks is not strong evidence in favour of the Claimants' theory, but nor is it any objection.
61. The next objection taken by Mr Leung was that the hole was not sufficiently wide for a corner of the block to snag in it. This objection depended on two matters: the actual width of the hole and the extent of the wear on the block.

62. As to the width of the hole, Mr Stone said he had measured the hole at 110mm wide, while Mr Euridge's report stated that it was 150mm wide. Mr Dunford's estimate, based on scaling photographs, was that the hole was between 136 and 146mm wide. It was not possible for Mr Dunford to measure the hole, because it was sleeved (as a repair) after the incident. Mr Dunford's opinion was that Mr Stone must have measured the topmost part of the hole, which was significantly narrower than its central portion, which Mr Stone denied having done.
63. I accept that Mr Stone believed by the time he gave evidence in January 2021 that in October 2017 his measurement of 110mm had been taken at the centre of the hole. Although Mr Euridge did not give evidence, the documents show that in October 2017, with the same opportunity to measure as Mr Stone, Mr Euridge stated that he believed the width to be around 150mm wide. Absolutely no suggestion was made that Mr Euridge would not have formed this opinion in good faith.
64. Bearing in mind Mr Stone's disposition to insist upon his own measurements, without giving consideration to questions properly raised about them, I think the likelihood is that Mr Dunford is right that Mr Stone took his measurement of 110mm at the top of the hole and that the true width was significantly greater. I cannot place excessive weight on Mr Euridge's measurement in the absence of any detail about how it was arrived at. In the result, I find that Mr Dunford's opinion that the hole was around 136 – 146 mm wide at its midpoint was correct.
65. Even if that were wrong, I also accept Mr Dunford's view that it is quite possible that the rubbing block was sufficiently worn for a corner of it to snag in the corrosion hole. I therefore reject this point as an objection to the Claimants' theory.
66. Next, Mr Leung attacked the sub-theory that a retaining bolt may have snagged in the hole after the block had become detached from it. Mr Dunford agreed that photographs taken by Mr Stone in March 2018 showed that the loss of the bolts had been relatively recent, because there was little corrosion around the bolt holes. Mr Leung submitted that there was no real explanation of how the block could have come away leaving at least one of the bolts in place or why both bolts (rather than just the one that got caught in the hole) were missing after the incident. I accept that these are fair criticisms and also that if it had been a steel bolt that caught, then the damage to the hole might have been expected to be sharper than the compression observed in the photographs. I therefore think that the bolt sub-theory is less likely to be correct than the corner of the block sub-theory.
67. The next point made by the Defendant is that if the Claimants' theory was correct, then the Vessel would have been noticeably listing by 20:35 on 7 October 2017, when Mr Wight observed her, but he noticed nothing amiss. Mr Dunford's opinion in his supplemental report was that the pile guide block would have risen to the level of the top of the corrosion hole somewhere between 20:15 and 20:30 with the result that at 20:35, any discrepancy would not be noticeable. Mr Stone's view was that the pile guide block should have been 38cm above the hole by that time, so that if the Claimants' theory were right, then the list to the pontoon would have been obvious to Mr Wight.
68. This question depends on the vertical position of the hole itself and of the depth of water and movement of the tide on the night in question. To summarise complex evidence, the Defendant says that the tide rose very fast from its low point in the evening of 7

October 2017, whereas the Claimants say the rate of rise was less dramatic. Mr Stone gave an estimate of 1.07m of rise in an hour at the relevant time, compared to 0.85m in the opinion of Mr Dunford. Both parties base their case on this issue on measurements taken by Mr Stone and Mr Euridge during various surveys conducted on later dates when the tidal conditions were believed to be similar to those on the night in question.

69. Mr Stone explained in his supplemental report that he had measured the relevant depths in the following way:

3.4 I obtained all of my tidal measurements from the pile using a tape measure tied to the pile with a magnet weight with square plate on the end to prevent the plate from sinking into the mud.

3.5 The hole in the pile was measured from the sea bed and recorded at 1.48m to the bottom of the hole. The hole measured 550mm vertically to the top of the hole. By measuring the hole in this way, it was clear where the hole was on the pile relative to the sea bed.

3.6 These measurements were transferred to a full size drawing on white lining paper, representing the true size of the hole to scale (see the photographs below).

3.7 I took these measurements on 7 March 2018, 20 March 2018, 16 June 2018, and 19 September 2020. The measurements taken on 19 September 2020 were particularly relevant because it was the closest accurate tidal range and lowest spring tide of the year, to replicate the same tidal conditions as the evening of the incident and to replicate the calculation of tide rates taken with Mr Euridge on 16 June 2018. I know this because I checked on Bembridge Harbour's website, where they display a tidal curve.

