

Case No: A3/2000/3519/A-C

Neutral Citation Number: [2002] EWCA Civ 89
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION,
ADMIRALTY COURT
(Mr Justice Colman)

Royal Courts of Justice
Strand,
London, WC2A 2LL

Thursday 31 January 2002

Before:

LORD JUSTICE SCHIEMANN
LADY JUSTICE HALE
and
LORD JUSTICE RIX

VOADEN

**Claimant/
Appellant**

- and -

CHAMPION

**Defendant/
Respondent**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Belinda Bucknall QC and Charles Davies (instructed by **Messrs Foot Anstey Sargent** for
the Claimant/Appellant)

Jervis Kay QC and Rachel Toney (instructed by **Messrs Donne Mileham & Haddock** for
the Defendant/Respondent)

Judgment
As Approved by the Court

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Lord Justice Rix:

1. On 28 October 1996 *Baltic Surveyor* was lost at her moorings in a storm. She had been moored alongside a steel pontoon in the Hamoaze at Plymouth near the naval dockyard. Both *Baltic Surveyor* and the pontoon were moored fore and aft to two buoys which were themselves anchored by chains to two substantial concrete blocks lying on the sea bed, a so-called trot mooring. *Baltic Surveyor* was lost because another vessel, *Timbuktu*, which had been moored on the other side of the pontoon, but negligently so, sank and in doing so holed *Baltic Surveyor* with her mast. The pontoon was dragged down with *Baltic Surveyor* and also lost. The trot mooring was damaged. All three, that is to say *Baltic Surveyor*, the pontoon and the trot mooring belonged to Ms Pamela Voaden, the claimant and, in this court, the appellant. She lived within sight of the mooring. Her partner, Mr Watkiss, had risked his life during the storm in an unsuccessful attempt to save *Timbuktu*.

2. Liability for Ms Voaden's loss was in due course accepted by the defendant, here the respondent, who had been the owner of *Timbuktu*. A defence based on statutory limitation was tried and abandoned mid-trial. The outstanding issues of quantum came before Mr Justice Colman (*The Baltic Surveyor* [2001] 1 Lloyd's Rep 739). He concluded that Ms Voaden was entitled to recover a total (plus interest) of £122,900, made up of the following items:

(1) The value of <i>Baltic Surveyor</i> :	£82,000
(2) The loss of the pontoon:	£16,000
(3) Reinstatement of the mooring:	£24,000
(4) Pilotage:	£ 900

No further issues arise on items (3) and (4) above: but items (1) and (2) are the subject of this appeal.

3. Ms Voaden submits that the judge was led into error as to item (1) because he was misinformed about the price and other circumstances of the sale of another yacht which he treated as the closest comparable for the purpose of valuing *Baltic Surveyor*. That other yacht was *Bluebird*. The judge believed that *Bluebird* had been sold in 1996 for £127,800. In fact, as will appear below, she sold in 1994 at a price of £142,000. Moreover, that price reflected her poor appearance and condition, about which the judge knew nothing. Ms Voaden submits that the judge should have found that *Baltic Surveyor*'s value was at least the price of £150,000 for which she was on offer at the time of her loss, if not more.

4. As to item (2), Ms Voaden submits that the judge erred in not valuing the pontoon at its replacement cost of £60,000. Instead he discounted that figure to £16,000 on the basis that a replacement pontoon would last for 30 years whereas the lost pontoon only had a remaining life in it of 8 years: thus $8/30$ of £60,000 = £16,000. Ms Voaden submits that no “new for old” deduction should have been made against the replacement cost, since only full replacement would have afforded her a complete indemnity, ie given her *restitutio in integrum*.
5. In addition Ms Voaden appeals a third issue, to the effect that the value of *Baltic Surveyor* plus interest from the time of loss does not compensate her for her loss of the extensive personal (ie private) use she had made of that vessel. She therefore seeks an additional sum to reflect that loss.
6. There are therefore three issues on this appeal. (1) Did the judge err in his assessment of the value of *Baltic Surveyor*? (2) Did he err in not giving replacement value for the lost pontoon? (3) Should he have awarded an additional sum in respect of loss of personal use?
7. The judge refused permission to appeal, but on application for permission being made to the court of appeal, Mance LJ granted it in relation to issues (2) and (3). As to issue (1), he adjourned the application to the full court since it drew in its trail an application to admit new evidence regarding the true facts of *Bluebird* and its sale. That application was opposed. This court decided to hear the new evidence and to admit it, and to grant permission to appeal (and if necessary an extension of time) in respect of this issue also. Its reasons for doing so have been reserved for this judgment.

The first issue: the value of Baltic Surveyor

8. The judge described the history of *Baltic Surveyor* in the following terms, which I am grateful to be able to set out:

“12. *BS* was an unusual boat. It was 29.5 metres long and had been built in 1943-4 in the Kroger Yard at Hamburg as a gunboat for the German Navy. The hull was designed for high speeds and torpedo warfare...

“13. The vessel had been acquired by Mr Watkiss, the partner of Ms Voaden, in about February/March 1976...Mr Watkiss then intended that the vessel should be converted, refurbished and fitted out for high class chartering. In the late 1970s and early 1980s, Mr Watkiss, therefore,...further converted *BS*.

This involved replacing the entire superstructure. All the internal bulkheads were replaced with steel watertight bulkheads with watertight doors. The existing sole was replaced so as to give greater headroom in the accommodation which was itself reconstructed to provide four double cabins and those bathrooms furnished with high quality woodwork. Central heating and air-conditioning was installed. A new gallery was fitted. The two 300 hp engines were rebuilt and many parts replaced. The vessel was also rewired and various fire safety devices and anti-pollution equipment was installed. Modern navigation equipment was installed.

“14. The conversion of the vessel to a high-class chartering vehicle was interrupted when Mr Watkiss’s companies collapsed and during this period maintenance was inadequate. Mr Watkiss re-acquired BS from the bank in 1987 and then set about making good the lapses in maintenance while in the bank’s hands and preparing her for chartering out. Thereafter the work was completed by December, 1987.

“15. In the course of that year Mr Watkiss had met Ms Voaden and a close relationship began...

“16. The evidence strongly suggests that the vessel was well maintained, both before it was taken over by the bank and after Mr Watkiss re-acquired it...

