



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**DEPUTY PRESIDENT BINET**

**C2022/3482**

**s.739 - Application to deal with a dispute**

**Construction, Forestry, Maritime, Mining and Energy Union (105N)  
and  
Australian Offshore Solutions Pty Ltd  
(C2022/3482)**

**Perth**

**1.00 PM, THURSDAY, 3 NOVEMBER 2022**

PN1

MR BOOTHMAN: Deputy President, may it please the Commission, Boothman – R, for the respondent.

PN2

THE DEPUTY PRESIDENT: Thank you. Can I get the parties to assist me? In those final submissions that is saying that the equivalent directed fact that the employees performed some specialist work or task or (indistinct) and they say – and that's cross-references by this agreed statements of fact four and five. And the statements of Mr (indistinct). The version of the agreed statements of fact that I have at four and five.

PN3

MR BOOTHMAN: (Indistinct). No.

PN4

THE DEPUTY PRESIDENT: Is there any?

PN5

MR BOOTHMAN: No

PN6

THE DEPUTY PRESIDENT: (Indistinct) this statement?

PN7

MR BOOTHMAN: I was provided a copy after the facts or we didn't file or went on the record at the time of that being filed. I think the (indistinct).

PN8

THE DEPUTY PRESIDENT: And while you're thinking about that the other statements were found (indistinct) is that the risk – the advocate says that the alleged specialist work occurred in some (indistinct) dates which were to be accepted in October. And in evidence Mr Sweetman gives is about surface work that occurred in February 2022.

PN9

MR EDMONDS: Yes. Those are the comments of what Mr (indistinct) was going to see to clarify – each incident. I think the answer is it's not in the material that's filed over these – or agreed that there's these have occurred. Sometimes when a project gets up and running the project starts. The mobilisation for the project starts September/October 20-21.

PN10

THE DEPUTY PRESIDENT: Yes.

PN11

MR EDMONDS: And the work, as I understand it, the scope of work is some 60 days that might have started November/December and leading to February.

PN12

THE DEPUTY PRESIDENT: My difficulty is - - -

PN13

MR EDMONDS: That actually attract the taxable dates.

PN14

THE DEPUTY PRESIDENT: Yes. And I needed them actually with the greatest respect.

PN15

MR EDMONDS: Yes.

PN16

THE DEPUTY PRESIDENT: Not just from the Bar table.

PN17

MR EDMONDS: No, no.

PN18

THE DEPUTY PRESIDENT: So that's informed but - - -

PN19

MR EDMONDS: Yes.

PN20

THE DEPUTY PRESIDENT: - - - my difficulty is with this decision in fact if I am not inclined to Mr Boothman's argument (indistinct) – the respondent's argument that – sorry, I am going to paraphrase it. It appears that the crux of the respondent's argument is that we agree with our clients and our clients tell us the rates of pay.

PN21

MR BOOTHMAN: Yes.

PN22

THE DEPUTY PRESIDENT: And therefore that's what the person that's classified has and the parties clearly agree that because the objects of the agreement say that we're going to (indistinct). And at this stage of the reporting (indistinct) it's not seeming to be particularly compelling at this stage because a client could dictate or describe a vessel as a – and there's a promise on there for accommodation on it and it needs – it's actually used for that as an accommodation vessel. And so I am struggling to be compelled by that argument.

PN23

And then is that argument where it's all away. I then have to look and say well what did the vessel actually do in order to say was it when that concession is affirmed. But I have almost little to no evidence - - -

PN24

MR BOOTHMAN: Yes.

PN25

THE DEPUTY PRESIDENT: - - -of what in fact they're doing.

PN26

MR BOOTHMAN: Yes.

PN27

THE DEPUTY PRESIDENT: And Mr Gatsby said that is at best is someone told him.

PN28

MR BOOTHMAN: Yes.

PN29

THE DEPUTY PRESIDENT: And there's the evidence of the respondents is that on the (indistinct) specialist worked in the period which doesn't relate to this application.

PN30

MR EDMONDS: The rates to the (indistinct).

PN31

THE DEPUTY PRESIDENT: Yes. So my difficulty is they seem to have - - -

PN32

MR EDMONDS: Yes.

PN33

THE DEPUTY PRESIDENT: - - -missing a whole lot of evidence.

PN34

MR EDMONDS: Yes. And perhaps I might address some of that for you, Deputy President. There was some alterations and (indistinct) in an offshore kind of deal - - -

PN35

THE DEPUTY PRESIDENT: Yes.

PN36

MR BOOTHMAN: Speak on it first. That's when I jump in. My friend has kindly provided a copy of the agreement this morning which was missing from the court book. Obviously there's no objections to that, Deputy President. Although it does mess with the numbering a little bit but I don't anything turns on that. We don't intend to take you to large tracts of the agreement. Indeed at the relevant parts of the agreement (indistinct) itself. Is now a convenient time, Deputy President?

PN37

THE DEPUTY PRESIDENT: We just managed to add it to the end of the court book.

PN38

MR EDMONDS: It's referred to in Mr Sweetman's statement. So I will just insert it at behind tab six. So it's (indistinct) attachment. (Indistinct) court book. To Mr Sweetman's statement – rather, Deputy President.

PN39

THE DEPUTY PRESIDENT: Could I avoid disturbing the page numbering of the court book?

PN40

MR EDMONDS: Yes. It's - - -

PN41

THE DEPUTY PRESIDENT: (Indistinct) court book.

PN42

MR EDMONDS: Yes. Well, the only thing that comes after the - - -

PN43

THE DEPUTY PRESIDENT: (Indistinct)

PN44

MR EDMONDS: (Indistinct) don't intend to take you to the authorities (indistinct) Deputy President. You're probably aware of what the authorities say but it might help in any respect.

PN45

THE DEPUTY PRESIDENT: Well, that certainly (indistinct).

PN46

MR EDMONDS: Well, yes. But I mean the evidence in these matters sometimes, Deputy President, is the best evidence that we could give. But the application itself was filed on 14 June this year, which is after the protest was finished. It's in relation to dispute about the application of AOS Pty Limited and MUA Offshore Oil and Gas Enterprise Agreement of 2021 which you will find in the court book numbered behind the agreed facts.

PN47

There's two disputes that arise from this application and one is the dispute over the correct classification of the vessel itself. It appears that the vessel has at various times been classified as a support vessel, I think as a supply vessel and for short periods of time as a specialist vessel as well.

PN48

THE DEPUTY PRESIDENT: Where is that?

PN49

MR EDMONDS: I think it's described in his statement. It refers to it being paid at 107 per cent on the 7 or 8 February. I'm not quite sure how he got 107 per cent and on the 4 February is 117 per cent on the basis that it is a specialist vessel on those days performing specialist work.

PN50

The agreement sets out definitions for the nature of those vessels and those definitions can be found in clause 3.1 of the agreement but also found an employer (indistinct) application filed in this matter.

PN51

The definition of specialist vessel turns on – well, there's two definitions of specialist vessel. Well, there's two different types of specialist vessel. One is the work being undertaken by a specialist vessel which means that a vessel goes on a specialist task for certain periods, that is free span corrections on new pipelines, new subsea installations using a crane, saturation diving from a DP2 Vessel or any of the following vessels.

PN52

And I don't think there's a contention that the (indistinct) falls into those dot points specialist vessels found in that specialist vessel definition. Rather there's intention that it has engaged on specialist tasks for a certain period which is subsea installations using that crane for the parts of the project.