3.8 The measurements were taken using a tape measure, and additionally by using a depth stick (the depth stick was 3 inches x 2 inches, pine, and 10 feet long. The depth stick was used as an additional method for recording. See photograph 2 (below) which demonstrates the water mark on the depth stick.

70. As this implies, Mr Stone relied primarily on his hand drawn chart on white lining paper to indicate the vertical position of the corrosion hole and the tides. Ms Paruk criticised him for not disclosing the primary measurements themselves other than their summary on this sheet. Mr Leung pointed out that the measurements taken on 16 June 2018 were set out in a table in Mr Stone's survey report relating to that date. There, Mr Stone explained:

5.1 A heavy commercial magnet with a 150mm<sup>2</sup> steel plate connected to a tape measure was used to take measurements. The bottom of the steel plate is fitted with a 20mm tube to take bottom samples.

5.2 The distance from the bottom of the steel plate to zero on the tape measure is 110mm this figure has been added to the above measurements.

71. In cross-examination, Ms Paruk pointed out to Mr Stone a discrepancy between different parts of his written evidence as to whether the bottom of the hole in the pile was 1.48m or 1.54m from the seabed. She then put to Mr Stone that on 16 June 2018 he measured low water at 1.2m as recorded on his chart and as clearly shown in the table of measurements in his report of the survey on that date. Mr Stone responded to that question that it was necessary to take off 110mm from the 1.2m, because of the length of the weight attached to the end of his tape measure. He said that his actual figure for low water was 1.09m. Ms Paruk took Mr Stone to the passage of his supplemental report I have set out above, but he still insisted that 110mm fell to be deducted from the figures on his chart.
72. Ms Paruk then put the obviously correct point that if an adjustment was needed, it would be the addition of 110mm rather than its subtraction. Mr Stone would not accept it. Ms Paruk sought to ask a series of questions on the basis that the low water figure was 1.2m, as shown in Mr Stone's chart, but he continued to insist that his own figure was 1.09m and that he would not "give" counsel 110mm.
73. In re-examination Mr Leung reminded Mr Stone of paragraph 5.2 of his supplemental report and asked why he subtracted 110mm in the light of that paragraph. He answered: "Because I'd added it on in the beginning because my tape measure was 110mm over reading".
74. I see no reason to doubt that Mr Stone was indeed using a measure with a section of 110m hanging down below the zero, as he explained. If so, then whatever figure was shown on the tape, he would need to add 110mm to obtain a correct reading. In other words, his measure would be under reading (not over reading) and that had to be corrected manually.
75. However, in circumstances where Mr Stone was confused about this – not just momentarily, but in a sustained way – I am left with very little confidence in what the readings actually were. It seems to me that the readings recorded by Mr Stone could well have been erroneous by 110mm or even by 220mm. Mr Leung's response to this concern was to say that it did not assist the Claimants on the basis that if every measurement was wrong, then the rate of rise of the tide would remain correct and the tidal height at 20:35 would have been even higher. This submission is ingenious, but I am not able to accept it, because I see no reason to assume that any error that Mr Stone made was made consistently across every reading. The process which Mr Stone followed, of adding a selection of readings taken on various dates (the readings taken on dates other than 16 June 2018 were not otherwise available) to a single chart showing depths, was likely to increase the risk of confirmation bias and decrease the ability of any later examination (eg in Court) to unravel precisely which measurements were taken on which occasion.
76. On the other hand, Mr Dunford's calculations (which resulted in a rate of rise of 0.85m per hour) were performed using the records of Mr Euridge's readings on 16 June 2018 and Mr Euridge's photographs of his own measuring rod. Some of those measurements were inconsistent and discarded by Mr Dunford. Mr Leung put to Mr Dunford that there

were other errors in Mr Euridge's tables. Mr Dunford said that he had relied for the rate of rise only on Mr Euridge's figures for the hour after low tide, which had not been criticised, and which he had been able to confirm from time stamped photographs of the sounding rod. Mr Leung submitted that if Mr Euridge's figures were unreliable, then no reliance should be placed on any of them.