“22. In 1996, according to the evidence of Ms Voaden and Mr Watkiss, a substantial programme of refurbishment was completed. This included anti-fouling the hull, replacement of the sacrificial anodes, repainting of the boot topping and cove line, application to the hull [above] the cove line of very hard wearing paint acquired from the motor industry at substantial expense, repainting of the main deck, superstructure and mast and the interior paint work, stripping and restoring of varnished surfaces and brass-work. The interior furnishings were also cleaned or replaced. It was intended that the vessel would be in good condition for chartering when the summer began...”

9. In the meantime, however, Ms Voaden and Mr Watkiss had determined to put the vessel on the market. This was first done in April 1991, when she was priced at £325,000. Following an inspection out of the water at that time, the surveyor noted in his report that

the vessel had been converted to a high professional standard and that she had been well and regularly maintained. Nevertheless the vessel did not find a buyer. The recession was then at its depth. In July 1991 the price was reduced to £250,000, and in June 1992 to £195,000, but there were still no buyers.

10. At this time Mr Watkiss's health took a turn for the worse. Ms Voaden discussed the prospect of selling the vessel quickly, in case Mr Watkiss should die, for £165,000. Then in April 1993 the brokers, Berthon International ("Berthon"), were instructed to reduce the price to £150,000. Details were circulated at regular intervals and the vessel was advertised a number of times between September 1994 and April 1996, but without success, even though the market was recovering during this last period. The vessel remained on Berthon's books for sale at £150,000 up to her loss in October 1996. Throughout all this time only once had a prospective purchaser inspected the vessel. Otherwise there was no buyer interest and no offers. Even so, Ms Voaden and Mr Watkiss gave evidence that they would not have agreed to sell her for less than £250,000, such was their love of the vessel.
11. The judge heard valuation evidence from two experts, Mr Robin Berwick, who was called on behalf of Ms Voaden, and Mr Richard Ayers, who was called on behalf of the defendant. They agreed certain matters, as follows. First, that the BS was "of a specialist nature with a limited market potential". Next, that the conversion work initially undertaken by Mr Watkiss had been carried out to a reasonably high standard. Thirdly, that elderly timber yachts are always very difficult to sell, partly because of high maintenance costs, that historic interest did not lead to an increase of value although it could attract initial attention, and that it was impossible to predict when a buyer might be found. Market values had remained unchanged from 1996 to time of trial.
12. The experts also agreed as to the process for valuation, namely that a sound market value should be arrived at as between a willing seller and a willing buyer on the basis that the vessel was in serviceable condition with no substantial defects, and that if a buyer's survey would be likely to reveal significant defects such as would have led a buyer to ask for a reduced price, then the sound condition value would have to be reduced by the costs of repairing the defects.
13. The judge next turned to the evidence of the individual experts. Mr Berwick put forward a figure of £250,000, in part based on his understanding that the vessel's refurbishment in 1996 had amounted to a full refit, which the judge did not accept. Factors cited by Mr Berwick were the vessel's great character and high standard accommodation, her attractive repainted appearance, the improving economy, and the possibility of marketing her at a better boat centre than Plymouth.

14. Mr Ayers on the other hand was firmly of the view that the vessel's sound condition value was only between £110,000 and £125,000. That was based on the vessel's good cosmetic condition as shown in her 1989 brochure and as he remembered seeing her at her moorings within three years of her loss; but he was unaware of the work that had been done in 1996. He considered that the closest guide to her value was to be found in certain comparables which he had cited including *Bluebird* (but which Mr Berwick had found less helpful).
15. Mr Berwick had not originally relied on any comparables, but when questioned by the judge on the topic had referred to certain vessels, ranging in price from £250,000 (mistakenly put in the judgment below as \$250,000) up to £500,000 and \$750,000: but the judge regarded these as "of very limited assistance" (para 42). Mr Ayers' comparables the judge took more seriously, and in particular the *Bluebird*. First there were two British harbour defence launches built early in the Second World War, which at 73 feet in length were smaller than *Baltic Surveyor*. One had sold in 1997 for £25,000 and the other in 1998 for £40,000 (having been put on the market in 1995 at £94,000). However, their speed was only 12 knots against *Baltic Surveyor's* 18 knots, and their accommodation was much less spacious. Ultimately the judge paid less regard to these, saying that they were "clearly significantly less attractive than BS, having regard to their size, speed and accommodation" (para 41).
16. *Bluebird* was Mr Ayers' other comparable. The judge referred to her in the following terms.

"31. ...[Mr Ayers] also referred to *Bluebird*, originally owned by Sir Malcolm Campbell. This was of steel construction and, at 103 feet, very slightly longer than *BS*. She had been built in 1938 and restored at Falmouth to her original condition. She had five double cabins and could do 12½ knots. She was originally put on the market in 1991 at £250,000, but, although she was successfully chartered out, she was not sold until 1996 and then only for £127,800.

"38. ...He was not surprised that "Bluebird" had sold for half the asking price. In his view prices for such vessels had remained static since 1985 and there was a very small market for "classic" boats...

"40. In this connection, I attach some weight to the fate of the comparables, in particular *Bluebird*. On the evidence before me, notwithstanding its less impressive appearance than *BS*, it would have been materially easier to sell because it did not have a wooden hull and therefore maintenance outgoings would

have been significantly lower. Although it was a lower speed boat than *BS*, it had more accommodation. It also had some historical interest. Furthermore, it was under continuous charter and, therefore, I infer properly certificated. Although *BS* had been refurbished to a highly attractive standard, which would make it more marketable, this would have been unlikely to have affected the price by more than £10,000.”

