CMAL
Caledonian Maritime Assets Ltd
Stòras Mara Cailleannach Eta

Caledonian Maritime Assets Limited
Municipal Buildings
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[redacted]

Ferguson Marine Engineering Limited
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4 March 2019

Dear Sirs

(1) NEWBUILDCON between Ferguson Marine Engineering Limited ("FMEL") and Caledonian Maritime Assets Limited ("CMAL") dated 16 October 2015, as amended, in relation to FMEL hull no. 801, "GLEN SANNOX"

(2) NEWBUILDCON between FMEL and CMAL dated 16 October 2015, as amended, in relation to FMEL hull no. 802 (together, the "Contracts")

1. Introduction

We write in response to your claim letter dated 20 December 2018 and the files that were provided with it (the "**Claim**"). We have now had the opportunity to give the Claim a full review and proper consideration.

You begin your letter by stating that CMAL has denied in public and in private any liability for payment of additional costs. Neither is true. In fact, CMAL have accepted in public (in testimony to the REC Committee and in our reactive press releases following the media spin issued by your ultimate parent) that a liability may arise for additional costs in the normal course of a ship-building project and for which a contingency amount has been provided.

In addition, CMAL have accepted in private certain variations to contract, both those formally agreed to date and those on an in-principle basis while the build phase continues – as your Claim document indeed mentions. So from the outset your claim is premised on a misunderstanding or a desire to see things other than as they are.

Importantly, any application by FMEL for such additional costs must be made in accordance with the Contracts. Your Claim makes scant reference to the Contracts and ignores the detailed and negotiated contractual provisions concerning claims for additional time or money. Your new strategy which now appears to rest on an implied term, cannot supplant or over-write the express wording of the Contracts.

It appears to CMAL that FMEL has failed properly to consider and implement the provisions of the Contracts at the time of your various difficulties described in the Claim; or the delays experienced; or the alleged interference to which you refer, as each have arisen.

As you must be aware, the Contracts contain an express mechanism for claims by the Builder for additional time or money and which provisions, if not strictly followed, carry severe consequences including that the right to make such claims against the Buyer may already have lapsed.

If so, that is your fault alone.

The quantification of the Claim as presently found is lacking details, calculation, explanation or sufficient vouching in its major elements and is surrounded by irrelevant padding. It is circular in its reasoning and never finds its mark. The narrative of the Claim bears no serious comparison to the numerous project schedules and plans that that you have created. In summary, we find it neither impressive nor compelling.

2. Outline structure

We will first consider the new basis of the Claim in the context of our correspondence to date and the representations you have made in previous attempts at alternative dispute resolution and also in the public domain (section 3). At section 4 we will consider the design challenge which FMEL agreed to fulfil.

We will then address briefly at a high level our response to each of the stated primary bases of your Claim (sections 5, 6 and 7). We will comment on the requirements for a party to establish an implied term in a detailed commercial agreement (section 8). Thereafter, in turn we shall consider the express terms of the Contracts relevant to each of the principal bases of the Claim (sections 9, 10 and 11).

At section 12 we will offer our explanation of the fundamental and perhaps fatal deficiencies in the various premises of your Claim. At section 13 you will find our analysis of the legal basis presented in Part 5 of the Claim. At section 14 we will mention some mistakes in the Claim.

We will then address potential alternative causes of the difficulties you have experienced (section 15). In sections 16 and 17 we consider the issue of changes to rules and regulations together with notes upon the more detailed technical elements. At section 18 and 19 we mention aspects of quantum and currency losses.

At section 20 we note some missing or illegible content in the Claim bundle and in section 21 you will find our conclusion.

3. Change in basis and presentation of claims for additional money

The heads of claim described in the VTC spreadsheet presented to CMAL in July 2017 were elaborated in your letter of 11 December 2017 and which by that time were presented as "*cost impacts*" arising primarily from "*unforeseen complexity*". These are your words and which you have used repeatedly, that is, unforeseen by FMEL (for whatever reason).

The response of CMAL, as summarised in our letter to you dated 9 February 2018, was that nothing within the process or necessity of approvals by Lloyd's Register ("**LR**") or the MCA were unforeseeable but in fact were known to CMAL and ought reasonably to have been known by FMEL at the time of your bid. That the vessels are the first of their kind under UK flag was a known requirement of the Invitation to Tender ("**ITT**").

We cannot ignore that one of your Directors has appeared on television admitting that FMEL "*wrongly assumed*" the extent of the design development responsibility of the Builder. His words are consistent with the view reached by CMAL that FMEL has, possibly from the outset, underestimated the task entrusted to you. Your prior insistence on "*unforeseen complexity*" reveals that FMEL did not fully understand the scale of the project.

You now blame CMAL for your mistakes, which we suggest might include: first, in FMEL failing fully to understand (as Mr McColl so publicly announced) the design requirements of the Contracts; secondly, in your management of the provisions of the Contracts that deal with applications for delay or variations to the specification of the vessels (which we shall address further below); and third, in the allocation of insufficient expertise and resource to the delivery of the project.

If the implied term that you allege was of such necessity, why do we hear of it first more than six months after hull 801 should have been delivered? By your conduct, with this obvious and almost

entire change of approach to the claim, you have demonstrated that it was not in contemplation when the VTC claims schedule was originally presented in July 2017 nor when the claim was re-cast on the basis of unforeseeable complexity in December 2017.