PN53

So for those in terms of this dispute the contest between the parties is the contest between the work that was being done that put it in the category of specialist vessel as opposed to the definition of a support vessel which is about the nature of the vessel itself which is also found in definitions 3.1 – Support vessel designed and/or equipped to perform anchor handling tug support that is engaged in association with offshore oil and gas operations and is capable of doing certain tasks. They don't have to be doing those tasks – just capable of doing that.

PN54

And obviously the employer has asserted that that's what it is doing. Or that it was engaged in or in association with offshore oil and gas operations and capable of doing those other things.

PN55

Then at the back of the agreement you will find Schedules 1, 2 and 8 which deal with certain work that the vessels undertake. So one is your support vessel which provides a certain (indistinct) manning, a certain level of pay and that is 100 per cent pay under the agreement. Further issue referred to the vessel is being 100% vessels, 117% vessels, of course the 117 per cent which is the specialist vessels and the most lucrative vessels and (indistinct) specialist vessel.

PN56

The other thing to note from the schedules is that a support vessel can become a specialist vessel depending on the work that it's doing and there's a difficulty from my friend in his evidence or the agreed provisions of that is that the (indistinct) at some point began to perform the specialist tasks. So went through the gateway if you will of being a specialist vessel.

PN57

And the difficulty for my friend in that regard in saying they're just in reply to their evidence and their submission is clause 8.3 of the specialist vessel provisions of the agreement provides that once you become the specialist vessel or once you are a specialist vessel classified under that schedule the specialist vessel from the time commencing mobilisation voyage - completes the demobilisation voyage and/or completes the specialist task as either Laid Up or commences a different work scope.

PN58

And there's actually provisions for written notice to be given of a change of work scope. I'm just going to be short in the way by agreement between the employer and the union (indistinct) days notice has to be given to move the vessel back out of its specialist task.

PN59

The difficulty my friend has got is that the point at which the Skandi Hercules undertakes specialist tasks because the Skandi (indistinct). It becomes a specialist vessel and we say becomes a specialist vessel the entire period of the project and continues until such notice is given or until its demobilised from the project. Do you see how that argument arises, Deputy President?

PN60

THE DEPUTY PRESIDENT: I do but 8.3(a) and (b) might form a stronger argument for the respondent that the classification has to be at the start of the mobilisation, rather than (indistinct) become specialist vessels for periods of time during (indistinct). So you might – the boat sails out to see five days as a supply vessel (indistinct) using a crane to become a specialist vessel. (Indistinct) balance of the journey it's still doing supply work. This is more consistent with its argument of the respondent that it is what it was from start to finish (indistinct).

PN61

MR EDMONDS: Well, our contention would be that if at any point from its mobilisation voyage until its demobilised or completes the specialist task and is Laid Up or commences different work scope that they can't use at as a support vessel, support vessel, support vessel, support vessel – oh, hang on we've got a specialist task for you for the days and then go back to being a support vessel. Once you use it on specialist vessel it's a specialist vessel for the whole time. It's classified as a specialist vessel here because it's doing specialist tasks set out in clause 3.1 of the agreement.

PN62

And in any event unless 28 days' notice is given it's a specialist vessel till the work scope changes.

PN63

THE DEPUTY PRESIDENT: But does 8.3(b) require the classification of it on – as a specialist vessel on mobilisation?

PN64

MR EDMONDS: No. So it's classified as a specialist vessel by the operation of a vehicle or anything not by designation by the employer.

PN65

THE DEPUTY PRESIDENT: Yes. But the specialist vessel should be classified in the time it commences its mobilisation. Does that not suggest that the decision about what it is occurs before it sails away?

PN66

MR EDMONDS: Before it sails away or before it sails to?

PN67

THE DEPUTY PRESIDENT: Yes. It's mobilisation voyage.

PN68

MR EDMONDS: No. What that suggests to me is once it does specialist tasks at any point it's then classified as under the schedule for the entire time.

PN69

THE DEPUTY PRESIDENT: So how long do the ships go to sea for?

PN70

MR EDMONDS: In this case I believe it's been – it's about 60 days.

PN71

THE DEPUTY PRESIDENT: Okay. So if the clause intended to apply the pay retrospectively - - -

PN72

MR EDMONDS: Yes.

PN73

THE DEPUTY PRESIDENT: If the clause was intended to work retrospectively then that would mean they would have been underpaid for earlier parts of work.

PN74

MR EDMONDS: Yes.

PN75

THE DEPUTY PRESIDENT: Would that not suggest that the decision about what it is should occur before they sail because they need to be paid at the start of mobilisation?

PN76

MR EDMONDS: Well, that would be the easy way to avoid ever paying then for specialist vessels to be mobilised is to simply mobilise all of them as support vessels and then when the specialist tasks arise say we'll pay you the specialist task today and then we'll cease paying you the specialist task when that's done tomorrow. And then you're back to being a support vessel. And that would clearly frustrate the intent of the agreement that a specialist vessel gets paid the entire time.

PN77

It's probably not in the second half of that specialist vessel definition geared to the nature of the vessel, such as combination vessel (indistinct) those dot points of the definitions. But the (indistinct) part which is focused on the work that it's doing it could easily frustrate part of the definition by simply designating the support vessel that is paid only 17 per cent on the day that it's required.

PN78

Now we acknowledge that it probably wasn't intended to be used as a specialist vessel, considering the use of a specialist vessel. That appears to be the state of



the evidence. It was used as a specialist vessel because of the unavailability of the Skandi (indistinct).

PN79

THE DEPUTY PRESIDENT: But those dates are February dates, not the September, October. That evidence was (indistinct) February 2022 not September, October (indistinct) - - -

PN80

MR EDMONDS: Yes. But - - -

PN81

THE DEPUTY PRESIDENT: - - - which your application (indistinct).

PN82

MR EDMONDS: Well, it relates to that project that started at that time. None of the evidence really deals with when that comes to an end. There at 10 deals with -  
- -

PN83

THE DEPUTY PRESIDENT: No, employees were engaged to work on the Skandi (indistinct) for a period in and around September and October 2021 and that would suggest when it was in September, October 2021. I think it was (indistinct). The respondent employed employees (indistinct) in the applicant's submissions.

PN84

MR EDMONDS: Yes. That was the preconditions stage of the project but then (indistinct) have come around and done the hard work. As it said it demobilised in the vessel.

PN85

So getting demobilised from the project as it was then subsequently used to do other things. And we say that once you subsequently do the other specialist tasks if they're added into to do certain work.

PN86

THE DEPUTY PRESIDENT: I suppose that's one of the difficulties I have is that I don't specifically have evidence of what (indistinct) went to.

PN87

MR EDMONDS: Yes. Well, all I would say, Deputy President is I was missing the (indistinct) of any assets (indistinct) investigators.

PN88

THE DEPUTY PRESIDENT: No.

PN89

MR EDMONDS: And that's always going to be the difficulty here, trying to lead evidence about construction projects that are occurring in the middle of the ocean on the sea beds because it's very hard to get that evidence as to what's required.

PN90

THE DEPUTY PRESIDENT: (Indistinct) for the employees.

PN91

MR EDMONDS: I would have to - - -

PN92

THE DEPUTY PRESIDENT: Or ask them was that in addition?

PN93

MR EDMONDS: Well, I've got another matter there I am trying to find where (indistinct) evidence from sea farers, Deputy President. Unfortunately, sea farers spend 50 per cent of their time - - -

PN94

THE DEPUTY PRESIDENT: At sea.