17. It is clear that ultimately what swayed Colman J was his preference for the evidence of Mr Ayers over that of Mr Berwick and his reliance on *Bluebird* as a close and helpful comparable. He concluded this section of his judgement as follows:

“43. Moreover, I found Mr Berwick’s attempt to explain the increased valuation from an asking price of £150,000 in 1993 to £250,000 in 1996 very unconvincing. The basis for this increase was said to be the “refitting” of the vessel and her being marketed in the Mediterranean, yet Mr Berwick had never seen the vessel as refurbished and he did not appear to have experience of selling vessels such as this in the Mediterranean. Nor did he give evidence of sales of comparables in the Mediterranean. By contrast, I found Mr Ayres’s evidence on value to be somewhat more cogent and convincing than that of Mr Berwick. It has convinced me that, even having regard to the amount of time which wooden hull vessels could be expected to take to sell, Ms Voaden would have been extremely lucky to sell this vessel in 1996 subject to survey for more than £125,000. It is more probable that it would have attracted offers at £120,000 subject to survey, that is to say rather less than *Bluebird*, but very substantially more than the more expensive harbour defence motor launch. I, therefore, conclude that £120,000 was its subject to survey value at the time of the loss.”

18. The judge then went on to find that the cost of remedying defects in *Baltic Surveyor* that would have been found on a buyer’s survey and would have led to a renegotiation of her price was £38,000. There is no appeal from that finding. That is how the ultimate figure for the vessel’s value of £82,000 was arrived at.
19. It will be immediately apparent that in comparing the sound condition pre-survey value of *Baltic Surveyor* at £120,000 to *Bluebird*’s £127,800 (“that is to say rather less than “Bluebird”) the judge appears to have implicitly assumed that £127,800 was also a sound condition pre-survey value. Otherwise he would not have been comparing like with like,

which is the whole purpose of using a comparable, subject to making allowances where justified. In one sense it might be said that the judge ought not to have made that assumption, since the ultimate price of *Bluebird* was also likely to have been a post-survey price. If therefore he was going to be guided in any way by *Bluebird's* price, he should have added to it a figure representing the discount on sound condition value in respect of defects which a survey would have revealed. Of course, the judge had no evidence or insight into *Bluebird's* condition, other than that he appears to have been under the impression that it was in sound condition, for he found that she had been restored "to her original condition" and went on to remark that "it was under continuous charter and, therefore, I infer properly certificated" (at para 40). I would conclude, therefore, that the judge did assume that *Bluebird* was in sound condition, without any defects such as would have been revealed at survey and would have led to a need to discount her sound condition value: which is why he was prepared to use her sale price as a direct comparable for the sound condition value of *Baltic Surveyor*.

20. On behalf of Ms Voaden, Miss Belinda Bucknall QC seeks to attack the judge's conclusion by applying for the admission of new evidence from both the seller and the buyer of *Bluebird* to show (i) that she sold for £142,000 not £127,800, (ii) that she sold at that price in 1994, rather than in 1996 when the economy had improved, (iii) that her price reflected an "after survey" value and not a pre-survey sound condition value, and (iv) that the judge was mistaken to find that the vessel had been continuously chartered or was properly certificated.
21. On behalf of the respondent, Mr Jervis Kay QC submits that this new evidence should not be admitted. His primary submission is that because such evidence was available to the claimant and to her expert, Mr Berwick, prior to trial, it is too late to attempt to marshal it on appeal. He points out that *Bluebird* was mentioned in Mr Ayers' report and that there is no further evidence from Mr Berwick to explain what enquiries he made about her prior to trial or why, if he made none, it is not now too late to seek to remedy that failure. Mr Ayers' first report was exchanged in March 1999 and there were later "meetings" by telephone between the experts in November and early December 1999. Trial began on 15 December 1999 and concluded in January 2000.
22. Miss Bucknall's response was to rely on the whole history of the preparations for trial as well as on the lateness with which the importance of comparables in general and any documentary evidence about *Bluebird* in particular had emerged. A highly condensed account of her submission, to the extent that I would accept it, is as follows. When experts' reports had originally been exchanged in March 1999, trial was due to take place in the following month. At that time the defendant had no case on quantum other than to put the claimant to proof, and in those circumstances it was being maintained on behalf of Ms Voaden that the defendant was not entitled to call an expert. Mr Ayers' March 1999 report said that his researches had revealed "no directly comparable vessels" but he made brief references to the two defence motor launches and to *Bluebird*. His sound condition valuation (without specific reference to *Bluebird*) was between £110,000 and £125,000. The trial date was later adjourned, first to May and then to June 1999. Following the

raising of the wreck of *Baltic Surveyor* and its acquisition by *Timbuktu's* insurers in May 1999, the defendant sought to develop a new case to the effect that *Baltic Surveyor* had been in poor condition at the time of loss. On 21 May 1999 the defendant sought leave to adduce a further report from Mr Ayers in the form of a condition survey of the vessel. Leave was refused. On 25 May 1999 the defendant sought leave to adduce an amplified version of that further report from Mr Ayers: lack of time led to the adjournment of that application to the first day of trial. The trial commenced on 14 June 1999: it was intended to embrace all outstanding issues of limitation and quantum. The late Mr Geoffrey Brice QC sat as a deputy high court judge. He refused the defendant's application, and, responding to the submission that without a positive pleaded case on quantum the defendant would not be entitled to call any expert evidence, ordered the defendant to produce a pleading of his case on quantum. By consent, Mr Richard Medler, a naval architect, was ordered to prepare a single report for the court as to what if any defects in the vessel would have been apparent to a prospective buyer. On the ninth day of trial, the defendant withdrew his defence of limitation, leaving only quantum in issue: but there had been no time to reach quantum, which had been adjourned to a further date to be fixed. In September 1999 Mr Medler produced his report: he suggested a deduction of about £50,000 from the sound value to take account of negotiations which might result from a buyer's survey. A case management conference took place towards the end of October 1999. On behalf of the defendant it was indicated that he would seek to put in a new valuation expert's report to replace Mr Ayers' and that the new valuer would be putting forward an after survey figure of £50,000. A (complex) draft pleading of the defendant's case on quantum was put forward for the first time: the bottom line figure pleaded was about £50,000, and a large number of new points was raised. Their new expert on valuation was named as Mr Collis. His report was served on 28 October. He listed seventeen vessels by way of comparison, none of them *Bluebird*. At the CMC on 29 October Mr Brice decided that the new trial date of 13 December could not be fairly maintained if the Collis report were to be admitted. He therefore gave the defendant leave to serve his draft amendment in a limited form and offered them the option of curtailing the Collis report, or of reverting to Mr Ayers, who would be permitted to offer a supplementary report. The defendant chose the latter option. Mr Ayers' supplementary report was served on 9 November, also supporting the new figure of about £50,000. The defendant's counsel had expressly accepted Mr Medler's figure of £50,000. It appeared therefore that Mr Ayers' previous figure of £110,000 to £125,000 was no longer maintained. The amended defence on quantum merely stated, for relevant purposes, that the vessel's market value "having regard among other things to her charterability" was about £50,000. On 9 December 1999 the two experts completed their Schedule of Agreed Facts. This stated that it was agreed that the vessel was "of a specialist nature" but said nothing whatever about comparables. It ended by stating the experts' sound condition valuations, namely Mr Berwick's £250,000 and, for Mr Ayers, his original figure of £110,000 to £125,000. This was inconsistent with the defendant's now pleaded case on quantum.