In open correspondence you have repeatedly mentioned unforeseeable complexity as the basis of the claim and no breach of the Contracts themselves, express or implied, has been suggested.

When the claim was further re-stated in your letter of 11 April 2018, describing "*the total cost impact **which has arisen due to the complexity and unforeseen circumstances** of the build*" (our emphasis) at some £27.4 million, there is no mention of an implied term. We hear, again, only complaint of costs arising from things that you – candidly, admittedly – did not foresee.

In other words, the implied term which FMEL now allege and upon which the Claim largely depends must be seen in light of your own prior public and private admissions of issues arising during the build phase which you did not anticipate.

4. Design challenge

Perhaps the most critical, fixed and unchangeable of the criteria which the new vessels require to satisfy is the water depth available and hence draft limitations within the areas which they are intended to serve.

In addition, the length of the vessels is also significantly constrained by the size of the Clyde and Hebrides ports. The essential challenge presented to the bidders by the ITT was to design and build a ferry of 102 metres in length, of 3.4 metres draft, and capable of operating at 16.5 knots with a payload of 900 tonnes. Five bidders, including FMEL, formally confirmed that this could be achieved. One bidder said it could not be done.

The "design spiral" which has been mentioned – as you know, the iterative and demanding process in which numerous competing criteria must be satisfied before the design can be 'settled' sufficient for construction to begin – was and is fundamentally a Builder's obligation.

The US Government Accountability Office Report to Congressional Committees "Best Practices" (Annex 2-001, the "**GAO Report**") which you found upon, at page 4 confirms: "*Though some design work occurs in the pre-contract phase, the design phase continues in earnest after contract signing. The design phase encompasses three activities: basic design, functional design, and production design*".

The GAO Report makes clear that it is up to the builder of commercial vessels to satisfy itself that the design is workable prior to contract: at page 13 we see "*Shipyards will not sign a contract if there is outstanding technical risk*".

On the basis of perhaps the major finding of this Report, which you say encapsulates good commercial shipbuilding practice, one would reasonably assume that FMEL had satisfied itself that the design was achievable before bidding for and fixing the price and timescale for delivery. The risk to the builder in not doing so is obvious: at page 15 "*If **the shipyard** fails to resolve program risks or showstoppers **before committing to a firm, fixed-price and fixed-delivery schedule**, it could encounter problems later in the construction process that will require the diversion of additional, unplanned resources to the project*" (our emphasis).

At page 17 the GAO Report continues: "*In cases where a new hullform is necessary, the ship buyer and the shipyard will work together to model and validate design attributes, such as seakeeping abilities, speed, and fuel consumption, as desired by the buyer. This modeling exercise is completed using both water tanks and computer simulation. Performance of other items, such as new propeller designs, is also validated using these means*".

Our point is this – using your own proposed guide to international best practice, the continuing process of design development following the contract award as described in the Claim is commonplace and should have been well understood by FMEL at the time of entering into the Contracts.

Above all, the design challenges presented in the Contracts are a Builder's responsibility to fulfil; and the detailed written specification of how these challenged will be met, is a Builder's document.

5. High level response to Part 2, para. 3 – the conceptual design was inadequate

We have in previous correspondence referred you to the provisions of clause 47 of the Contracts. The adequacy of the conceptual design contained within the tender documentation is now entirely historic.

For this reason we do not wish to enter significant discussions on the ITT (paragraphs 26-39, 60, 61 and 69 of Part 2 of the Claim, among others) but let us be clear – FMEL expressly held itself out in its bid as fully understanding the scope of the design and build responsibilities. Mr McColl recently confesses that was not the case. That is the fault of FMEL alone.

Five other leading shipyards submitted comprehensive tenders in response to the ITT. None complained of inadequacy of the design within the tender package. Further, the outline specification included as Schedule 2 to the ITT provides at section 1.1.1:

> "*This outline tender technical specification* ***describes a vessel to be designed*** *and constructed as a Ro-Ro Passenger Ferry, hereinafter called "The Vessel".*
>
> *This specification does not detail all requirements; the* ***tenderer is to provide a full detailed specification*** *for all areas of the vessel as indicated in the ITT documentation.*
>
> *Variant bids that meet, or exceed, the* ***basic requirements of the vessel in terms of dimension limitations, deadweight, speed,*** *manoeuvrability, station keeping, passenger, freight and car capacity, safety, reliability, sea keeping and efficiency will be accepted.*
>
> *The attached General Arrangement Dwg No. 454-002-0101-01 C provides guidance to the Builder on the concepts that the Buyer requires, alternative arrangements will be considered.* ***The General Arrangement is for illustrative purposes only.***"
> (our emphasis)

As mentioned in section 4 above and made clear in the foregoing excerpt from the ITT, the design ingredients (specification and general arrangement) which were appended to the Contracts are an FMEL output. From our perspective, the first primary head of your Claim appears to complain of the inadequacy of a document of your own creation.

The GAO Report discusses this transition, exactly as in our own project, from the 'outline specification' (developed by the buyer) to the one appended to the contract: at page 21 "***The shipyard takes the lead*** *in expanding this document into a ship specification…*" (our emphasis).