PN95

MR EDMONDS: - - - at sea. And they should be with their agreements. So whatever evidence we might lead we then say to you, 'I'm afraid this sea farer is still at sea. Can we have his evidence appear by ship telephone on the other side of the country.' It's really unsatisfactory.

PN96

MR BOOTHMAN: If it may assist the vessel as the evidence shows is owned by the DOF Group – DOF Subsea Australia. They run daily runsheets which actually do indicate all of the tests which were undertaken.

PN97

MR EDMONDS: But those documents - - -

PN98

THE DEPUTY PRESIDENT: I suspect there is some evidence that does exist on (indistinct).

PN99

MR BOOTHMAN: Yes, there are.

PN100

THE DEPUTY PRESIDENT: But I don't have it here.

PN101

MR BOOTHMAN: No. And apologies but AOS is not in possession of those documents. Perhaps it would be more – perhaps we consider a production order of those documents to assist the Commission form a view as to what the tasks were on any given day. That might be an appropriate course. But certainly AOS is not the holder of those runsheets and DOF will be required to give details (indistinct).

PN102

THE DEPUTY PRESIDENT: Because I mean Mr Sweetman's evidence is that I don't know what (indistinct) might do. They just tell us what the rates of pay

were. So his evidence (indistinct) that he knew what they were going to do from the outset.

PN103

MR EDMONDS: Well, sorry, on that point we say that the tasks were clear. They were preconditioning tasks. They're outlined in paragraph 12 of his statement and that AOS did the preconditioning tasks which was not construction of work. And then at a point in time which we say was in February 4th to 7th, which is paragraphs 19 and 20. The work that was undertaken could properly constituted the considered specialist work but for the reasons we will get to that doesn't change the designation of the vessel. That's just work that is undertaken that AOS can and did pay at a higher rate.

PN104

THE DEPUTY PRESIDENT: By consent the paragraph 19 is at that point (indistinct).

PN105

MR BOOTHMAN: That's right. But AOS was aware that it was preconditioning project in view of Mr Sweetman's background and given his understanding of the project that did occur were that it was undertaken and fall within the categories of paragraph 12. And there are as we say run sheets that will show the work that was undertaken was not specialist work but for those days which are outlined in paragraphs 19 and 20 of his statement. There are runsheets but, again, I would need to have a less look at getting those from their clients of – they're not commercially competence I wouldn't assume but they're just not in their possession as full time.

PN106

MR EDMONDS: With that - - -

PN107

THE DEPUTY PRESIDENT: I suppose my difficulty with that – it's not been clear – it's not clear on the applicant's submissions for evidence what particular date or times or the nature of the work other than George says that it goes to and they used a crane sometimes.

PN108

MR EDMONDS: Yes. And that's actually not a dispute that the crane was used most of the time.

PN109

THE DEPUTY PRESIDENT: Except that it looks on the applicant's submissions that you're talking about a period of September to October.

PN110

MR EDMONDS: Yes.

PN111

THE DEPUTY PRESIDENT: And then the respondent says, 'Oh, yes we agree to use the crane but that's in February 2022 statement.' (indistinct) parties what dates is it agreed that the crane's been used.

PN112

MR EDMONDS: Can I make this observation, Deputy President? I think my friend is right. The missing piece of the puzzle is the daily runsheets and they show the tasks that were done each day, that there's 60 or 70 of them. This is not urgent. The project's finished. There's no pressing need for this to be determined today as opposed to next week or next month or January or February of next year. And it's that evidence – it sounds to from what my friend said that evidence will probably be fairly conclusive about what was done.

PN113

THE DEPUTY PRESIDENT: Okay then so - - -

PN114

MR EDMONDS: We have no objections to it being adjourned off to deal with that question to produce that evidence.

PN115

THE DEPUTY PRESIDENT: Because the only thing is that evidence or require the submissions around 8.3 because that wasn't really being articulated in that.

PN116

MR EDMONDS: No. No, no it didn't. Not it wasn't and it really only emerged from Mr Sweetman's evidence that concession that at certain points they were - - -

PN117

THE DEPUTY PRESIDENT: (Indistinct) crane.

PN118

MR EDMONDS: At certain points they've not only used the crane but owed the specialist rate pay.

PN119

THE DEPUTY PRESIDENT: Okay.

PN120

MR EDMONDS: And I did alert my friend to that this morning when he came in. But as you may or may not know, Deputy President, my preparation for (indistinct) be done between 9 o'clock and 10 o'clock last night and 8 o'clock and 9 o'clock this morning. I'm sure Mr Boothman would be delighted to hear from me at 10 o'clock at night. But it's not really an opportunity I (indistinct) to that before now. And I accept that there's probably a procedural of fairness issue that he raises and my friend can address it here. But it would be a reasonable objection to make.

PN121

THE DEPUTY PRESIDENT: Well, (indistinct) – Mr Boothman - - -

PN122

MR BOOTHMAN: Sorry, Deputy President, just to cut across if I might be heard just on the point. The submissions that we've made and certainly we would make today we say that it doesn't really turn on what the tasks were every day. So, yes, we could go and get the runsheets and – yes, it might show that they were doing some specialist work. This, in evidence, we say that the specialist work was undertaken. There's an admission from my client that the work probably constitute and could count as specialist work but there's no evidence led that for any other period of time concerning (indistinct) support work. The contention of 8.3 that it somehow flips very late in the project from being a support vessel understanding from the very point of which the parties – Chevron, Technip, DOF – those parties contracted requiring a specialist vessel which was another vessel undertaking construction work with All Seas personnel. That work was being undertaken quite separately from AOS and DOF and Skandi Hercules. And the Skandi Hercules was engaged and supplied by DOF under the guise of the contract which says it was required to be a support vessel.

PN123

The decision, I suggest, is not an authority but is helpful is that the custom and practise of these vessels coming into Australian waters to undertake work, and the Skandi Hercules, as I understand has been here for a number of years. But when a vessel is localised as the Deputy President knows that the vessel has opportunities for inspection by the union. There's correspondence often engaged in – not by my client – but certainly by DOF Group.

PN124

There's no evidence that that designation at the time that those parties were contracted, worked out their rates, worked out the scopes of work – the agreement at the very top of Schedule 8, for example, says the aggregate salary referred to shall be paid from the commencement date on or after the designation date.

PN125

That's inconsistent with the interpretation of 8.3 which says that at some point during the project you can flip and then go backwards and create a new designation date. So the ambiguity we say is not whether it's construction or commissioning.

PN126

We say all of that is highly irrelevant. It's the designation date upon which the obligation on AOS to pay the aggregate salary arises. And we say that's the point in time in which the vessel is first designated. And it's designated at the time the vessel has commenced its work and as the Deputy President alluded to. So I am not sure what the runsheets would offer, other than confirming my client's effectively an admission and concession that on two days work that if it was to be properly designated as a specialist vessel from the start, that might constitute specialist work. But we say that doesn't change the designation of the vessel.

PN127

The ability to pay employees at the specialist rates – and just to clarify – the 107 per cent arises from the great horsepower of the vessel under Schedule 1. So there's ability to pay 100 per cent.

PN128

THE DEPUTY PRESIDENT: Yes.

PN129

MR BOOTHMAN: For 107. The work that was undertaken which I have not (indistinct) but whether sandbagging of the subsea installation – now, bearing in mind that the evidence will show that the installations were there. They were not constructed - - -

PN130

THE DEPUTY PRESIDENT: I think from this there's no evidence of what was (indistinct) of all this happening or in turning around services about what inspections were done and what agreements for (indistinct) and I think my problem is that the case appeared to start as being run about whether they actually did specialist work at all. And that's sort of how the parties prepared it. Now a clear and distinct to be certainly different arguments. It's – yes, they did specialist work but if they do specialist work how is that dealt with in the course of the agreement.