23. The position down to trial, therefore, was that until 29 October 1999 the defendant had produced no pleaded case on quantum and thereafter his case had been put at about £50,000 based on express acceptance of Mr Medler's figure of £50,000 for the deduction

to be made from sound condition value. No reliance was pleaded on any comparable vessel. Mr Ayers' original report and figure had been overtaken by events. It was only on 9 December, a few days before trial, that that figure re-surfaced.

24. On 15 December Mr Berwick gave evidence. It was in the course of his evidence that it emerged that the judge was himself likely to attach considerable importance to comparables. He raised the matter with Mr Berwick (at the transcript for 15.12.99 at page 36). It was then that Mr Berwick mentioned the vessels with values of £250,000, £500,000 and \$750,000. In cross-examination by Mr Kay, Mr Berwick accepted that *Bluebird* could be used as a comparison by reason of her size, but that she "didn't have any of the charisma or character of the *Baltic Surveyor*" (at pp 42/3).
25. Mr Ayers did not give his evidence until 17 January 2000. In cross-examination he confirmed his report's evidence that he had found no directly comparable vessels, but went on to say that the closest he could get to a comparison was in the two defence launches and the *Bluebird*. The following exchange occurred (at pp 64/65 of the 17.1.00 transcript):

"Q. Would there have been any difficulty about getting the specifications for *Bluebird* and appending it to your report?

A. Well, there were difficulties at the time. I attempted to get them from Ancaster in Falmouth. Ancaster brokers in Falmouth changed hands around the time I was producing this report – it is too late to offer as any sort of evidence – I do now [have] with me here a copy of these brokerage details of the boat.

Q. You have got a copy?

A. I managed to get them on Friday morning because the new owner of Ancaster at Falmouth – it is very recent – allowed another Ancaster broker I know to give me a copy.

Q. When did you ask for that?

A. I have been asking for them ever since I started on this case."

26. What was then produced, at Miss Bucknall's request, was an invoice for the sale of *Bluebird* in the sum of £127,800 and particulars of sale at a price of £250,000. The invoice was dated 9 May 1995, but the date appears to have been overlooked: when the judge, who may never even have seen or retained copies of the documents then handed over to Miss Bucknall, came to write his judgment, he reproduced "1996" as the date of sale, as stated in Mr Ayers' original report.

27. What was also overlooked at that time was the fax line on the top of the documents handed over to Miss Bucknall, which was 11 January 2001, the Tuesday before Mr Ayers' evidence, rather than the Friday, which was when Mr Ayers said he had received the documents.
28. In these circumstances Miss Bucknall submitted that Mr Berwick had never really been in a position to verify Mr Ayers' evidence about *Bluebird*. On one view, it was never clear until the last moment that the defendant or Mr Ayers was relying on *Bluebird* as a comparable; on another view, there is no reason to think that if Mr Berwick had sought to obtain further details about her sale from the brokers concerned, he would have been any more successful than Mr Ayers. What was therefore of more importance was the credibility and importance of the new evidence.
29. As to that, the position is essentially as follows.
30. In a chance conversation between Mr Berwick and his company's managing director, it emerged that the buyer of *Bluebird* had approached his company, as a result of which an "Open Listing Agreement" had been made on 23 July 1997 to market the vessel at an asking price of £900,000. Although *Bluebird* under her new ownership was thus listed with Berthon, where Mr Berwick himself worked, he had not been concerned with motor yachts for about six years prior to trial, having transferred to the marketing of racing yachts. As a result of that conversation, Mr Berwick obtained his company's file on *Bluebird*. That led to an approach to Mr Robert Harvey-George, who had sold her to the current owner. He made a statement to the effect that he had bought the vessel in 1986, had refitted and chartered her. After a while, however, he stopped chartering to concentrate on selling the vessel, for she had become a financial drain on him, and he was under pressure from his bank. After 2/3 years he was approached by Captain Mastenbroek who offered him £142,000 on a take it or leave it basis. At that time *Bluebird* was on offer at £250,000. He felt he had no option but to accept. Captain Mastenbroek paid a deposit of 10%, £14,200. The contract was evidenced by an invoice dated 9 December 1994 in the sum of £142,000: to reflect the payment of the deposit, the typed figure of £142,000 had been crossed through in manuscript and replaced by the figure of £127,800 being the balance payable on completion. The deposit had been paid through the medium of a Dutch bank guarantee dated 17 November 1994 in the sum of £14,200, which was also exhibited (see also under para 37 below).
31. The Berthon file also revealed the following concerning *Bluebird* under her new ownership. Berthon's managing director, Ms Sue Grant, had inspected *Bluebird* at Chatham on 22 August 1997 and had filed a report. The vessel looked "aesthetically pretty tired", but she was certificated for unlimited seagoing. The top deck was "definitely hogged" and the aft deck was "pretty dodgy". The forepeak "absolutely stinks of decay and rust" and was clearly leaking fairly badly. Nevertheless, the engine room was "very good", and with her "enormous charm" she would "make a most amazing project for restoration". Whilst it was agreed that the asking price of £900,000 would be retained, her

view was that “there is no more than £300,000 worth of value in the yacht”. In November 1999 Captain Mastebroek had brought his listing with Berthon to an end.