77. Mr Leung raised a number of issues about Mr Euridge's reliance on the photographs, which I have carefully considered. The issues raised do not directly impugn the measurements upon which Mr Dunford relied for his calculation of the rate of tidal rise. It seems to me that these are more likely to be right than Mr Stone's figures.
78. This conclusion is confirmed by the fact that the Jet Black incident is acknowledged to have taken place at a time when the tide was not as low as it had been on 7 October 2017. That suggests, as Ms Paruk submitted, that the pile guide must have been below the level of the bottom lip of the plate used to sheath the hole, which in turn implies that the position of the hole would have been significantly higher than it was placed by Mr Stone's figures, delaying the time when the effect of the rising tide on the pontoon would have been visible on the surface.
79. The next objection raised by the Defendant to the Claimants' theory is that it does not explain dry loose wood chippings which were found on the pile guide on the morning of 8 October 2017. The Defendant's case was that since one splinter observed after the event was pointing upwards, it can only have been caused while the pile guide was on the way down. As Mr Leung pointed out, Mr Dunford's response to this case was confused and ultimately settled on the opinion that splintering would have been caused both ways. This is a point against the Claimants' theory, but I consider it be of little weight as it is simply impossible to know how a particular wood splinter was caused or came to be pointing in a particular direction when observed after the incident.
80. A further objection raised related to the "Ruffles", which was a Rigid Inflatable Boat or RIB, moored on the inner berth of the hammerhead pontoon, opposite the Tangent. The Defence avers that if the Claimants' theory was correct, then the Ruffles would have submerged as well as the Tangent, which did not occur. Although the Defendant stated that the Ruffles was not submerged, no factual evidence was adduced about this. Mr Stone stated in his first report, dated 21 October 2020, that the Ruffles was inspected by her owner the morning after the incident and there was no evidence that she had taken on any water or mud. He does not state the source of this understanding, though on one reading of his report, it may have been communicated to him by Mr Pethick during a visit to the Wight Shipyard on 13 March 2018. This understanding seems to have been accepted by Mr Dunford and not challenged by the Claimants, so I proceed on the basis that it was correct.
81. Mr Dunford's opinion was that on his calculations, the Ruffles would have stayed afloat as she would have been elevated rather than held down, as the hammerhead tilted on being held down on the other side of the pile from the Ruffles. This was supported by a photograph of the Jet Black Incident where the pontoon is seen to be pivoting in a way that is not placing any significant downward pressure on the Ruffles. On this point, I prefer Mr Dunford's opinion and I do not consider the lack of water ingress to the Ruffles to be a point against the Claimants' theory.



82. I turn now to the Defendant's theory that the incident was caused by the improper arrangement of the white barrel fenders affixed by Mr Hewitt on behalf of the Claimants to the pontoon to fend the Vessel from the berth. The Defendant's complaints were that these fenders were not tied at their bottom edges, but only on their tops and that two white barrel fenders on the pontoon opposite the stern of the Vessel were too close together.
83. The Defendant says that at the lowest tide of the year, the hammerhead pontoon grounded, while the Vessel remained afloat owing to the slope of the seabed away from the pontoon. Because of this, the pontoon was higher than normal against the side of the Vessel as the tide dropped. As the tide rose after low water at around 19:30 on 7 October 2017, the Vessel rose with it before the pontoon began to move. The fastening rope of one of the black fenders fixed to the Vessel slipped into the gap between the two close mounted fenders, causing the top of the black fender to become wedged, causing the Vessel to develop a list at the stern, restraining her against the rising tide. The Vessel then developed a list towards the pontoon allowing water to enter through the port aft scupper which was at most 140mm above the water line. As the pontoon rose on the tide, the Vessel floated free as a result of the defective state of its moorings, while still taking on water. Then, as the pontoon rose above the Vessel, it exerted an upward pull on the port side of the Vessel tied to the pontoon, causing the Vessel to lean away from the pontoon to starboard. As the tide fell again in the early hours of 8 October, the Vessel, heavy with water, pulled downwards on the side of the pontoon, keeping the pontoon pinned against the pile, preventing it dropping with the tide and tilting the pontoon towards the Vessel until the guide was wedged hard against the pile, eventually leading to the failure of the bolts holding the pile guide block, releasing the pontoon and the Vessel.
84. With assistance from Mr Leung's lucid and thorough written closing submissions, I have attempted to describe the essentials of the Defendant's theory as shortly as possible. Even so, it posits a complex sequence of events. The Claimants attack the sequence at several points.
85. First, the Claimants say that there is no sufficient evidence that the pontoon would have grounded at low tide on the evening of 7 October 2017. Mr Stone was very clear in his reports for the trial that it would have done so and that he observed it in his visit to the Marina on 16 June 2018, but there was no previous written statement to this effect. In particular, there was no mention of it in Mr Stone's own report of the survey he conducted on 16 June 2018 when the tides were similar to those on 7 October 2017. Mr Stone's explanation for this was that it was not necessary to mention it because the grounding of the pontoon was so clear and apparent and that it was common knowledge among owners at the Marina. However, Mr Euridge's survey report of the same visit states "At no time did the water depth surrounding the pontoon drop below 1.02m, this was at the north east corner and equated to a depth of 1.47m below chart datum. At the pile the minimum water depth was recoded [sic] as being 1.2m some 1.67m below chart datum."
86. I have already given reasons why I am not inclined to put great weight on Mr Stone's opinions about the observations made on 16 June 2018, especially where they are not supported by his own report of that visit and even more so when expressly contradicted by Mr Euridge's report. Mr Dunford maintained the clear opinion that the pontoon did not ground even at low tide, though this was primarily based on Mr Euridge's