PN131

MR BOOTHMAN: And the problems for my client is that that we say that's the applicant's responsibility too. If there was a dispute at the time the vessel was engaged over this contract. This project is not a secret. It's a well-known large scale piece of work that we say absolutely the union knew about. There's no evidence that it was disputed at the time. And then for several months, or for a couple of months at least, there's a period of time where no one's disputing that the work is not fair work.

PN132

And then at the very end of the project there's an admission and in my client's evidence that this work undertaken could be constituted as specialist work because it was dropping sandbags down to what we say at paragraph 16 is that subsea infrastructure was already installed.

PN133

So page 70 of the court book. Installed by the Skandi Africa All Seas Marine Contract of Australia. They were engaged for the primary purpose and engaged by Technip again as I understand it. That they were engaged to install the subsea materials and our client was supporting them for the entirety of that time. There's no dispute at any point until now, after the project is completed, with the suggestion that it has these two days that specialist work was undertaken.

PN134

Now one of those days, as you will see from paragraph 19, on the 4th the DOF agreement which we don't have in evidence but the DOF agreement suggests that periods of time and excess of 12 hours where specialist work is undertaken that will be paid. It doesn't redesignate the vessel. It's payable at a higher amount, almost like an uplift or higher duties, and my client did the same. My client paid those workers for those days where they exceeded 12 hours, which is paragraphs 19. And 20 suggests they did not pay that higher amount as it did not exceed 12 hours - - -

PN135

THE DEPUTY PRESIDENT: But where are you getting the obligation to do it four hours, 12 hours because it's not in the agreement.

PN136

MR BOOTHMAN: Well, that's the period at the timeframes which is in our written submissions. I'm sorry I'll just find that particular paragraph.

PN137

THE DEPUTY PRESIDENT: Yes. But where is the magical pro rata timeframe?

PN138

MR BOOTHMAN: That is in a separate DOF agreement. So DOF owns the vessel. DOF is paying my client. And so the consistency purposes on the vessel is that for periods of time as DOF does, so you have a consistent pay structure on the vessel.

PN139

THE DEPUTY PRESIDENT: So where does this agreement say that the pay rate should be as applied to the DOF agreement (indistinct).

PN140

MR BOOTHMAN: It doesn't. And so I take your point and I'm certainly not looking to press that that we're correct on that. Our client was paid the work that they say was specialist work. And so we say that the evidence is that for 12 hours or more they paid up with the rate. But as we've made in our submissions there's not even an obligation to do that.

PN141

THE DEPUTY PRESIDENT: (Indistinct) ordinary meaning of the language of this agreement. I'm not sure how I can take into account what some other agreement provides or even what the commercial arrangements. And that's my concern with the argument which you find in the respondent's submission which is basically well it is what our client says it is.

PN142

MR BOOTHMAN: Mm.

PN143

THE DEPUTY PRESIDENT: And those submissions made no reference to (indistinct).

PN144

MR BOOTHMAN: Because we say it's not relevant. We say that from the designated date the employer, AOS, is obliged to pay the aggregate salary from that designated date. And that's what they did. And we say that there's nothing for 8.3 to do unless the vessel was designated from a particular date.

PN145

We say it cannot be accepted that at some time, well into the project that all of a sudden its redesignated and then back pay is owed for work that was – if I use my

hand here – support work, potentially specialist work. The very next day back to support work. We say that's commercially unsound to suggest that that be the case.

PN146

THE DEPUTY PRESIDENT: So, commercially you can correct that by having a clause in your contract as the client is saying it gets to other job can charge them also. I don't know that you (indistinct) the argument has a lot of weight because it (indistinct). But if the argument is that designation is whatever AOS designates it or whatever the client designates (indistinct) goes to things what is the point of having the definition or agreement which says that classification is determined by reference to? Whether it's these types of vessels or whether it does this type of work. So what the purpose does that part of that actually serve?

PN147

MR BOOTHMAN: I take the point. We say it's the latter point. That the start of the agreement. So the agreement with AOS. They do have an obligation to designate because once you designate there's an obligation to make payment of the aggregate salary in accordance which with – whichever schedule is applicable.

PN148

The definitions are relevant so that at the commencement of any work – before the commencement of any work the parties are as informed as they can be and can effectively marry up the work that's being undertaken in accordance with the definitions to any contractual document. And that's the point I say Commissioner Clayton was making in the decision of Tug and Marine is that the parties well understand that a vessel is coming down to undertake a particular scope of work. Then you have an enterprise agreement which defines particular scopes of work that would be known to the parties which were after the agreements, and there would be rock dumping and various other specialist type work.

PN149

If the vessel is coming down, contracted and in that contract document there various types of work, if they match up then the parties confirm and agree, or the employer designates based on what their understanding of the definition is. So, in this case the work that was

PN150

- - -

PN151

THE DEPUTY PRESIDENT: That confer and agree is not just a random in that decision. And it's the same as this decision there is a part of the definition of which says the parties in the agreement can be (indistinct).

PN152

MR BOOTHMAN: Correct. And they can.

PN153

THE DEPUTY PRESIDENT: And that's what this decision was. On that point you can see was that the parties agreed and named it 'X' and that's what it is. But



there's no assertion on the terms of (indistinct) no evidence before me that the parties undertook that process and agreed the sum. In that case it was a saver (indistinct) separately to resume and the union had - - -

PN154

MR BOOTHMAN: That's right.

PN155

THE DEPUTY PRESIDENT: (Indistinct) agreed and so to a certain extent if that takes that decision and the context you're not asserting that you agree with the (indistinct).

PN156

MR BOOTHMAN: There's no evidence that that took place and certainly my client has no recollection that he can take the stand and say the same. But I understand there's no recollection from paying less. When (indistinct) – I don't know. The definition however is slightly more expansive than that in terms of the specialist vessel and the support vessel in that if it's a specialist vessel it can also be unless otherwise classified under the agreement.

PN157

THE DEPUTY PRESIDENT: Yes.

PN158

MR BOOTHMAN: So that we say that the vessel was in play, DOF Group had already supplied the vessel and we understand employees were on it for at least a month before AOS boarded. So there's a period of a gap where DOF are actually working. They've engaged the vessel for Technip and AOS stepped foot on that vessel and AOS designated as a support vessel. And so it's otherwise classified already. And so we say full and designated dates as a start point to pay less.

PN159

THE DEPUTY PRESIDENT: But it's not as otherwise designated by that (indistinct). It says otherwise classified under this agreement. Sorry. It's not by reference to what was acquired for AOS money to come in is that otherwise (indistinct) of this agreement. So it can go to support vessel which starts working on something more sophisticated than on the support vessel then you classify as something else. That phrase is used in all the definitions. So it contemplates – it would appear in context it contemplates the idea that the complexity of the work or the tasks that the vessel could do might be quite basic or whether it was doing particular tasks then it moves into the higher category. (Indistinct) so I don't see the language there that that phrase and otherwise classified under this agreement can then be used as a designation, as an alternative that were designated by the client or respondent.

PN160

MR BOOTHMAN: I take that point. We would say that it's been classified. You know, having regard to the definitions and the work scope that was understood by and at the time of the voyage that their employees were setting out on. And at that particular time the designated date – so that word is used some 11 times in the agreement. It's not defined but we say the ordinary meaning of that word would

have to be the point of time in which the parties knew and understood what the vessel was actually doing. And we say it's critical that there's no dispute at the time the work commenced.