FMEL held itself out as understanding this basis of the project. May we remind you that the overview of your build specification, forming Annex B to the Contracts (the "**Specification**") states:

> *"Following a successful tender and contract award* ***this Specification****, Classification and other Approved Design Documents, Makers and Buyers information* ***will be fully developed by the Builder into a full set of detailed design and production data****, drawings and documents taking into consideration Buyer's comments and preferences as well as all Classification, Flag State, Makers and other regulations and requirements…*
>
> *…****It is understood that anything not mentioned in this specification, but required by the regulations will be supplied and installed by the Builder, at the Builders expense.****"* (our emphasis)

The Claim in this context mentions ground-breaking and first-of-its-kind design projects. We do not consider an LNG ferry to be anything of the sort. When launched in 2006 "EMMA MAERSK" was the largest container ship ever built. These are not our circumstances.

As [redacted] has explained, by May 2018 there were 40 LNG passenger ferries in operation or under construction. Class and Flag State approvals are an ordinary requirement of the build process and for which, as we shall discuss below, the Contracts create a specific mechanism for how they should be addressed.

6. High level response to Part 2, para. 3 – CMAL instructed changes to engines and hull draft

It is quite remarkable that while paragraph 40 of Part 2 of the Claim acknowledges the existence of clause 49 of the Contracts, FMEL complain that the right of the Buyer to elect the size of engine after the award of the contract was flawed. This is what we, and you, very intentionally agreed to in writing at the time.

The reason for the existence of clause 49, which itself might be considered a concession at preferred-bidder stage (to the benefit FMEL) was that your tender specification was insufficiently developed or specific to allow the engine requirement to be made firm from the outset.

In respect of the change of engine specification, we accept this is not routine, but nor should have it come as a surprise – the parties have expressly anticipated the subject prior to signature of the Contracts and specifically captured the consequences in a bespoke additional clause.

As you may be aware, the treatment of a topic in an additional clause means that the parties will be considered expressly to have applied their minds to the subject matter as compared to the use of standard template wording. Here, therefore, is not an interference (as paragraph 94 pretends) but rather the most specific and evidently anticipated and negotiated circumstances – as contrasted with an unforeseen or left-field event of re-design arising during the build phase – of which FMEL were undoubtedly aware from the outset.

Insofar as relating to hull draft, this change was initiated by FMEL because of your inability to meet the deadweight requirements of the Specification. It is simply untrue to suggest that CMAL requested a change in draft at any time.

7. High level response to Part 2, para. 3 – CMAL interfered in the design process

To interfere is an intrusion by someone without right to do so. CMAL cannot interfere, it is a party, a direct participant who is expressly entitled in accordance with the Contract and in practice to involve itself in the design process. This is not mere semantics – as an apparent key ingredient of the Claim, we think the whole basis is misconceived.

The elements mentioned at paragraph 94 of Part 2 are not interferences, save for the first (change of engine specification – discussed in section 6 above) they are routine change requests and/or circumstances in which the Contracts contain a clear mechanism for how the changes should be handled by the Builder as and when they each arose.

For those other bullet points listed, FMEL were entitled either to accept or reject the modification or change proposed using the clause 24 mechanism available to them. See further section 9 of this letter.

By way of one specific example, that your Claim labours over. On page 43 (paragraph 51) you state that CMAL started considering alternative propeller designs in February 2016 and complain to have "*wasted over three months investigating and testing alternative propeller designs at the instruction of CMAL*". No such instruction was given. We believe the suggestion by CMAL to FMEL, that you might wish to consider alternative solutions to meet the contractual Specification, was in May 2016; you replied immediately to confirm that Wartsila were already considering these aspects.

You refer earlier in this context to the minutes of project meeting 3 which confirm "***FMEL** to optimise design solution*" (our emphasis). Our point entirely – this was, in the ordinary course, up to FMEL and your subcontractors to resolve.

8. Implied term

For the record, the implied term which you allege to exist is denied.

For completeness, that CMAL has breached any such implied term to the Contracts is also denied.

An implied term must give "business efficacy" to the agreement to which it is proposed to be added. It must be obviously needed, in that the relevant contract cannot work without it. It would be positively approved by both parties had they applied their minds to the relevant subject-matter at the time of entering into the agreement. It must not contradict what the agreement has specifically put into words. We suggest that none of these criteria, however formulated, are satisfied here.

Even were such an implied term considered necessary for the efficacy of the Contracts (which CMAL do not accept) there remain at least two fundamental difficulties with the Claim:

(i) the Contracts already comprehensively deal in words to manage the situations you describe; and

(ii) those express terms of the Contracts, relevant to the key allegations of design changes and delay, do not somehow disappear.

Without prejudice to our view that there is no such term, as a corollary of the implied term which you allege, we would consider as an implied term that one of the obligations incumbent on the Builder is to effectively manage this necessarily iterative and co-operative process (of Builder's design, revisions by the Buyer, approvals and revisions by Class and Flag, revisions by the Builder, changes initiated by the Buyer, responses thereto by the Builder, and such like) to ensure "regular and orderly" progress according to the project plan and build schedule and in accordance with the surrounding express Contract terms.

If there is any interference or unreasonable delay, or if in the Builder's view the Buyer is being too pedantic or too granular or too slow, in our experience it is up to the Builder to cajole or encourage the Buyer accordingly in a professional manner and with recourse to the deemed approval provisions in the Contracts as appropriate.

A more detailed legal consideration is found below. First, we might address what the Contracts say, with reference to the broad categories used in your letter dated 20 December 2018. The highest authority on the subject makes clear that an implied term can only be established after a full consideration of the written words has been undertaken.