32. Latest information pursued by Ms Voaden’s solicitors at the suggestion of Ms Grant revealed that *Bluebird* was currently listed with another broker at \$1.1 million.
33. That was the state of the new evidence at the time of Ms Voaden’s appellant’s notice. Subsequently, Captain Mastebroek made a witness statement as well. His more detailed account of the sale was as follows. He went to see *Bluebird* three times. He described her as “looking terrible. She was very rusty everywhere and had had little or no maintenance for years. Inside there were lots of leaks from the top deck planking. In other words, she looked like scrap!” But he fell in love with her lines and shape. He knew that she had been on the market for several years and concluded that she would only have been left in that condition if the owner were in serious financial difficulties. On the third visit he had the vessel surveyed over two days on a slipway. The hull was sound, but a big list of defects was developed which were costed at £287,000. Armed with that, he made Mr Harvey-George an offer of £142,000 on a take it or leave it basis. He paid a 10% deposit. It was only in May 1995 that he took possession. At that time *Bluebird* was not certificated for charter use at all. He did a “huge amount” of work on her: a schedule of such work was attached. This contained 42 items, including new railings, a new bulwark along part of the deck, de-rusting of the whole vessel, a new speedboat, 60% of wiring renewed, sprinkler installation throughout the vessel, new mechanical parts, renewal of all bathrooms and the master cabin, airconditioning of the whole vessel, new ship’s drawings and stability book, certification, etc.
34. A supplementary statement of Mr Harvey-George provided further details of the history of his ownership and of the growing difficulties of his financial circumstances. In June 1991 he gave a prospective buyer a three-month option to purchase *Bluebird* for £400,000, but it was not exercised.
35. The respondent opposed admission of this evidence: but he also made a counter application to the effect that the complete brokers’ (Ancasta Falmouth) file on the sale of *Bluebird* should be available to assist with the cross-examination of any witnesses which this court might allow to be called at the hearing and to be taken into account if the new evidence was admitted; and they also applied, if necessary, for the admission of a new statement from Mr Ayers. This was concerned with the means by which he had learned of the sale of *Bluebird*, through the manager of Ancasta Dartmouth, a Mr Box, who reported to him that she had been sold, through Ancasta Falmouth, for £127,800 in 1996. Mr Ayers had then contacted Ancasta Falmouth, but its manager did not wish to get involved in “legal activities”. It was only on “Friday 14th January 2000” that Mr Box had “faxed to me” the documents which he had produced in court on the following Monday, and which he identified in his statement as the invoice dated 9 December 1994 (showing £142,000 struck through in manuscript and replaced by £127,800, as produced by Mr Harvey-

George in his first statement, see para 30 above) and a page of particulars. He described this invoice as “consistent with the advice that I was given by Mr Box”. He had now, at the respondent’s solicitors’ request, followed the matter up at Ancasta Falmouth. A secretary agreed to retrieve the *Bluebird* file from archives to check whether the sale had in fact taken place in December 1994 for £142,000. The secretary subsequently faxed to him a sale agreement signed by Mr Harvey-George and Captain Mastebroek dated 12 May 1995 in the sum of £127,800. Mr Ayers’ statement was obviously intended to provide evidence with which to maintain the position that *Bluebird* had been sold for £127,800, if not in 1996 at any rate in May 1995. However, his statement also continued:

“If I had been advised that *Bluebird* had sold for £142,000 and not £127,800, and that she had been sold in December 1994 and not 1996, my conclusion as to the value of the *Baltic Surveyor* would not have altered.”

36. That statement was made on 13 February 2001. It would seem, however, that the background to its making took place at a slightly earlier period, because already on 19 December 2000 the respondent’s solicitors had sent a copy of the 12 May 1995 sale agreement to Ms Voaden’s solicitors “in accordance with the ongoing duty to disclose documents relevant to the proceedings”, explaining that it had come into the possession of Mr Ayers. It so happens that on 31 October 2000 Ms Voaden’s solicitors had faxed the manager of Ancasta Falmouth to request loan of its *Bluebird* file, and on 3 November the fax had been followed up by a telephone call. That had produced the sale particulars and a copy of a brochure (probably the chartering brochure), but the manager had advised that the remainder of the file had consisted of a few scraps of paper of no relevance. Following receipt, however, via Mr Ayers and the respondent’s solicitors of the sale agreement of 12 May 1995, Ms Voaden’s solicitors wrote again to Ancasta Falmouth on 21 December 2000, complaining of the impression of “one sided disclosure of information”. The upshot was that following a fax dated 22 January 2001 from Mr Harvey-George to Ancasta Falmouth requesting them to release the file to Ms Voaden’s solicitors, the file came into the possession of both firms, although at what precise time is not known.
37. On 30 January 2001 the respondent’s solicitors faxed Ancasta Falmouth to query a document which had been passed to them, which was the letter of guarantee which had been annexed to Mr Harvey-George’s statement (see para 30 above). This guarantee was in the amount of £14,200 dated 17 November 1994 from a Dutch bank, naming Captain Mastebroek as “Principal (Buyers)” and Ancasta Falmouth as “Beneficiaries (Sellers)”: under which the bank agreed unconditionally to pay that sum on demand, prior to expiry on 31 December 1994, if the Buyers had failed to fulfil their obligations under an agreement dated 7 November 1994 for the purchase of *Bluebird*. The respondent’s solicitors asked Falmouth Ancasta to confirm whether the £14,200 had been paid and whether the correct price at which the vessel had been sold was £142,000 or £127,800.