PN161

There's no dispute for a couple of months and then there is a point in time in paragraphs 19 and 20 of our evidence that work was undertaken that could be construed as specialist work. And for the days in excess of 12. Except that there's nothing in the agreement that – or evidence why that occurred. I have nothing to say on that particular point.

PN162

But we say that the vessel was classified appropriately. It was designated by DOF and then by AOS for the purpose of their responsibilities under the agreement and the aggregate salary flowed from the point of time and which it was designated. And that was under the Schedule 1 107 per cent, but for the day that specialist work was undertaken some time in February.

PN163

THE DEPUTY PRESIDENT: That's so much (indistinct) an argument (indistinct) submissions but the difficulty still argues that 8.3(a) – the (indistinct) vessel will be classified (indistinct) so that would be consistent with your current argument that once the vessel – once it leaves or that it's something and it's something else to that concept and it also talks about it was classified under (indistinct) of whether a down time. So that seems to contemplate events arising to be the cause of a voyage not just for the duration of the voyage which was – it can be argued (indistinct) it can be changed what it is during the course of the journey - - -

PN164

MR BOOTHMAN: Yes. Correct. And we say that to that point the parties must understand that (indistinct) be answered. So 10 per cent in the standard of things might not sound large in isolation. However, the course of the project on the earnings of these people is quite significant, particularly where there are potentially over 100 plus workers. Not necessarily on a vessel at any one time but certainly in the course of the project.

PN165

So it is a significant amount that the parties would want to be aware of at the time and we say for the periods of weather– you end up in this scenario where if you're redesignating the vessel in February and whether in a cycle season in the north-west occurred – for example – in November, if the vessel is 107 per cent for that whole period of time then clearly for those weather purposes. To then go back and say, 'Well, you have to 117 per cent for all of that.' It just doesn't make any sense to have this retrospective ability.

PN166

Perhaps you could say from the days on which specialists work. But, again, the agreement contemplates that there be mobilisation and demobilisation. If the vessel is already at sea that's inconsistent with how those would be properly understood.

PN167

THE DEPUTY PRESIDENT: And if the sentence ending with mobilisation demobilisation (indistinct).

PN168

MR BOOTHMAN: Yes.

PN169

THE DEPUTY PRESIDENT: Might hold that (indistinct) clauses that the use of the phrase 'periods of weather downtime' seem to contemplate events which happened during or before each. So your argument the only way the clause works is that the (indistinct) at the start and believe is inconsistent with those words because they seem to contemplate - - -

PN170

MR BOOTHMAN: No.

PN171

THE DEPUTY PRESIDENT: - - - events that (indistinct) voyage.

PN172

MR BOOTHMAN: And to my learned friend's point earlier the specialist vessel is the vessel that everyone wants to be on. If you are on a vessel that is a designated specialist vessel I say the point of that clause is that a person's rate irrespective of whether they're actually performing specialist work on a vessel does not change. So at some point in history and I don't have any reference for this but I imagine there was an ability for employees to potentially reduce the 117 per cent to a lower amount in events of weather. So stand-downs or you'd be paid a proportion of the rate where you're not actually undertaking work.

PN173

My reading of that clause is that that's an ability for employees to say 'It's not my fault, I didn't create any of this. You still need to pay me 117 per cent for the whole lot.' And that's the whack that the employer understands where they designate at the very commencement of the project that the vessel is a specialist vessel. Here my client had no understanding that it was specialist work at commencement. And so the base is tendering as probably - - -

PN174

THE DEPUTY PRESIDENT: I'm not convinced (indistinct).

PN175

MR BOOTHMAN: Yes.

PN176

THE DEPUTY PRESIDENT: Because it's (indistinct) commercial contract and say that you – if the client did tell us to do something different that it's going to cost more. So I don't think that commercial argument – to me – doesn't seem to have a lot of weight and there's no reference to it in the terms (indistinct) to try and make it have that at this. I think there's more.

PN177

I'm interested in argument that 8.3(a) is intended to make it clear that the vessel has to stop being specialist during this voyage because of say a cyclone that the guys continue to get paid at the higher rate. But I would have thought if I'm going to accept that I would have to have some evidence that that was the parties intended by that (indistinct) rather than just from the Bar table that that - - -

PN178

MR BOOTHMAN: Well, that's right. So but we say that the point is going back to my earlier point. The ambiguity arises not from that. It arises from the point in time which it's designated. And the difficulty is we don't have a definition in this agreement that talks to the designated date. But it must have some work to do and we say that the work was undertaken at the commencement of the project. So at the commencement of the project the designated date kicks in, as does the aggregate salary that was payable. And the instances of whether the Deputy President is alluding to that is that the rate applicable under the relevant schedule. Here we're talking about Schedule A. The aggregate salary is payable for the entirety of the time. But we say the ambiguity exists because of designated date.

PN179

THE DEPUTY PRESIDENT: What happens then if the client – so for this vessel Skandi Hercules is able to give specialist tasks. What do you say to that? So what happens if the client says, 'We've got a contract with Skandi Hercules to do the support work.' It goes out there. The vessel that was going to do this work has (indistinct) onboard facility and that in the period – once it's gone out to sea and (indistinct) at sea it does specialist tasks. So the guys, in effect, the whole time they're at sea are doing specialist work you would say on the interpretation that the respondent suggests that they would become support (indistinct) for all of that period because when your boat sailed from the jetty the scope of work for that boat around the time that rate of pay was that it was a support vessel.

PN180

MR BOOTHMAN: Well, there is a possibility for that but we say that in the instance of it (indistinct) for example if there was a fire you would imagine that's where the clause – sorry, 8.3(c) there may be agreement between the parties that there will be a change in the designation from that date. You would waive – theoretically, you would waive the 28 days' notice period and you would pay as per a specialist vessel from that point in time but bearing in mind that the parties would know from that point in time that they would be undertaking specialist work.

PN181

Here we have a situation where the work was 'support' and for the 7 and 8 February there was arguably specialist work undertaken. And then on the 9th it went back to support.

PN182

THE DEPUTY PRESIDENT: So what is the tipping point? How many days on the voyage do you need to be doing specialist work to be a specialist task then.

PN183

MR BOOTHMAN: And this is the point we – I would say – are on shaky ground. This is the point we say that the agreement refers to a payment for a period of time. The period of time my client points to is the DOF agreement because it's a situation where they working alongside DOF personnel. They take that agreement so if for any period in excess of 12 hours the agreement, I concede, is that it's a period of time. So I say at worst the decision might suggest that for the time which an employee was undertaking what could be properly construed as specialist work they ought to be paid in accordance with the Schedule.

PN184

We still maintain our written submissions that that's an obligation and they can and do pay those rates. And they have done. But I would, again, got – like playing my back hand – but the point being that for any period of time might be properly construed as for any time they've worked those specialist tasks. What we would take issue with is that somehow that's a redesignation of the entirety of the vessel and then all work becomes specialist dating all the way back to mobilisation. That's not contemplated by the agreement.

PN185

MR EDMONDS: But why would an employer ever agree to designate that vessel into specialist vessels? They might only just designate it as a support vessel and then when they get it out they go – surprise - - -

PN186

THE DEPUTY PRESIDENT: (Indistinct) having it under that.