9. Express terms – claim letter "1. Changes instructed to the works"

You Claim appears to overlook clause 24 of the Contracts, which as you know creates a detailed mechanism for the Buyer (as of right) to request modifications or changes to the Vessels and in turn for the Builder to propose the consequences of such changes in terms of time and money.

Clause 24 shows no substantive changes to the wording of the internationally recognised BIMCO form of agreement. The Buyer has the express right to request reasonable modifications or changes to the design of the vessels as that was understood on the date of contract signature.

In terms of clause 24 of the Contracts it is incumbent upon the Builder to provide a written proposal of the consequences of implementing modifications or changes and for present purposes including in respect of Contract Price adjustments and changes to the Delivery Date.

Specifically, commencing at line 484:

> *"(b) The Builder shall, as soon as possible after receipt of the written request for modifications or changes,* ***give the Buyer a written proposal of the consequences of implementing such modifications and/or changes****. These consequences may include changes in the Contract Price, Delivery Date, capacity, draft, speed, fuel consumption, or any other provisions of this Contract.*

> *If in the Builder's reasonable judgement, such modifications and/or changes will adversely affect the Builder's planning or programme in relation to the Builder's other commitments, the Builder shall notify the Buyer that it declines to give such a proposal for the requested modifications and/or changes or part thereof."* (our emphasis)

Significantly, while we recognise the best intentions and attempts by those involved to find solutions, we note that it is open to the Builder to decline any such proposal if it were adversely to affect the Builder's planning or other commitments.

For each of the heads of claim concerning: (i) choice of engine; (ii) change in hull draft; (iii) propeller design; (iv) duck-tail; (v) belting; and (vi) port fit, please provide copies (or with reference to the appendices to the Claim) the written proposal made by FMEL in accordance with clause 24(b) or any notice declining such proposal.

We suggest that your failure to have adopted the clause 24 mechanism for any such changes is consistent with our view that they were in truth initiated by FMEL in its attempt to settle your design that might meet the key requirements of the Specification, and were not proposed by CMAL at all.

We reserve the right to maintain that in the event of resulting delay or cost you have acquiesced in the same or due to your failure to adopt the notice mechanism within the Contracts are now personally barred from asserting this cause as a ground for alleged breach of contract by CMAL.

We note in passing that the Specification also provides that if modifications result in a change to the price or delivery date: "*these are to be agreed with the Builder* ***in writing at the time of change***" (page 34, our emphasis).

10. Express terms – claim letter "2. Interference in the design process throughout the project"

Clause 22(a) of the Contracts allows the Buyer to have present at the Shipyard one representative and a reasonable number of assistants. No limit to the number of assistants is given. Do you contend that the number of assistants deployed by CMAL across the two vessels to be unreasonable?

Clause 22(c) of the Contracts permits the Builder to request the replacement of the representative or his assistants if:

> "*they are carrying out their duties in an unreasonable manner* ***detrimental to the proper progress*** *of the construction of the Vessel...*" (our emphasis).

You are called upon to confirm whether and when any such request has been made by FMEL for the period to 31 August 2018 with which the Claim is concerned, and if so to provide documentary evidence. We would expect such conduct complaints to feature prominently in the minutes of project meetings, or in correspondence between our representatives.

If the presence of any CMAL representative or assistant has so hindered the proper progress of construction as your Claim suggests, we reserve the right to maintain that you have acquiesced in the same or due to your inaction on the subject are now personally barred from asserting this cause as a ground for alleged breach of contract by CMAL.

Standing your allegation that CMAL has prevented FMEL from performing its obligations in a regular and orderly manner, please describe specifically such occasions and also the steps taken by FMEL to mitigate or avoid such effects. We sense only the vaguest suggestion of some more institutional approach by CMAL which you consider to be ponderous or indecisive.

Clause 22 shows no substantive changes to the wording of the internationally recognised BIMCO form of agreement.

We take this opportunity to remind you also of the terms of clause 23(d) of the Contracts.

11. Express terms – claim letter "3. Delay in providing necessary approvals"

We referred FMEL to clause 34(a)(iii) and clause 34(b) of the Contracts in our letter dated 17 August 2017. We find no substantive treatment of those provisions in your Claim. No meaningful claim for delay or payment can ignore their requirements.

We consider that the claim which you describe as prolongation costs is entirely periled on the Builder satisfying the clear, industry-standard and un-amended wording of NEWBUILDCON clause 34(b), namely at line 740:

> *"(b) The Builder shall notify the Buyer within ten (10) running days of when the Builder becomes aware of the occurrence of* ***any event of delay*** *on account of which the Builder assert that it may have a right to claim an extension of the Delivery Date. A* ***failure to so notify shall bar the Builder from claiming an extension*** *to the Delivery Date..."* (our emphasis)

You are called upon to confirm whether and when any such notice has been made by FMEL and if so to provide documentary evidence or with reference to the appendices to the Claim.

Clause 34 includes claims for additional time arising through modifications or changes under clause 24. Even if no notice was duly given under clause 24(b) as we mention in section 9 above, notice is nonetheless required within 10 days of the awareness by FMEL of any event of delay.

FMEL were mindful of this – on 13 December 2016 Liam Campbell wrote "*we understand it is in our interests to inform [CMAL] of any threats to the project and also if indeed there is any threat to the delivery dates*".

We consider that unless any head of claim within the VTC spreadsheet presented on 7 July 2017 (and, for the avoidance of doubt, is now found in your Claim as presently described) was not within the awareness of FMEL earlier than 26 June 2017, the right to assert an extension to the Delivery Date in respect of it has already expired. It follows that any claim for any ensuing overhead, financing and storage costs (which are in any event denied) are also no longer recoverable.