observations and Mr Dunford's interpretation of photographic evidence, so it is not of great weight in itself. It seems to me that the question whether the pontoon grounded is part of the overall assessment of the likelihood of the two scenarios, neither of which is capable of definitive proof. I propose to take it into account in that way. However, in case, contrary to my view, I am required to make a finding of fact on the balance of probabilities, then I find that the pontoon did not ground.

87. Secondly, the Claimants respond to the Defendant's imputations based on Mr Hewitt's adjustments to the fenders on the morning of 8 October 2017. I accept and find that Mr Hewitt was doing his best to prevent damage to the Vessel and that whatever adjustments he may have made do not assist me in assessing the relative likelihood of the rival theories of causation.
88. Thirdly, the Claimants deny that the mooring lines were wrongly fixed. Mr Leung relied in this respect upon certain passages in his careful cross-examination of Mr Hewitt. I have considered those passages carefully along with the photographs that he put to Mr Hewitt. It seems to me that at least one of the mooring lines did have some slack the night before the incident, though I am not prepared to draw any wider inferences than that from the very slight evidence available. Moreover, the fact that Mr Wight noticed nothing amiss (and he confirmed that he would have intervened if he had spotted any danger) confirms that there was no very serious issue with the mooring lines or the fenders.
89. Fourthly, the Claimants say it is fanciful to put forward that the white pontoon fenders would have held down the Vessel given that they were light weight, being made of plastic and hollow and attached to the pontoon by four screws. The Defendant's response to this point is to argue that their strength only needed to be sufficient to hold the Vessel briefly to induce a slight list, which would have been self-perpetuating once water had entered the Vessel. I accept that is a possibility, but the Defendant's implicit acceptance that the white barrel fenders would not have held the Vessel for long adds to the unlikelihood of the chain of events they predicate, especially given that nobody suggested that any of the barrel fenders had broken from the pontoon by morning.
90. Fifthly, the Claimants say that the black fender which Mr Stone identified as having initially got caught was photographed only at 12:45pm on 8 October 2017 after which it would inevitably have moved further. This is right. On its own, it does not do much to dislodge the Defendant's theory, but its relevance is that Mr Stone seems to have seized upon the photograph as strong support for his opinion about the causal chain and I accept that Mr Stone placed undue emphasis on this factor which weakens the weight I should attach to his opinion.
91. Sixthly, the Claimants point out that the Defendant's theory would, in the first instance, have led to the Vessel to turn down onto her portside, whereas she was eventually discovered portside uppermost. As I have described it, the Defendant's theory does indeed involve an initial portside list. According to Mr Stone in his second report: "The vessel would eventually end up to starboard as it was sinking during the night as it would have been pulling down against the pontoon with the portside high and the starboard side lower." He said later in the same report: "Also, once the vessel developed a small list to port this allowed the fuel in the 700ltr fuel tank to stay on the port side of the tank and increase the list even further taking the pressure off the barrel fenders. As the vessel took on more water it sank lower into the water until it broke free. A full tank

of 700 litres will weigh approximately 0.5 tonnes and, even if the vessel's tank was half full, that would still have amounted to a weight of 250kg which is a significant weight added to the port side aiding the list." When Ms Paruk asked Mr Stone about the apparent contrast between these two passages in respect of the ultimate direction of the listing, Mr Stone answered as follows:

We don't know how much fuel was in the tank. We have no record of this. You know, it's -- we don't know, but you have to consider that the boat's got -- you know, if it had fuel in and the tank was half empty or three quarters, it's going to come onto the port side and give it a port side.