PN187

MR EDMONDS: Yes. We've been using the specialist task for two weeks then you're back to support vessel and then there never be a payment as a specialist vessel for the mobilisation or demobilisation. That was the (indistinct). You'd just never – you would never do it. You'd never agree. But I'm going to get you to do the specialist tasks that would fit in the definition of the specialist vessel but the DOF agreement says I only have to pay you (indistinct) of more than 12 hours a day. So I'm only going to pay you when you're doing those specific tasks and then I won't bother. But that would defeat the purposes of the provision set out in 8.3.

PN188

MR BOOTHMAN: But to counter that and to take the point. To counter that we would point to paragraph 16 of Mr Sweetman's statement. The construction work that was being undertaken was being undertaken on a separate vessel. I don't know for sur but if that's performing construction work and doing subsea installations which is what the evidence of Mr Sweetman is, then I would imagine that that vessel – that vessel paid at 117 per cent. It was performing construction work. It was laying subsea installations and, again, I'm not aware of any dispute that the unions might have but I would imagine that that vessel paid 117 per cent.

PN189

So the argument that you'd never do it I think falls way because vessels are inspected all the time by unions when they come into Australian waters and they

are designated at a particular rate and they are paid the aggregate salary as soon as that date comes into play.

PN190

So I think the Skandi Africa that's doing the subsea installations which is a separate vessel, not part of this dispute, I would imagine is paid 117. The Skandi Hercules provided support and did pre-commissioning. So once everything is in the sea bed it's then individually turned on, and then turned on as an entire system and that falls within the definition of support.

PN191

So the suggestion that you'd never do it – I think you might never do it for a particular vessel but that's not to suggest that for other vessels you wouldn't do it. And the other important thing is that DOF's fleet, as I understand, certainly looking from my crew – and searching their portfolio is that there are vessels that are very specifically designed for specialist work and they fit very neatly the definitions in the agreement. So if I point to those? Rock dumping - - -

PN192

THE DEPUTY PRESIDENT: Yes. But that's (indistinct) my view or my understanding of the clause is there's two different – there's two tasks. There's either – vessels are specifically designed (indistinct) and that's basically what they do always. Then there's other vessels which might otherwise fall in one of the other categories in the agreement. But when they're doing that specific type of work then they become a specialist vessel. And that's the case of the Skandi Hercules is that it's not – it might not – not already have done specialist work but we have agreed that it did do specialist work that occurred at the time.

PN193

And so that first part of the definition deals with the circumstance that the vessel is not purpose built for a particular specialist task but it's used for a specialist task. And then I specifically look in how I deal then with the submission that it must be designated at the start and can't change during the duration. But if you then concede, 'Oh, look it could change.' (indistinct) how you get that language from your interpretation of the clause (indistinct). The interpretation of the clause (indistinct) is designated at the start and the only way it can be undesignated is that if the parties agree that (indistinct) or it's starting to do work which makes it something else.

PN194

But the way that you propose to interpret clause – the Schedule 8 and the language in 8.3 is that once the specialist vessel – once it sails away as a specialist vessel, always a specialist vessel. So if you have a specialist vessel that sails away for 60 days and only does support work then it would always be a specialist vessel and you have no reference to what it does while it's out there.

PN195

MR BOOTHMAN: I would take the point. But we say that once designated the ability to pay rates that are higher exist and AOS did do that for periods of time, albeit 12 hours. Where the scope of work – so where that scope of work that AOS was contracted to do, be it DOF, where that scope of work would change that's the

point in time on which you would give notice to the union. So if the precondition in work was to change to something else and it was to move to specialist work we would say that's the point in time we could negotiate with the union. You would give notice.

PN196

THE DEPUTY PRESIDENT: Or when you start doing specialist work?

PN197

MR BOOTHMAN: I think where the scope changes. So - - -

PN198

THE DEPUTY PRESIDENT: Sorry, is that – so it's under the support clause as scoping works or not? Is that what (indistinct).

PN199

MR BOOTHMAN: No.

PN200

THE DEPUTY PRESIDENT: So turning to – so getting to Schedule 8 - - -

PN201

MR EDMONDS: So get into Schedule 8 - - -

PN202

THE DEPUTY PRESIDENT: It has to be a specialist vessel. So you can't - - -

PN203

MR EDMONDS: To get out.

PN204

THE DEPUTY PRESIDENT: Yes. That giving notice can only be getting out of being a specialist vessel.

PN205

MR EDMONDS: Correct.

PN206

THE DEPUTY PRESIDENT: And operating of these (indistinct).

PN207

MR EDMONDS: Yes.

PN208

THE DEPUTY PRESIDENT: You've got to be at Schedule 8 to (indistinct).

PN209

MR EDMONDS: There's no delay of getting into the higher pay rate (indistinct).

PN210

THE DEPUTY PRESIDENT: And so why I was raising these issues because if I end up finding – well, first of all because the materials before me seem to be

arguing about whether a specialist task (indistinct) or not and (indistinct) agree that special (indistinct) did occur, so the submissions don't really address the arguments that we're going to deal with today. First of all, to give the parties procedural fairness properly (indistinct) rather than (indistinct) what your arguments are about – because the submissions really don't deal with (indistinct) schedule A.

PN211

First of all, what the submissions are about is how they should be interpreted. If it's the case that a vessel can become a specialist vessel mid-journey, so once mobilised, then I would need evidence of how long it did the specialist work, because there must be some sort of way - it can't just be you use the crane once in 60 days and it's now a specialist vessel for that period or whether it has to be the majority of the time it's a specialist vessel or - - -

PN212

MR EDMONDS: Well, (indistinct) use a crane on a (indistinct) installation, then it becomes a specialist vessel.

PN213

THE DEPUTY PRESIDENT: But the aggregate salary is only paid on the designated date.

PN214

MR EDMONDS: Yes, there's no concession on our part that the designated date is what my friend says it is. The designated date could be any number of things.

PN215

THE DEPUTY PRESIDENT: So if it sails as a support vessel - - -

PN216

MR EDMONDS: Yes.

PN217

THE DEPUTY PRESIDENT: Let's say we take this approach, that you can change what you are - - -

PN218

MR EDMONDS: Yes.

PN219

THE DEPUTY PRESIDENT: - - - during your life.

PN220

MR EDMONDS: Yes.

PN221

THE DEPUTY PRESIDENT: In particular (indistinct) support, which remains what you are.

PN222

MR EDMONDS: Yes.



PN223

THE DEPUTY PRESIDENT: If you can change what you are during the period, then that phrase that the pay commences on or after designated date, it might lead to the conclusion that beyond designated – when you leave the port is when you do the task which makes you a specialist vessel and so the designation occurs when you start doing the specialist task.

PN224

MR EDMONDS: Yes. I don't understand how 8.3(a) operates, Deputy President, which provides – or talks about mobilisation voyages. If you're not designating a specialist vessel until you start performing the task and you're mobilised, what work does that - - -

PN225

THE DEPUTY PRESIDENT: Well, perhaps Mr Boothman's argument that you have to be a specialist vessel from the time you leave, from mobilisation onwards - could it be that the language – and this is just – because I wasn't a party to the agreement or a party to the negotiations or (indistinct) but could it be that the general principle is that vessels are normally designated when they leave the port, so generally – and the language of 8.3(a) is so that if while the vessel is out there is, say, a cyclone and there is a period of time there is no work to do which is specialist, the guys still get paid the higher rate.

PN226

So if they're out for 60 days and for two days they can't work due to high seas or whatever that is, they get the specialist rate for all of that time; that's the purpose of clause 8.3. The purpose of the statement 'The aggregate salary shall be paid from commencement – on and after designation date', that's the circumstance where the vessel has gone out as something else, but then partway through the journey has been allocated other tasks to do and then when a higher rate goes from that date.