38. It was despite the evidence from Mr Harvey-George and the documents annexed to his statement, such as the invoice dated 9 December 1994 in the sum of £142,000 and the Dutch bank guarantee for £14,200 (the difference between which is of course £127,800), that Mr Ayers went on to make his statement on 13 February 2001.
39. Nevertheless, the complete Ancasta Falmouth file, at whatever time it came forward, together with Mr Harvey-George's and Captain Mastebroek's evidence, makes the position absolutely clear. An original sale agreement dated 14 November 1994 provided for the unconditional sale of *Bluebird* to Captain Mastebroek for £142,000, of which 10% was to be paid to the brokers as stakeholders and the balance was to be paid by 20 December. The guarantee of 17 November 1994 secured the deposit. On 20 December Ancasta Falmouth called on the bank guarantee. On 21 December the Dutch bank issued an advice of payment of the £14,200. On 9 May 1995 Mr Harvey-George issued a (new) invoice for £127,800 and a second sale agreement dated 12 May 1995 for £127,800 was entered into. This refers to a part payment of £40,000 being paid to the brokers with the balance to be paid in 14 days. A bill of sale for £127,800 was drawn up also dated 12 May 1995. Payment of the £40,000 (plus a further £2,193 in respect of fuel and luboil) was effected on 16 May. The balance was secured by a further bank guarantee for £87,800. All those documents are in the Ancasta Falmouth file. The only document not apparently in the file is Mr Harvey-George's original invoice dated 9 December 1994 for £142,000.
40. In the circumstances by the time of the hearing of this appeal there was no longer any attempt to suggest that the original sale had not been at £142,000. The evidence on the documents alone, quite apart from the witness statements of Mr Harvey-George and Captain Mastebroek, was that the vessel had originally been sold in November 1994 for £142,000. A letter dated 10 March 1995 from Mr Harvey-George to his bank, annexed to his supplementary witness statement, explains the position:
- “...as far as we know Cpn Maestebroek the Dutchman is still interested but he is having a problem selling his own boat and raising the money.”
41. There was therefore no doubt that an error had been made at trial in relation to the price and the date of the original sale of *Bluebird*.
42. As to *Bluebird's* condition at the time of sale there was some dispute, but on the basis of Mr Harvey-George's and Captain Mastebroek's evidence there could be no doubt at any rate that the judge had been in error to regard her as “under continuous charter and therefore, I infer, properly certificated”. She had not been under charter for a number of years prior to sale, and was not certificated. It follows that without such work as was necessary to obtain certificates permitting her use on charter, *Bluebird* was not capable of being profit earning, ie of earning sums with which to defray the expenses of ownership or of refurbishment. This was an important distinction as against *Baltic Surveyor*, which,

while not possessing a Code of Practice certificate (and not yet required to do so under the phasing in provisions for existing vessels) was permitted year by year by Captain Campbell of the Plymouth Harbour Master's office to operate as a charter vessel in the vicinity following an annual out-of-water inspection of the vessel by him personally (see paras 17/22 of the judgment).

43. The remaining question was as to *Bluebird's* general condition. As to that, it is clear that the judge had, not unreasonably enough, been influenced by the sale particulars which Mr Ayers had produced in the course of his cross-examination on 17 January 2000. Those particulars ended with a paragraph headed "Owners Comments". This spoke of the "enormous amount of work (and expense)" which had been put into restoring *Bluebird* and also said "Successfully chartered". Neither comment was false as far as it went, but each was by 1994 only historically true. The statement of Mr Harvey-George said that he had ceased to charter her some time before sale; the statement of Captain Mastebroek (who had no reason to decry the vessel, now that he owned her) spoke to her poor condition at the time of sale and also showed that his price was proposed and negotiated as an *after survey* rather than a sound condition price; and the report of Ms Grant of Berthon in August 1997 indicates that even after Captain Mastebroek's refurbishment there was still quite a bit to criticise in the vessel.

44. In the light of this material, this court determined to admit the new evidence proffered from both sides, to hear the witnesses to the extent that either side wished to cross-examine them, and, if necessary, to reassess the value of *Baltic Surveyor* for itself in the light of the case as a whole. The following reasons led the court to that decision.

45. The three strands of the *Ladd v. Marshall* [1954] 1 WLR 1489 criteria are well known, viz (1) that the evidence could not have been obtained with reasonable diligence for use at the trial; (2) that it is such that, if given, would probably have an important influence on the result of the case, although it need not be decisive; and (3) that it is such as is presumably to be believed. These criteria are still relevant to the new regime of the CPR, but need to be applied as guidelines rather than rules and subject to the overriding objective of dealing with cases justly. As to the first, I would acknowledge that the evidence might well have been obtained with reasonable diligence for use at the trial: for instance, even if he had had no leads to the *Bluebird* himself (and subsequent history was to show that merely mentioning her to his managing director would have opened up the trail) Mr Berwick might have pursued the matter with Mr Ayers. On the other hand, I accept the essence of Miss Bucknall's submission (see para 28 above) that Mr Berwick had had little reason to regard Mr Ayers' casual mention of *Bluebird* as important until trial itself and, perhaps more importantly, there is no reason to think that Mr Berwick would have succeeded with Ancasta Falmouth any further than Mr Ayers himself. Indeed, subsequent events narrated above would suggest that for reasons which remain obscure Mr Ayers was likely, if anything, to have received preferential treatment from his sources. This factor, therefore, may not point strongly in either direction.

46. As to factors (2) and (3), in my judgment these militate strongly in favour of admitting the new evidence. The evidence relating to the true price of the sale, its date, the lack of certification of *Bluebird* and her general condition is certainly credible, indeed it goes far beyond that test. Moreover it is difficult to think that it would not have had an important influence on the trial, having regard to the importance which Colman J plainly attributed to the matter of comparables and to the price of *Bluebird* in particular.
47. Having said that, I am very conscious that the assessment of the value of a chattel such as *Baltic Surveyor* is very much a matter for the judgment of the trial judge, and that if, on a matter as in one sense peripheral as a mere comparable, new evidence can be allowed to give rise to what is in effect a fresh mini-trial about a vessel *other than* the subject matter of the action, then there is a real danger of subverting the process of litigation and the importance to it of finality in pursuit of a will of the wisp masquerading as truth. That danger was present to the minds of the members of this court when it took the decision to admit the new evidence. Nevertheless, four factors in particular determined the court's ultimate decision. One was that, formally peripheral or not, it was clear that *Bluebird's* price of £127,800 was critical to the judge's decision ("that is to say rather less than "Bluebird"); secondly, it was manifestly clear that that price was in error; thirdly, subject to cross-examination it appeared quite likely that the *Bluebird* price was not a sound condition price as that concept was utilised by the judge and therefore that an adjustment of more than just 10% might be required; and fourthly, there was concern that the way in which the material produced by Mr Ayers at the last moment introduced an element of unfairness into the trial. After all, if Mr Ayers' hearsay advancement of his information about *Bluebird* was to be given the firm support of that documentary material (which he appears to have received on the previous Tuesday rather than the Friday), then it was to say the least unfortunate that the documents provided to him by Ancasta Falmouth supported a figure of £127,800 when, in the light of the complete file subsequently revealed, they could so easily have supported a figure of £142,000. There was a similar feeling of disquiet about the further documents which Mr Ayers obtained from Ancasta Falmouth for the purpose of his February 2001 statement: these again supported a figure of £127,800 when there was every reason by that time to suppose that a review of the file would have revealed the truth. In such circumstances it seemed to this court to be a matter of simple justice to permit Ms Voaden to present her new evidence and to permit Mr Ayers to explain why the new information did not affect his opinion of the value of *Baltic Surveyor*.
48. The cross-examination of Mr Harvey-George and Captain Mastenbroek showed them to be straightforward witnesses, with no axe to grind other than, perhaps, the expected pride of ownership. To the extent that there was any difference between their recollections of the negotiations, Captain Mastenbroek's more detailed account was to be preferred, from which it was clear that the price was negotiated post survey. As for the vessel's condition, Mr Harvey-George acknowledged there had been a lack of maintenance in the last year, the interiors were "tired", there was rust in many places, and leaks through the decks: there was need of shot-blasting, painting, work to decks, certification, but otherwise "it is in the eye of the beholder...If that is how Captain Mastenbroek saw it, I can't dispute it".