We don't know what happened when that banged like that and slipped over. What we do know, on the other side in the cabin, it's full of cushions, of thick mattresses, not just cushions, floppy pillows, but it's got all of the settee berths, all of that right the way around in the main cabin. Thick foam mattresses. That would have also absorbed water and kicked it over. We don't know if the vessel -- the vessel would certainly have had a -- what we don't know is the list to port, you know, it would have just gone right over. It would have gone as it fell down and went right over. We know that it didn't ever hit the pontoon and have such a list to port, because the cabin side, even how low it was in the water, would have hit the pontoon or, the fenders, and there was no damage there. And, as it dropped, we don't know what rocking motion that has. You can't -- you can sort of roughly predict it, but, you know, that's where the vessel was found. You know, the sequence of events in all of this is tricky to, you know, accurately -- you know, there's a bit -- you've got a vessel that's got a bit of wobble on it. You know, the stern -- it would have taken water right through the stern. It would have taken that and that, the bough would have been significantly higher in the water and only held by the mooring lines. Which way it was --

92. I do not find this answer convincing as an explanation of why the Vessel swapped sides. Mr Leung relied on his re-examination on this point, in which Mr Stone said:

*Q. You were asked about how the vessel took on a starboard list on your theory of what happened to the Tangent. Now, on your theory, as the vessel sank, she was being pulled up on her port side by the rising pontoon. Can you explain what effect, if any, that would have had on the vessel's list?*

A. Well, the pontoon and all of the boats within the marina were pulling it up. So the tide was rising going up. Her first list was to port. Her first list was to port, without a question. As the vessel rose and kept going up through the night, okay, they would have switched over and then dropped down, when it dropped.

*Q. Can you explain why the rising pontoon -- well, whether the rising pontoon would have had any role to play in that process?*

A. Well, because the boat was sinking below the pontoon, so there was nothing for the boat. The boat was still tied to the pontoon but sinking lower. It would have changed. The first initial list was to port. Okay? So it's taking on water with its first initial list to port, because of the fenders being trapped, mooring lines, okay. That was to port. As it started to rise up through the tide and Tangent took on more water, okay, the vessel would have slipped over and down on the side. Her first initial list was to port.

93. Ultimately, this evidence seemed to me to amount to little more than bare assertion that the Vessel might have swapped sides as she and the pontoon rose and fell. I accept that is possible, but it is not likely, and I think it is a significant weight in the balance against the Defendant's theory.
94. Seventhly, the Claimants pointed out that there was no damage to the portside of the Vessel. Mr Stone's response to this was that the "Vessel was well fendered". That, again, is a possible answer, but not a likely one in the circumstances. I find this is another pointer against the Defendant's theory.
95. Eighthly, it is said that the timeline of the Defendant's theory is problematic because the black fender should have been caught in time for Mr Wight to observe it at 20:35. I am not prepared to place weight on such a fine point.
96. Ninthly, the Claimants say that there were fresh marks on the western side of the pile at the same level as the top of the corrosion hole which were not explained by the Defendant's theory. The Defendant relied on the following answer of Mr Stone's in cross-examination on this point:

Q. Right. So this mark, and you accepted very fairly that it looks like a fresh mark, can't be explained, and isn't explained, by either of your theories, is it? Because on your theory the pile guide got jammed at the top of the pile and so there's no explanation for this mark?

A. Yes, there is. Of course, there is. It's when the pontoon slid down the pile. That could be anything. That could be anything that caught that off. It could be the guide block nearest it. You know, it could be anything. No, this is absolutely disgraceful. No, I totally disagree. We don't know what that is. You can't use some barnacles taken at an angle to work out the angle of any form diagram or calculation. You cannot do this. When that vessel -- we don't know what happened on that pile as that vessel dropped, we do not know, and I'm sure that the pile could have -- the pile block would have scraped that off. How it actually came off, I'm sorry, it's just guesswork. Guesswork.

97. I accept that these marks are not strong evidence either way, as Mr Stone said, but his answer on this point is an illustration of his general tendency to substitute vehemence for reasons, which made his evidence less helpful than it might have been.

98. There is one other matter I should mention as it featured in the evidence, though it was not one of the key matters that either side relied upon to attack the other's theory, namely the evidence that a neighbour of the Marina heard a loud bang at around 4.00am on 8 October 2017. The Defendant said that their theory would explain this as the Vessel was released from the pontoon at around that time. The Claimants said that the noise was more likely caused by a delivery bowser that was seen on a security video arriving at the Marina at around that time. The noise adds nothing to the Claimants' case, but I consider that it adds very little to the Defendant's given the coincidence of timing of the delivery that could also explain it.
99. Overall, I have no hesitation in holding that the Claimants' theory is significantly more likely to be correct than the Defendant's theory. My reasons are incorporated in my above explanation of each party's criticisms of the theory of the other.
100. On my findings, there is no evidence which renders either party's theory impossible or, for that matter, certain to be right. However, in circumstances where neither party has suggested any third mechanism could have operated, I find that the Claimants' causal mechanism has been established on the balance of probabilities.
101. It follows that I also find that the Vessel was sunk as a result of the Defendant's breach of contract in failing to take all reasonable steps to maintain the Marina in reasonably good working order.
102. It also follows from that conclusion that I will dismiss the Counterclaim, as any breach of contract by the Claimants (which in any event I do not find) was not the cause of any loss.