PN227

MR EDMONDS: I should clarify what we say the agreement says when it talks about a demobilisation and a mobilisation voyage, Deputy President. A mobilisation voyage includes when a vessel is brought in from overseas.

PN228

THE DEPUTY PRESIDENT: Right.

PN229

MR EDMONDS: So it's mobilised when it arrives in Australia, it's demobilised when it leaves Australia and goes somewhere else.

PN230

THE DEPUTY PRESIDENT: (Indistinct) talk about the vessels that (indistinct) a specialist task and then part (b) of the definition, rather than a vessel that could otherwise be a support vessel that can do specialist tasks, which is part (a) of the definition.

PN231

MR EDMONDS: I understand that submission. I wouldn't necessarily concede that submission. I would imagine that I would be instructed that the submission is they would use a crane on the (indistinct) installation (indistinct) on that vessel (indistinct) specialist vessel tasks. That would be the primary argument I would be asked to put, I imagine.

PN232

THE DEPUTY PRESIDENT: And the outcome of that might be – is that the mobilisation/demobilisation (indistinct) that purpose when it's brought into the country and - - -

PN233

MR EDMONDS: (Indistinct) after having done that purpose.

PN234

THE DEPUTY PRESIDENT: Yes.

PN235

MR EDMONDS: Potentially. I understand that submission, Deputy President.

PN236

THE DEPUTY PRESIDENT: Yes.

PN237

MR EDMONDS: I do acknowledge there is a (indistinct) actually occurred. The daily work sheets (indistinct) access to.

PN238

THE DEPUTY PRESIDENT: No, but as Mr Boothman says, that doesn't become an issue until we determine whether the vessel can change what it is during the life of its task. When you look at the definition it talks about a specialist vessel for a specified period of time, so that also arguably has this idea that it can be something else at other periods of time and then it becomes a specialist vessel, but in part (a) vessels - not in part (b) definitions, but in a part (a) definition a vessel can change what it is for a period of time.

PN239

MR BOOTHMAN: I feel like we're somewhat conflating the issues of the schedules. The schedules are individual schedules and we're somehow merging (1) and it merges with (a) and they all cross over. I say and I still maintain that you must be classified or designated as one thing. When we say we can slip in and out of (a), I don't agree. I don't accept that. I say that the '28 days written notice of such changes to work scope', that's suggesting that you're changing the work scope under schedule 8, so you're changing out of specialist work.

PN240

I don't accept that you can be a support vessel and flip between. We say that you're a support vessel as designated or as classified over the term you're used. The ability for our client to pay over and above – and again we're still at this threshold question of whether the work was even specialist work. We say

properly construed it could be, so I guess it's a 90 per cent concession but it's still not suggesting that that then becomes a specialist vessel.

PN241

The 8.3 is that you were classified a specialist vessel. When you seek to change that work scope, you give notice. You give notice that you're going into specialist work, that's not what schedule 1 says and it's certainly not what schedule 8 says. I accept that it does say when you are a specialist vessel you're classified and you are classified from the date of mobilisation/demob, everything in between. That is absolutely accepted.

PN242

I say when you are designated as a support vessel and it's an agreed fact that the vessel was designed to be a support vessel, it was undertaking support work and then there are periods of time when my client looked at the work being undertaken and said properly construed that would otherwise be specialist work, that doesn't change the vessel's designation. So I say schedule 8 is something entirely independent from schedule 1. They don't have this merge as we seem to be getting into.

PN243

I say that's not right. I say that schedule 8 is you're classified as a specialist vessel and some of the definition terms are very specific as to what those vessels and tasks might be. They are very, very unique. That's schedule 8 and when you bring that vessel in that's what you're doing, you're classified, and schedule 1 is something wholly different and that's what we are, and we say there is no merger.

PN244

THE DEPUTY PRESIDENT: So that works well for the vessels listed in the definition, but that doesn't work for the task. It talks about the specialist vessel being a task – doing certain tasks for a certain period or being a type of vessel. So a type of vessel, if that language of mobilisation/demobilisation gives us a type of vessel, whereas the second – first part of the definition didn't contemplate the idea that a vessel which might be something else can for a period of time be a specialist vessel.

PN245

Going to the schedule, it seems to determine that the pay rate can only apply from the date it becomes a specialist vessel and so it won't be a specialist vessel because of what it's doing - then there is the potential that the pay rate applies from the date it starts doing the task.

PN246

MR BOOTHMAN: On that, we would say that 8.3(b):

PN247

*A specialist vessel shall be classified until it completes the specialist task –*

PN248

so we say at worst paragraph 19 of Mr Sweetman's statement - if the Deputy President was minded, then AOS owes its employees an additional 10 per cent for

that period of time and that's it, because you can't read the language of the paragraph, we say, as all one. There is 'and/or completes the specialist task' and we say that period of time – and again I accept that the (indistinct) says 12 hours and my client has followed that, and potentially without wanting to wave the white flag has misconstrued the terms of the agreement in the sense that for a period of time until they complete the specialist task.

PN249

We say at the very worst paragraphs 19 and 20 deal with period of time where specialist tasks were undertaken and at worst – sorry, paragraph 20 is the only one in which employees were paid 107 and there might be an argument to suggest they ought to be paid 117, at worst, but we say there's no requirement for the run sheets. We say there is no requirement – if that is the case, then there may not even be a requirement for any of the witnesses today to be crossed. If that's the point - --

PN250

THE DEPUTY PRESIDENT: Yes.

PN251

MR BOOTHMAN: But I have reviewed that and I feel it ought to be brought to the Commission's attention that that wording – I say that they're separate schedules, they have entirely separate work to do, but if there is a point in time when all specialist work was to be undertaken, then we would concede that that specialist task and the wording

PN252

'for a period of time' - if it's not 12 hours, then it ought to be the period of time in which that was work was undertaken and the concession in the statement is that in 20 there was a period of time between 6.13 am on 8 February – sorry, between 8.19 pm through to 6.13 on 8 February.

PN253

Then if the view of the Deputy President is that that's a specialist task, then between that period there is an issue for us in terms of (indistinct)

PN254

MR EDMONDS: Just on that point, Deputy President, if I might, that a specialist vessel shall (indistinct) under schedule 8, section 3(b), until it completes its specialist task and is either laid up or commences a different work scope, 28 days have to be given for that work scope. So once you're through that door, which is to say nothing of the claim for mobilisation or (indistinct) once you're through that door, you only get out of that door by giving 28 days' notice it's on a one-day provision. Otherwise, simply, every support vessel that would be mobilised to the project would be required to perform specialist tasks on one day or another and then only paid for that day. There would never be any concession made and there would simply be no cause to the balance of 8.3.

PN255

So you can't just be a specialist vessel for one day unless it's agreed that you're a specialist – unless it's agreed that that different work scope (indistinct) and then -

the danger that my friend's submission creates for his client is employees who are engaged as support vessels on a project and are then asked on a particular day to do a specialist task would simply say, 'No, not going to do it. We refuse to do the specialist task because we're a support vessel only. You will have to mobilise another vessel to the project to undertake that specialist task.'