Captain Mastebroek said that he had spent about DFIs 6/700,000 on the vessel since her purchase, and he rejected Ms Grant's "£300,000 of value" as too low and at a time when he had not completed his refurbishment: he said that *Bluebird* was presently on the market for \$1.4 million. As for her condition at the time of purchase, he fully maintained his written evidence. She was seaworthy for the trip back to Holland, but "she still had to be turned back into a yacht". If, however, the vessel had been in good looking condition, he would have been willing to pay over £200,000 for her.

49. Mr Ayers, on the other hand, was an unsatisfactory witness. He had difficulty explaining why he remained sure that the documents he had produced at trial had reached him only on the previous Friday, rather than on the Tuesday as their fax line would suggest. He had difficulty explaining his failure in his February 2001 statement properly to identify the documents he had produced at trial (which admittedly he had not retained). In these circumstances he continued to maintain that the documents put to him as those produced by him at trial had been misidentified. He was unimpressive in maintaining his original sound condition valuation of £110,000 to £125,000 in the face of the evidence as it had developed since trial. When challenged with Captain Mastebroek's figure of over £200,000 for *Bluebird* if she had been in good looking condition, a figure which he disputed, he said that even the assumption that *Bluebird* had sold for £200,000 might make a difference of only £5,000. Why? Because of the two defence launch comparables. He seemed to have difficulty in understanding that £142,000 was a *post* survey price, but dismissed that factor on the basis that *Bluebird* was in good structural condition. I was not satisfied that Mr Ayers had sufficiently taken to heart his obligations as an independent expert. In the light of his evidence before this court I would not be inclined to place any weight on his opinion.
50. In these circumstances it fell to this court to reassess the value of *Baltic Surveyor* in the light of the new evidence. Mr Kay had submitted that the matter should have been remitted to the trial judge, but given the comparatively modest sums at stake in comparison with the costs of this litigation such a solution would have been disproportionate and unfair.
51. Miss Bucknall contended for £212,000 as the value in question, which she derived as £250,000 sound condition value less the judge's discount, based on Mr Medler's evidence, of £38,000. She submitted that in the light of the new evidence Mr Berwick's sound condition value of £250,000 was not, as the judge had thought, "inconceivable" at all. It matched comfortably with Captain Mastebroek's figure of over £200,000 for a *Bluebird* in good looking condition. If the judge had realised that Mr Ayers was an unsatisfactory witness, he would not have rejected Mr Berwick's evidence. The fact that *Baltic Surveyor* had been on the market for three years at £150,000 without a sale did not mean that her value was not greater than that: it merely meant that a buyer had not yet come along.

52. Mr Kay felt himself unable to say that the new evidence made *no* difference, but the question was: How much? His submission was no more than £5,000 to £10,000. He emphasised the following points. First and foremost, *Baltic Surveyor* had failed to sell at £150,000 for three years: some reduction in the asking price would therefore be necessary, say to £135,000, and then it would be inconceivable that a prospective buyer would not be able to negotiate a reduction on that: which would bring one back to Mr Ayers' range of £110/125,000 for a vessel in sound condition. Secondly, it must not be forgotten that the valuation is of *Baltic Surveyor*, not of *Bluebird*. Even if the latter was the closest available comparable, allowances had to be made for their differences. They were not the same animals. *Bluebird* had a beautiful interior, as her chartering brochure showed: she was a fabulous, 1930s, gentleman's yacht. *Baltic Surveyor*, however well converted, however good her condition, and however much loved she was by Ms Voaden, remained what she had always been, a small gunboat. Thirdly, what did the evidence about *Bluebird* ultimately reveal? There was nothing in the date of sale, whether that was viewed as November 1994 or May 1995 as distinct from 1996, for there was no evidence that this end of the market had moved at all since the 1980s to date. As for condition, the only real difference was that *Bluebird* lacked the good painted condition of *Baltic Surveyor*, but that the judge had found was only worth £10,000 (para 40).
53. In my judgment the right figure, in the light of all the evidence before this court and in an attempt to remain as faithful to the approach of the judge as the change of evidence permits, is £145,000. I would seek to rationalise that figure as follows.
54. First, it is within but reasonably close to the figure of £150,000 which is the value which Ms Voaden had herself placed on her when offering her for sale at that price. When account is taken of the great love which Ms Voaden had had for her yacht (discussed in greater detail below under the issue of loss of personal use), the fact that although Ms Voaden and her partner were minded to sell in order to buy something smaller she had not been an active seller for instance by visiting her brokers regularly (as Mr Harvey-George had done), and the fact that the vessel had not sold, or even received an offer, for the three years that she had been priced at that figure, it seems to me that there is no reason to think that £150,000 had undersold the value of the vessel. Of course, Ms Voaden, in pricing at £150,000, would have known the vessel as well as anyone, virtues and faults combined. In other words the price represents, in the judge's terms, a sound condition valuation of £188,000. Like the judge, I am not impressed by the post-casualty evidence by Ms Voaden and Mr Watkiss that they would not have sold for less than £250,000.
55. Secondly, £150,000 had been the value which Mr Berwick, writing on behalf of Berthon, had put on the vessel at the time of her loss in his letter to Mr Watkiss dated 18 November 1996. He then said:

“...The market has generally been quiet since, although it has been on an upturn more recently. Were the market to continue improving, ... it is quite possible *Baltic Surveyor* would be worth more than the £150,000 being asked for her now.