### **Loss and damage**

103. At the start of the trial, the Claimants' pleaded claim in their Amended Particulars of Claim was that the Defendant's breach of contract had caused "the damage" to the Vessel. No particulars were given of what "the damage" consisted of. It was then alleged as follows at paragraph 14:

14. By reason of the matters aforesaid, the Vessel had to be recovered and was then sold on an as is basis. In the premises, the Claimants have suffered loss and damage in the sum of £165,964.40 as follows:

#### PARTICULARS

a) Insured value of the Vessel and engines	£185,000
b) Salvage Agent fees and expenses	£21,145.22
c) AP Marine invoice 129	£1,231.02
d) AP Marine invoice 141	£634.36
e) Peter Hewitt Skipper and Yacht Management services fees	£877.50
f) Loss of use of mooring (169 days)	£2076.30
Total	£210,964.40

Less figure for salvaged value	£45,000
Total claimed	<b><u>£165,964.40</u></b>

104. The response to this in the Amended Defence and Counterclaim was a denial that the Defendant was the cause of any loss and damage and “the Claimant is required to prove the loss and damage alleged”.
105. Following a dispute in the statements of case as to whether the costs of the salvage operation were reasonable, the following plea was included in the Defendant’s Reply to Defence to Counterclaim dated 30 January 2019:

Further, since the Claimants contend that the Vessel was capable of preservation and repair, the basis on which they allege that their loss in relation to the Vessel is not the cost of repairs, but the insured value of the Vessel and engines less a figure for her salvaged value, is not understood. In any event and if relevant, it is also unclear why the insured value has been used in this calculation instead of her actual market value immediately before the incident. The Defendant will plead further if necessary once the Claimants have explained their case in this regard.

106. The witness statements for the trial were dated 28 September 2020. Mr Greenwood stated:

I am aware that the boat was bought from the underwriters by a buyer who owns a boatyard in the Solent, where it was essentially resuscitated and it is now floating in the Solent; as such the water of integrity of the boat cannot be questioned.

We made a claim against our [sic] insurance for the loss of the Tangent and we were indemnified in the sum of GBP163,888.10.

107. Mr Robertson’s witness statement stated:

Unfortunately, Tangent was deemed to be a constructive total loss as a result of the water ingress. We made an insurance claim for the loss of Tangent and we were duly indemnified in the sum of GBP163,888.10.

108. In her opening skeleton argument for the trial, Ms Paruk contended that:

The insured value of the Vessel was a proper reflection of her actual market value as (as appears to be common ground) she was almost brand new at the time of the incident.

109. In his opening skeleton argument, Mr Leung argued that the premise of the Claimants’ quantum – that the Vessel was a constructive total loss – was not made good and that, even if it was, the measure of loss would be the market value pre-incident, not the insured value and that no evidence of market value had been relied upon. “In the premises, there is no basis for awarding the damages claimed in respect of the alleged loss of the Vessel.”

110. I raised this issue with Ms Paruk in oral openings and she informed me that the Claimants' position was that the Vessel was brand new when insured and that the incident was only around 2 months after the date of the policy so that the insured value was as good evidence as could be got at proportionate cost to demonstrate the market value of the Vessel.
111. In his opening submissions, Mr Leung made the point that there was no evidence of market value, nor indeed of the purchase price of the Vessel, nor of how much use she had received and he also made the point that the Vessel was not in truth a constructive total loss so there was no basis for claiming her entire value.
112. Mr Leung asked Mr Greenwood about the paragraph of his statement that dealt with the sale of the Vessel. Mr Greenwood said that he had no awareness of any repair quotes or the name of the party who had bought the Vessel, saying "We left the matter to our insurers".
113. Mr Leung also asked Mr Robertson about the relevant parts of his evidence. Mr Robertson confirmed that it had been left to insurers to obtain quotes as to repairs and explained that from the Claimants' perspective it was a better deal to take the insured value of the Vessel than to carry out repairs. Mr Leung put to him that there was no evidence that the Vessel had been abandoned as a constructive total loss and Mr Robertson responded:

No, I took the offer made by our insurers, which was of the cost of the Vessel as being, you know, what I needed to recover. It was slightly less than the insured value.