12. Flawed premises

a) Premise of design inadequacy is misplaced

The limb of your claim which depends upon design inadequacy of some kind is bound to fail because it ignores or attempts to conflate the essential difference between the outline specification provided within the ITT (issued by CMAL, for guidance only, as we have explained above) and the tender specification issued by FMEL with your bid (which became the Specification as appended to the Contracts). Following the signature of the Contracts, the former is entirely irrelevant.

At its simplest, FMEL have undertaken to perform its own design of the vessels. We fail to understand why CMAL should bear criticism for this.

b) Premise of design changes by CMAL is misconceived

The topics of (i) weights and increased draft; (ii) choice of propeller; and (ii) the duck-tail, are not changes by CMAL at all. As discussed in section 9 above, they are attempts by FMEL to fulfil the contract Specification.

Throughout, you categorise these topics as changes or requests initiated by CMAL and causing hindrance to your programme whereas each are in truth solutions proposed by FMEL to CMAL for our approval of your attempts to meet the contracted requirements through the ordinary iterative process of the design spiral.

Periods which you characterise as delay or prevarication or change by CMAL are in fact the time taken by FMEL to wrestle with and eventually settle the design so as to be capable of meeting the essential deadweight requirements and draft restrictions.

It is not preferential engineering for a Buyer to insist that the requirements of the contract Specification are met.

c) *Premise of change to fabrication methodology is false – no change occurred in block sequence*

First, we have to mention that it seems most unusual and unlikely that a change in the entire methodology of fabrication of the vessels should be revealed for the first time in a claim document without any prior mention of that, at the time such a momentous decision was taken, to CMAL as your customer.

You state nonetheless that CMAL "*caused such delay and disruption that FMEL had to make two radical changes to the sequence of its works...*" (paragraph 110 on page 19) namely the change to a consecutive build strategy and forcing the premature launch of hull 801. We suggest that most of your Claim rests on this theory.

We can demonstrate that no such change occurred, attributable to any fault by CMAL, with reference to the earliest versions of the Cardinal Date Programme ("**CDP**") that you have produced.

No doubt because of the difficulties you have encountered in the design spiral such as to satisfy the deadweight challenge within the prevailing draft restrictions, in order to fix the blame with CMAL, the Claim makes numerous references to a proposed fabrication scheme commencing from the stern.

For example: "*provided that they were built from the stern forwards*"; "*hence the need to consolidate starting with the stern blocks*"; "*provided both vessels were consolidated from the stern*" (paragraphs 9, 10 and 11 on page 64); "*needed to build both vessels from the stern forwards if it was to meet the Contractual Dates...*" (paragraph 12 on page 65); and "*without the design of the stern block, fabrication could not start*" (paragraph 20 on page 66).

The entire premise of this, perhaps the most significant, limb of your Claim (and expressly affecting both hulls and influencing almost everything that follows) depends upon the allegation that a change from concurrent to consecutive fabrication of the two vessels was necessitated by delays attributable to CMAL and which prevented the allegedly planned and preferable 'stern-first' method.

The Claim explains that in order to deliver the vessels two months apart, for both vessels blocks 1, 2 and 3 would require to be consolidated first of all, and so forth. You say that the commencement of consolidation at midships, which you attribute to delays and interference by CMAL, has in effect ruined your plans. In fact, that was your plan all along.

The CDP issued to CMAL on 14 December 2015 – prior to any of the delays or interference for which you contend – shows for both vessels the fabrication of blocks 5 and 6 first of all, then blocks 7 and 8, then blocks 4 and 9. This sequence also founds the Milestone Events described in the Contracts as establishing 25%, 35% and 50% fabrication respectively. This sequence is also shown in what you refer to as the Baseline Programme dated 7 January 2016 [Appendix 3-002].

Entirely contrary to the purported methodology which your Claim describes, we see that in fact from the very beginning some 50% fabrication was intended to have been reached (notably, for both vessels) before the yard would turn its attention to the stern-most blocks 1, 2 and 3.

It seems inescapable that your original intention was always to begin construction at midships. Your cash-flow projections and entire approach was based on this 'chasing steel' mode of operation, which was of your choosing.

We note in this context the GAO Report, in which the comment "*Ships are **typically built from the centre**-bottom up*" is consistent with our understanding of the intended and actual sequence (page 7, our emphasis).

The suggestion that the vessels should have been built stern-first appears more a theory applied in retrospect than a description of anything that ever happened.

d) Premise of change to fabrication methodology is false – no change in 802 delivery until 2018

The fact that there has been no radical change to your fabrication methodology that is attributable to CMAL (as compared to the admitted limitations of space at your facility) can also be readily seen from the CDPs that you have prepared for hull 802.

For this purpose we refer to the CDPs for hull 802 respectively issued on 14 December 2015 (Revision 1); 4 March 2016 (Revision 2); 16 May 2016 (Revision 3); 7 July 2017 (Revision 4); and 27 June 2018 (Revision 5).

Between revision 1 and revision 2 there is no change to the delivery date; between revision 2 and revision 3 there is a delay of 34 days shown; between revision 3 and revision 4 that delay has been clawed back. This means that by your own estimation, as at the date of revision 4, namely in July 2017 you forecast no delay in the delivery of hull 802.