PN256

That would create all sorts of problems and all sorts of bottlenecks and all sorts of expenses for my friend's client, as well as for (indistinct) projects themselves. The employers have acted in good faith. They have engaged the specialist tasks on that day. The implications of that I think are more significant (indistinct)

PN257

THE DEPUTY PRESIDENT: Okay. What I might do is have a brief adjournment. When we come back you can suggest how we might proceed today (indistinct)

PN258

MR EDMONDS: Yes. I'm mindful that you, Deputy President (indistinct)

PN259

THE DEPUTY PRESIDENT: Yes, I was just going to go (indistinct)

PN260

MR EDMONDS: Yes.

PN261

THE DEPUTY PRESIDENT: Issue some directions that (indistinct)

PN262

MR EDMONDS: Yes.

PN263

THE DEPUTY PRESIDENT: Thank you.

**SHORT ADJOURNMENT**

**[2.32 PM]**

**RESUMED**

**[2.53 PM]**

PN264

MR EDMONDS: I have an idea, Deputy President, and I did discuss it with my friend before - - -

PN265

THE DEPUTY PRESIDENT: (Indistinct) specifically.

PN266

MR EDMONDS: I'm not sure if my friend - - -

PN267

THE DEPUTY PRESIDENT: Mr Boothman, do you have idea, as well?

PN268

MR EDMONDS: I'm not sure if we're on the same page, Deputy President, but we did have a discussion. The proposition we've got, Deputy President, is that (indistinct) urgent and the (indistinct) decision – not fulsome evidence. The daily run sheets or the daily reports described that they're in possession of (indistinct) in that situation will have to provide some very clear dates around start and finish dates for this project and of the particular work concerned.

PN269

My friend says it won't show any other specialist tasks being undertaken. If that's the case, let's (indistinct) to the Commission in that respect and would be (indistinct) in and of itself, but it also will allow us to probably deal with the construction question and deal with the specialist vessel question, and then it's just a matter of submissions from the parties as to if indeed these specialist tasks are undertaken, how long do they go for.

PN270

So our submission would be that this matter ought be adjourned to the notice of produce that we file. Second, the production of those documents from DOF - I think the Commission can get production (indistinct) DOF will hopefully simply photocopy those and produce them for us, then there might be an opportunity for further evidence which goes to those run sheets, the daily reports only, not expansive evidence that (indistinct).

PN271

Without necessarily conceding that (indistinct), but further evidence that goes to those particular issues and then perhaps that will eliminate the situation, and it would probably a more (indistinct) such that we never need to come back, which I think is probably the more likely scenario.

PN272

THE DEPUTY PRESIDENT: If it's of any assistance to the parties, having looked at the clause again brought up the submissions before me today. I was wondering whether the clause – the agreement might be interpreted given the case law around the drafters (indistinct) with a practical mindset, legal drafters, what would their intention have been. Perhaps what might be inferred from the way the agreement is phrased (indistinct) context, those words, is that there are two types of circumstances where you have specialist vessels; one where the vessel is a specialist vessel and is one on that list or one where the type of work means the vessel is not otherwise a specialist vessel (indistinct).

PN273

Where it's a specialist vessel it would generally arrive in the country as a specialist vessel, as a (indistinct) whatever (indistinct) and would be (indistinct) deal with from mobilisation to demobilisation tend to deal with a situation where that vessel comes into the country and when you sign off on the (indistinct) to work on that vessel (indistinct) pay that higher rate of pay for the entire period on that vessel because the vessel is a specialist vessel, and whether the vessel is put down – it's a cyclone or it doesn't have work to do from day to day during the voyage, that pay rate would be paid for the whole period.

PN274

If for some reason you've been out to sea for 20 days and your employer decides that they're going to have to (indistinct) pipe layer into a support vessel rather than pipe laying and you have budgeted or anticipated you're on a specialist vessels for 60 days, that the employer would need to get consent from the union to change what everyone else would otherwise (indistinct) specialist vessel. That's where that clause 8.3 (indistinct) to apply.

PN275

When you have a task based specialist vessel where it's otherwise normally something else, that it becomes a specialist vessel because of the specific work it's doing, that the salary only applies from the first pay period in which that task starts happening, so that's where that clause talking about the pay coming on the designated date. In those circumstances where it talks about a task being completed, that means the intended payment only goes to the person doing the task and that 28-day period (indistinct) is intended to apply to vessels which – only to those specialist vessels which were always intended to be a specialist vessel.

PN276

The drafters, being in a practical mindset, are dealing with two different situations where someone gets on a vessel understanding it to be a support vessel but is asked to do other more complex work, in which case they get paid accordingly for the period of time they're doing that, or someone who signs up to work on what they believe to be a specialist vessel but for some reason unbeknownst to anyone at some point time it's no longer doing that. The only circumstance in which you can change that being, say, a pipeline vessel, is if the parties agree that it no longer is a specialist vessel.

PN277

That's what my inclination is at the moment to make of the clauses which are there and that requires some (indistinct) writing with magic pen, because the clause just doesn't articulate that in as much detail, but it's the only way in which I can see at this point you can reconcile the various aspects of the clauses to make them all work together in that sense, because if you apply the plain reading of some of those clauses to both types of definitions, they don't make sense.

PN278

It might be that the parties had in mind that there are two different types of situations dealt with differently, but they just haven't clearly articulated that in the agreement but they have dealt with it by dealing with things that were in their mind like at what point should the pay start, which is the thing that they're most concerned about, and how does the pay get protected, i.e., 'I thought I signed up for a specialist vessel. You can't change that without giving us 28 days' notice.'

PN279

It might appear that the parties have turned their mind to the practical issues of changes, but haven't clearly articulated that necessarily in agreement (indistinct).

PN280

MR EDMONDS: Well, we would probably want to make some further submissions about that 3(c) point, about whether or not if you're only a support vessel which is now asked to do a specialist task - whether you can only do that task because that will have implications for utilisation of other specialist vessels in other circumstances. If you can effectively cherry pick certain days that you do specialist tasks, then (indistinct) specialist vessel (indistinct) a suite of support vessels able to do those tasks.

PN281

That might be something about which we might want to make certain submissions at some point in the future, Deputy President (indistinct) views and a lot of it might not be relevant, but (indistinct) may well be that period of time from the time that the (indistinct) specialist tasks might be so short that it's cheaper to get (indistinct) than we need to have that argument.

PN282

THE DEPUTY PRESIDENT: Yes, excellent. Okay.

PN283

MR EDMONDS: I'm not sure if my friend necessarily agrees with (indistinct) I didn't want to represent that as a consent - - -

PN284

MR BOOTHMAN: No, I think the only basis we're not on the same page is (indistinct) production can still occur. We don't take issue if that's the course of action that the Commission wants to take. I'm minded to refer to the transcript and address your thoughts (indistinct) but I think we were leaning towards certainly that thought, that when a vessel does that work all the employees undertake those specialist tasks and they revert back to a support vessel the very next day.

PN285

As I said, I had my white flag halfway down, but I think the case is at worst that (indistinct) is obliged to pay a specialist rate for the third day (indistinct) statement and I'm not sure that - we're not concerned about your production. We think there's nothing else to show, but we're happy for that to occur.

PN286

THE DEPUTY PRESIDENT: Because otherwise if I'm forced to (indistinct) ruling it may create an inflexibility for both parties which is undesirable, which might be corrected - clarification in the next agreement.

PN287

MR BOOTHMAN: I take my friend's point there is more at stake for various other agreements potentially or vessels that are out there, but (indistinct)

PN288

THE DEPUTY PRESIDENT: Excellent. Okay, thank you for your time today. Sorry (indistinct) I'll just wait for your submissions.

**ADJOURNED INDEFINITELY**

**[3.03 PM]**