114. After the conclusion of the evidence on the second day of the three day trial, at about 19:42 in the evening, the Claimants sent to the Defendant a draft Re-Re-Amended Particulars of Claim. (There had been an uncontroversial re-amendment on Day 1). This proposed the following changes to paragraph 14 of the Particulars of Claim:

14. By reason of the matters aforesaid, the ~~Vessel had to be recovered and was then sold on an as is basis. In the premises,~~ the Claimants have suffered loss and damage in the sum of £165,964.40 as follows:

PARTICULARS

a) <del>Insured value of the Vessel and engines</del>	£185,000
<u>Cost of repairs</u>	<u>£140,000</u>
b) Salvage Agent fees and expenses	£21,145.22
c) AP Marine invoice 129	£1,231.02
d) AP Marine invoice 141	£634.36
e) Peter Hewitt Skipper and Yacht Management services fees	£877.50
f) Loss of use of mooring (169 days)	£2076.30
Total	£210,964.40
Less figure for salvaged value	£45,000

Total claimed **£165,964.40**

115. It will be seen that the effect of the draft amendment was to commence the calculation from alleged cost of repairs of £140,000, which replaced the previous allegation of insured value of £185,000 less salved value of £45,000, to end up at the same total.
116. In her written closing submissions, Ms Paruk told me that:
- The amendment has come so late as a result of the matter having been dealt with by different underwriters and different claims handlers within those different underwriters.
117. The Defendant's position was that the proposed amendment came far too late and was unfair on them because it would require different evidence.
118. In oral closing submissions I put to Ms Paruk that as I understood the evidence I had heard, the Claimants had not incurred any cost of repairs, because they had handed over the Vessel to their insurers in return for a particular payment, without carrying out any repairs. I indicated that my provisional view was that the Claimants' vessel, having been damaged, was worth less than it was before the damage, and that difference in value would represent their loss.
119. It was at this point that Ms Paruk showed me the letter agreement dated 31 January 2018 to which I have made brief reference above whereby Mr Ingram of Osmotech agreed to purchase the Vessel for the sum of £30,000. That document had not been referred to in the evidence, but Mr Leung did not object to it being relied upon as authentic. It is a curious document, on a single page of the headed notepaper of the loss adjusters acting for the Claimants' insurers. It was addressed to Mr Ingram and signed by him, stating that he agreed to purchase the Vessel on an "as is where is" basis and upon transferring the £30,000 to a bank account in the name of "Amethyst", he would "become responsible for the vessel thereafter". Curiously, the document does not state who was selling the boat.
120. Returning to the oral closing submissions, Ms Paruk then told me that her team had discovered only on the previous day that the bank account to which the £30,000 was paid was an account of the Claimants themselves and not the insurers. I comment that this is consistent with the name of the account being "Amethyst", the name of the previous vessel jointly owned by the Claimants.
121. On the basis of this material, the facts about what happened appear to be, and I find that they were, as follows. The Claimants sold the Vessel in her damaged state to Mr Ingram for the sum of £30,000. The Claimants then accepted a settlement from their insurers which was quantified as a sum "in lieu of repairs" of £140,000 and a sum for salvage and recovery of £23,888.10.
122. After further exchanges, Ms Paruk agreed that she could not pursue a claim for the cost of repairs and her pleading remained unamended. She made it clear in the end that her claim was for the difference between the Vessel's market value before and after the incident.