Only in revision 5 do we see a delay of 593 days appearing. We suggest that if a decision had truly been taken during August 2016 to build the vessels in sequence rather than in parallel, the plans which you have issued would have looked very different.

13. Legal analysis

a) No treatment of written contract clauses

It will not do simply to declare the existence of an implied term in isolation from the contract to which it is said to be included. Specifically, in order for it to exist at all, you must show that the alleged implied term does not run contrary to any of the express language found in the Contracts. See sections 9, 10 and 11 above.

Perhaps most importantly, the effect of the implied term which you allege must not operate to defeat or over-ride the express provisions of the written clauses of the Contracts that serve clearly and unambiguously to limit the ways in which the Builder may make claims for time or money if the appropriate contractual procedure has not been followed.

In the Supreme Court decision of Marks and Spencer v. BNP Paribas Securities given in 2015, it is made very clear that "*only after the process of construing the express words is complete that the issue of an implied term falls to be considered*".

Your implied term fails because it is not necessary and separately because it contradicts the existing detailed provisions Contracts as we have describe above. We will explain each further below.

b) Business necessity

Our understanding of an implied term is given at section 8 above. For the term which you allege to be implied, FMEL must demonstrate that the Contracts are "***incapable of practical performance*** *without the implied term, and that both parties would have agreed to the inclusion of such an implied term* ***when regard is had to the other express terms of the contract***" (Rockcliffe Estates plc v. Co-operative Wholesale Society Ltd, 1994, our emphasis).

The "bystander" test of the parties' presumed intention, if the question were asked at the outset, here would be answered in the negative – the implied term is not necessary because the Contracts function perfectly without it. The Buyer would respond that claims for changes and modifications are dealt with in Clause 24. Claims for additional time and money are dealt with in Clause 34. And so forth, as shown in sections 9, 10 and 11 above, in accordance with the internationally accepted template agreement that the Contracts largely implement unchanged in these key subject areas.

In the words of a Scottish appellate judgement, the Contracts "*constitute an apparently complete bargain*" (Crawford v. Bruce, 1992, at first instance) and there is no "*hiatus or gap which had to be filled to give effect to the common intention of the parties*" (Crawford, on appeal). There is no necessity because the NEWBUILDCON contains the whole regime and mechanisms required for claims to delay and additional cost howsoever arising.

In the words of the leading judgement in the Marks and Spencer case, "*a term can only be implied if, without the term, the contract would lack commercial or practical coherence*".

In short, we consider that had the clause 24 and clause 34 provisions been followed by FMEL in response to any changes genuinely initiated by CMAL or any delays genuinely attributable to CMAL, the implied term would not be necessary at all.

c) *Implied terms may not contradict the written word*

Separately, your alleged implied term must not contradict the express provisions of the Contracts which you are well aware have been reduced to writing and were negotiated at length with both parties supported by specialist professional advisers.

We consider that the Court will "*guard against too ready a resort to holding that terms are implied into a contract which the parties have set out in express detail...*" (Scottish Power plc v. Kvaerner Construction (Regions) Limited, 1998). The judge in that case continued, approving the earlier Rockcliffe decision, to say that it is "*quite clear that there can be no question of implying a term which is contradictory of an express term to which the parties to the contract have agreed*".

Nowhere in your Claim do FMEL assert that the Contracts are wanting in their treatment of the relevant subjects of changes and modifications or categories of permissible delay or the consequences of such occurrences. In fact, you barely reference the Contracts at all.

As we have explained, the Contracts as written create a means for the Builder in specified circumstances to claim additional time or money. Nowhere within the Contracts do we see an allowance for recharge of overhead, financing costs or interest in the event of delays.

In situations where Permissible Delay, properly understood, does not entitle the Builder to claim running costs (but only a deferral of time without incurring late delivery penalties) we cannot see how your implied term must necessarily be included with the result effectively to fund your entire operations for the duration of the additional works.

Again, the Marks and Spencer case makes clear, "*it is a cardinal rule that no term can be implied into a contract if it contradicts an express term*". You must explain how and why the alleged implied term can be read sensibly together with (at the very least) clauses 15, 24, 34, 47 and 49 of the Contracts.

d) *Alleged interference or hindrance may be simply categorised as routine modifications*

The language of interference and the purported obligation of non-hindrance, which constitutes much of the Claim, is no doubt designed to suggest some new category under which your various professed losses should be dealt. As previously mentioned, that may be intended to circumvent the failure by FMEL to follow clauses 24 and 34 with any rigour.

We suggest that a combination of the related requirements of necessity and non-contradiction, as discussed above, will lead the Court to the view that the instances of interference that you allege may be simply categorised as ordinary incidents of modifications and changes.

Of the 110 change orders documented between us as at 8 February 2019 (nowhere close to the figure of 600 you have mentioned to the press) we consider that 25 are minor or neutral in nature, and of the balance some 40% were requested by CMAL in the normal course and some 60% of those were initiated by FMEL. These are wholly routine.

Your Claim does not in truth criticise interference, it complains of delay. In such event, clause 34 applies.

e) *Claim for payment in any event premature*

You have our letter of 9 July 2018 commenting that any claims for the cost of design modifications asserted prior to delivery are premature.

You are on notice that any claims such as you may present in relation to modifications to the specification of the vessels fall to be determined at the time of delivery of each of them, in accordance with clause 15(b)(i) of the Contracts. The alleged implied term contradicts this provision.