123. In his closing submissions, Mr Leung contended that the claim as pleaded did not make out a proper claim for loss of market value and that even if, contrary to his contention, I permitted such a claim to be argued, it could not succeed because there was no evidence of what the market value was prior to the incident. Indeed, Mr Leung told me on instructions that his client had disclosed documents tending to show that the market value was less than the insured value, but had chosen not to refer me to them because they had understood the claim to be brought on the basis of insured value rather than market value.
124. Both counsel made it clear that they did not wish to apply to adduce any further evidence in the light of the unsatisfactory position in relation to quantum, but wished me to decide the matter on the evidence adduced already.
125. I find on the evidence that the Claimants have shown that there was damage to the Vessel as a result, at least, of the destruction of her engines, which would have been replaced in any repair. There was other damage too, but for present purpose that suffices. Accordingly, the Court passes from causation of damage to quantification of loss.
126. I hold that the proper measure of the Claimants' principal loss (I'll return later to salvage and other costs) is the difference between the market value of the Vessel prior to the incident and her market value afterwards. Cost of repairs could in principle have evidential relevance to what that difference is, but it cannot be claimed as such in circumstances where the Claimants did not carry out any repairs.
127. I hold that the Claimants' pleading is sufficient to make such a claim for loss of value. The statement of case is unsatisfactory and I have considerable sympathy for the pleading point that Mr Leung took upon it. However, I think construing the statements of case objectively, including the reasonable averment in the Reply to Defence to Counterclaim that "it is also unclear why the insured value has been used instead of her actual market value immediately before the incident", I ought to conclude that the Defendant understood that the true measure of the Claimants' loss was a difference in market value and that that was likely to be the case which it would have to meet.
128. The Defendant chose not to rely upon documents which it had identified going to market value on the basis, so I was told, that it did not understand the claim to be made in that way. It seems to me that a Defendant who thus stands on a pleading point of that nature takes the risk as to whether the Court will ultimately accept it, which I have not done.
129. Since I am now engaged in the quantification stage of the inquiry, I must do my best on the available material to estimate the Claimants' loss. The first component of the calculation is the value of the Vessel immediately before the incident. As to that, the Claimants have failed to adduce any evidence, other than inviting me to infer that the insured value must approximate to the market value because the Vessel was so new.
130. The evidence before me does demonstrate that the Vessel was in good condition, but it does not give me any assistance on the extent to which market value might be reduced merely because a yacht of this sort is second hand rather than new, which seems to me to be an important question.

131. Ms Paruk relied (following a suggestion of my own in opening) upon paragraphs 116 to 118 of *Involnert Management v Aprilgrange* [2015] EWHC 2225 (Comm) in which Leggatt J pointed out that it is normal for a brand new yacht to be insured for the cost of purchase, which is likely to be the best available evidence of the yacht's market value if sold and that the nearest obtainable equivalent if the yacht is lost is likely to be a new yacht of the same specification. Leggatt J said that he had heard evidence that it was common for yachts to remain insured at their purchase price for a number of years.
132. This authority does not assist the Claimants in the present case. As Leggatt J explained at paragraph 120, the basis for the continued insurance valuation at the purchase price would not be that this necessarily reflected the market value at the time, but that no practical alternative would be available and moral hazard would be minimised by the knowledge that actual market value would have to be proved upon a loss.
133. One piece of evidence which I do have is that insurers were prepared to pay £140,000 on account of the value of the Vessel and that the Claimants were prepared to accept this sum together with the purchase price paid by Mr Ingram of £30,000, viz, a total of £170,000 (as well as the salvage costs they had incurred). The insurers described their payment as being "in lieu of repairs" (and if I have assessed the VAT correctly, it was in fact very close indeed to the sum that the Claimants would have had to pay Osmotech for repairs), but that does not alter the fact that insurers were prepared to pay this sum and if a comparable boat to replace the Tangent could have been had for less, I can assume they would have offered that instead.
134. I have no reason to doubt that this was an arm's length transaction between parties looking to their own interests. Accordingly, I conclude that the true value of the Vessel prior to the incident lies between £140,000 which insurers were willing to pay and £170,000 which the Claimants were willing to accept. In circumstances where this evidence was not relied upon by the Claimants in this form, I think it would be unfair to the Defendant for me to take anything other than the bottom of this range as having been established. I therefore find that the market value of the Vessel before the incident was £140,000.
135. The value of the Vessel after the incident must have been at least £30,000, which is the price that Mr Ingram was prepared to pay for her. However, the Claimants' statements of case conceded that figure to be £45,000. I think it would be unfair to the Defendant to permit the Claimants to rely on the figure of £30,000 which was only raised in this connection after the evidence had been heard. However, there is no unfairness in holding the Claimants to have proved a damaged value of £45,000 because this figure was plainly in issue on the statements of case and was not challenged by the Defendant. Accordingly, I take £45,000 as the value of the Vessel after the incident.
136. On this basis, the value of the damage to the Vessel was £140,000 less £45,000, namely £95,000.
137. I must now consider the salvage and other costs claimed by the Claimants.
138. I do not allow the pleaded claim for loss of use of mooring both because there was no evidence to support it and because it was a sunk cost not caused by the Defendant's breach of contract.

139. In relation to the other costs incurred in a total sum of £23,888.10, I have carefully considered the submissions made by counsel, but I am not prepared to find that they were incurred so unreasonably that such unreasonable conduct was their cause rather than the Defendant's breach of contract and the resulting accident. Accordingly, I award this sum in full.

### **Conclusion**

140. I allow the claim and dismiss the counterclaim. I will award damages in the sum of £118,888.10 (£95,000 + £23,888.10).