As above, in the context of the express limitation of certain claims for delay, the effect of the implied term which you allege must not operate to defeat or over-ride the express provisions of the written clauses of the Contracts that serve clearly and unambiguously to determine when the Builder may make claims for additional money arising from changes.

f) Anticipated claims by third parties speculative

Given our reasoning at section 12 that seeks to explain why the difficulties and delays that have been experienced are of FMEL own making, we reject any liability for claims brought by others against you (for whatever reason).

In any event, the inclusion of claims which have not been formally submitted to you nor paid by you, appears premature and speculative.

g) Entire Agreement

As mentioned, we are reluctant to be drawn into any discussion as to the sufficiency of the ITT. Clause 47 expressly anticipates and forbids it.

h) Part 5 is circular

One turns beyond page 158 to see if there is more, an argument based on the words of the Contracts. There is nothing. In many instances in Part 5 a clause is quoted and no narrative or conclusion is given. This is not good enough.

On many occasions, the Claim refers for its justification to the legal basis of Part 5 and that part refers back to the body of the claim narrative. It is circular and pointless. In failing to address systematically the express terms of the Contracts – when read together with the alleged implied term and why it is necessary for the agreement to be coherent and effective – such as:

(i) the requirements of the Contracts in circumstances of delay or additional cost;

(ii) the steps taken by FMEL to fulfil those requirements; and

(iii) a residual vacuum which the implied term must necessarily fill,

we find the legal analysis entirely empty.

14. Errors and omissions in claim document

At paragraphs 91 and 92 on page 15 of the Claim, you complain of interference with respect to "LOCH SEAFORTH" being used as a point of reference in the outfitting of the vessels. In the Specification it states: "*the accommodation throughout the vessel will be guided by that of Loch Seaforth*" (Section 54, Group 540). In this way, the "LOCH SEAFORTH" is expressly referenced in the Contract for this purpose. In fact, FMEL have regularly asked CMAL for designs and drawings of that vessel, in pursuance of this requirement, and CMAL have provided these to you in support. So it is wholly wrong to characterise this as somehow inappropriate or unwarranted or preferential engineering.

The discussion of 'Window 3' on pages 54 and 55 of the Claim appears based on a CDP issued in October 2017. No CDP was received by CMAL at that time. The reference to that programme within Appendix 3 appears at 3-053 (rather than 3-052) but more importantly there shows the CDP from June 2018. No programme was ever issued to CMAL with a delivery date of 10 September 2018.

15. Alternative causes of delay

Should you proceed to Court we reserve the right to explore alternative causes of delay to the project. These will include:

a) Delay by FMEL and its subcontractors

Clause 20(a) of the Contracts requires the Builder to provide a proposed detailed building and testing schedule within 21 days, that is, by 6 November 2015. The first CDP was issued to CMAL on 14 December 2015, more than five weeks late.

For both hulls 801 and 802, instalment no.2 was estimated for 12 November 2015 and was achieved on 18 January 2016 – over nine weeks late. From the outset, and occurring before the delays or interference which you allege, FMEL have been running behind. Countless examples could be given.

b) Unconventional management approach by FMEL

FMEL do not appear to have a single point of contact with responsibility to manage this project, which CMAL consider unusual in its experience. Rather, responsibility appears shared or passed between the design authority (Mr Alexander) and the procurement manager (Mr Kelso).

c) Under-resourcing by FMEL

We believe that insufficient manpower has been available for FMEL to fabricate and assemble the hulls in parallel as the Contracts anticipate. The sheer volume of personnel needed on the shop floor for a project of this scale has rarely been seen.

On occasion, we are aware that workforce has been depleted, rather than reinforced – you must take some responsibility for the slow pace of works where this factor alone is one of the most obvious causes preventing "regular and orderly" progress.

d) Choice of Classification Society

We make no criticism of the competence or capability of LR in the classification of LNG newbuild projects. We note nonetheless that the choice of LR was an election made by FMEL and was not dictated by the ITT.

Sub-group 1.8.1 of the tender specification, forming Schedule 2 of the ITT, shows Lloyd's Register as class and states: "*Alternatively, the following DNV equivalent notation may be accepted...*". Sub-group 1.9.1 also recognises this choice. Part I, Box 8 of the draft NEWBUILDCON, forming Schedule 3 of the ITT, shows the DNV notation "*OR LLOYDS REGISTER EQUIVALENT*".

In the event, FMEL were the only bidder that specified LR in their tender submission; one other specified for DNV and four bidders made no election as to Class at the time of their bid. Difficulties or delays which you may have experienced with LR are not attributable to CMAL.

e) Insufficient yard space

You state in the Claim that you resolved to build the vessels in sequence rather than in parallel, admittedly due to the constraints of space available. It may well be that it is the limitations of your slipway that was the dominant cause of that decision and all which it brings. Taking due consideration of the requirement for efficient access and movement between the hulls, plus allowance for craneage and scaffolding, you appear to have underestimated the space requirement to achieve progress of parallel builds commencing at midships as was always intended.

We believe that the original decision to build the hulls in parallel was a FMEL choice rather than a stipulation of the ITT, and so reserve our position to maintain that FMEL miscalculated its ability to fulfil the Contracts effectively upon the land available.

That in March 2017 you explored the outfitting of the accommodation for hull 802 at Inchgreen, and your evident use of third party storage facilities, suggests inadequate space available at the Newark Works. That should never have been necessary if the methodology held out in your bid, that there was room and space for construction of two vessels simultaneously, could be borne out in practice.

Separately, we understand that delays or difficulties arose following the construction of the Module Hall that prevented the efficient movement of blocks from the new hall to the 801 slip.

f) The effect of yard redevelopment

Separately, the impact of the redevelopment of the Newark Works upon the "regular and orderly" progress of the fabrication must be considered. While we recognise the potential long-term benefits of investment in the fabric of the facility, the imperative (at all times) in the planning and execution of the redevelopment should (at all costs) have been the unhindered progress of hulls 801 and 802. Again, our position here is reserved.

g) Premature launch of hull 801

Given the references in the Claim (and in the GAO Report, as an indicator of international practice) to the "1:3:8" rule, it may well be thought that the launch of hull 801 was premature. We suggest that the launch of hull 801 was motivated by extraneous factors for which CMAL is not responsible, including: the release of cash collateral by HCCI; and the desire for the publicity of apparent progress for the benefit of the general public, the CBC fund investors and certain Ministers.

h) Summary – alternative causes

Individually, and when compounded, we believe that errors or misjudgements of FMEL own creation caused the preponderance of the delays which you now attribute to CMAL "hindrance". In particular, the limitations of space to fabricate hulls 801 and 802 alongside one another seems the most obvious reason for your predicament.

16. Changes to Rules and Regulations

Part 5 mentions clause 26 of the Contracts. Do you contend that any changes to Class or Flag State requirements have a bearing here?

17. Technical elements

We are in the process of a detailed technical review of the allegations which you have made.

We do not address those here, given our concerns as to the lack of legal or contractual basis (express or implied) for the Claim and which we suggest is required first to be demonstrated before significant time and cost is appropriate to be incurred in the factual and technical rebuttal.

18. Quantum

Similarly, we shall review separately the documents offered by way of vouching quantum but which we also consider of secondary relevance to your explaining precisely why, standing the detailed express provisions of the Contracts, the implied term(s) for which you contend can be maintained.

In the meantime, it seems that a proper description and calculation of many significant elements of the Claim is wholly wanting.

19. Currency losses

Your claim in respect of currency losses which we see mentioned again in your letter of 20 December 2018 is preposterous. We refer you to our letter dated 13 July 2017. We shall hold you responsible for our legal costs on an agent and client basis should you pursue it further.

20. Missing or illegible content

Appendix 3-63 is missing from the bundle but we have our copy of the first meeting minutes.

Appendices 3-15, 3-16, 3-19 to 3-24 inclusive, 3-30, 3-32, 3-47 and 3-47 are reproduced so small in the bundle as to be barely legible. If your Claim is to proceed to Court, please provide full-size copies of each.

Appendices 3-35, 3-36, 3-42 to 3-44 inclusive and 3-49 appear heavily redacted. If you are to rely on them to any degree, please provide complete copies.

21. Conclusion

We have given your Claim bundle very careful consideration. We have consulted at length with our legal advisers and with Senior Counsel in relation to its content.

In summary, we would adopt the introductory description of the GAO Report (page 4) as accurately describing our position:

> *"In commercial shipbuilding, firm, fixed-price contracts are almost always used. This type of contract (1) provides for a price that is not subject to any adjustment on the basis of the contractor's experience in performing the contract and (2) places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss."*

You have persistently failed, in our correspondence exchanged in the past 18 months and now in the Claim before us, to address the provisions of the Contracts which together we signed.

We suggest that a claim in damages for breach of an alleged implied term must address in detail:

(i) the contract which the term is intended to supplement;

(ii) show no inconsistency between the alleged term and the contracts as written; and

(iii) show a vacuum which the term must necessarily fill in order to give the written agreement coherence or business efficacy.

We do not believe you have satisfied the requirements of such a claim. For this reason we make no more than high level comments upon the technical allegations or the limited quantification so far offered in support.

We would also adopt as appropriate to describe your Claim and circumstances, the following passage from the Philips Electronique Grand Public case from 1995, which was approved by the Supreme Court judgement in Marks and Spencer and by the Commercial Court of the Court of Session in the Zahid v. Duthus Group case in Scotland last year:

> *"The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong."*

Simply put, your Claim presents as various instances of fault by CMAL your own evident inability to design and build the vessels as required by the Contracts. That was and is the Builder's responsibility. The implied term for which you contend cannot shift the design responsibility from the Builder to the Buyer, nor contradict any of the express terms as written. Regrettably, the professed capabilities within your tender bid have been let down by mismanagement, insufficient resource and the physical limitations of your facility.

We believe that the Commercial Court will have no difficulty in reading the Claim for what it is – distraction and misdirection.

It is a retrospective and in some parts near fictitious attempt to reallocate blame for your own catalogue of failures to satisfy the essential requirements of the Specification. The narrative of the Claim bears no comparison to the raw facts of what has taken place, nor to your own project plans as made from the outset and those continuing beyond the time at which you allege a fundamental change in the way of working was somehow forced upon you.

This letter is intended to remain at a reasonably high level and indicative rather than exhaustive. It is also written without prejudice to the whole rights and pleas of CMAL and may not be referred to by you without our express permission. All rights of CMAL arising pursuant the Contracts are reserved.

We shall refer to this letter in relation to any issue of expenses arising hereafter.

Yours faithfully

Kevin Hobbs
Chief Executive Officer

for and on behalf of
Caledonian Maritime Assets Limited