“Despite our best efforts, and advertising *Baltic Surveyor* on an irregular basis, but in prominent magazines, we haven’t produced a potential purchaser who really was likely to make an offer and buy the boat. On a normal assumption, this would mean that the boat was priced too high and that the likelihood of a buyer being found will have increased with the price reduction, but as *Baltic Surveyor* is very much a unique boat, this may very well not have been the case.

“When I last saw *Baltic Surveyor* earlier this year, apart from some cosmetic paintwork, she was in good condition, with an allowance being made for repainting in the price. All looked well mechanically and structurally as far as I could see...

“On the basis of this information, and the market being what it is, I would put her value on the market at the moment she went down, assuming she was in the condition as when I last saw her, to be £150,000...

“Were *Baltic Surveyor* to have been refitted, moved to a more prominent market area, for example the Med, and put back on the market then I’m sure an asking price in excess of £150,000 and probably £250,000 would have been attainable.”

56. I find that, against all the evidence I bear in mind, to read like an honest, independent, reasonably balanced and informed opinion. The difficulty for Mr Berwick was that when he came to produce his expert report in March 1999 he said this:

“I am informed that in 1996 she was put in the same excellent condition in which I first saw her in 1991. On that assumption, I have every confidence in estimating her value in the open market, selling on “as is where is” basis would have been approximately £250,000 as between a willing buyer and seller.”

57. The judge did not accept his explanation that at the time of his November 1996 letter he had not been aware of the extent of the 1996 refurbishment, nor did the judge accept that that refurbishment had amounted to a refit of the vessel to her 1991 condition. It seems to me that I am not justified in going behind those findings. Nevertheless, I remain impressed by the November 1996 letter. The £150,000 figure then put forward may not have taken account of all defects to be found on survey, but neither does it take account of the repainting and refurbishment work that had been done in 1996. Mr Berwick knew the vessel well, and I think I am entitled to take account of his November 1996 opinion, even if his subsequent evidence did not impress the judge.

58. Thirdly, my figure of £145,000 is comparable to *Bluebird’s* sale price of £142,000. It is clear that the judge regarded *Bluebird* as a helpful comparable. He pitched his sound

condition value of £120,000 just a little under what he then believed was *Bluebird's* sale price of £127,800. Of course, he did not know nearly as much about her as is now known. For one thing, he did not know that the *Bluebird* price, in fact £142,000, was a price negotiated post survey in the light of serious complaints about her condition, both cosmetic and otherwise. However, I do not regard that increase of knowledge as undermining the relevance of the comparison. *Bluebird* may have been bigger, and more stately, and capable with the required expenditure of creating, as Ms Grant put it, an amazing yacht. However, she was also older, slower, in poor condition, requiring very large expenditure even in excess of Captain Mastebroek's already substantial investment, uncertificated for chartering, and also requiring a much larger crew. Whereas *Baltic Surveyor*, save for the £38,000 of work which the judge found a survey would have revealed, was in immaculate condition. In these circumstances, I see these various factors as balancing themselves out and I would keep faith with the judge's essential exercise as seeing *Bluebird* as a helpful, indeed ultimately the only, comparable. But like must be compared with like, and it is the post survey value of *Baltic Surveyor* which must be matched to *Bluebird's* post survey price of £142,000.

59. Fourthly, however, I have not been much if at all influenced by Miss Bucknall's submissions regarding the date of *Bluebird's* sale or the fact that it may have been imposed on Mr Harvey-George by his financial difficulties. All that can be said about the difference between November 1994 and October 1996 is that the economy had been improving, but there is no evidence that the prices of historic boats had as yet been rising (see, for instance, Mr Berwick's November 1996 letter). What, however, an improving economy does do is to bring back buyers. Therefore that is a factor which Ms Voaden can pray in aid as part of an answer to the submission that a vessel which had failed to sell at £150,000 for three years could not be worth anything like her asking price.
60. I would therefore arrive at my figure of £145,000. It is closely comparable to *Bluebird's* selling price of £142,000, a little above rather than a little below to take account of the fact that Mr Harvey-George was a weak seller, whereas Ms Voaden was a more reluctant seller. It is also close to the then asking price of £150,000 and to Mr Berwick's figure of £150,000: but it allows a realistic gap of £5,000 to permit some negotiation.
61. It follows that on this point I would allow Ms Voaden's appeal to the extent of increasing her recovery from the £82,000 allowed by the judge to £145,000.

The second issue: loss of the pontoon

62. It will be recalled that the judge awarded £16,000 in respect of the pontoon, on the basis that a replacement would have cost £60,000 and had a life of 30 years but the old pontoon only had eight years life left in it. He therefore awarded 8/30ths of £60,000. He said (at para 106):

“There can, however, be no question of the recoverable damages being the full cost of such a replacement...Her loss is not the cost of replacing the lost property by a substantially more valuable pontoon, but the capital value of that which has been lost at the time and place of the loss. In a case where there is no market for similar old pontoons, as here, the relevant notional value may have to be arrived at by inference and extrapolation from the value of similar new pontoons simply by asking the question, If one would pay £x for a brand new pontoon with a life expectancy of possibly as much as 50 years, what would one pay for an old and well-worn pontoon in the last few years of its life? This approach is not inconsistent with the principle that there should not be a new for old deduction in collision cases where ships have been damaged and can be repaired, as in *The Gazelle* (1844) 2 W Rob (Adm) 279, for the basis of indemnity is quite different: in the case of a total loss the starting point is the capital value of that which has been lost, whereas in the case of damage to property, subject to acting reasonably to mitigate loss, the starting point is reinstatement.”

63. Miss Bucknall disputed the judge’s approach as being wrong in principle and ill-suited to the facts of the case. She pointed out that the judge assumed that Ms Voaden would have replaced the pontoon with just the kind of new pontoon which he went on to find would have cost £60,000 (“the appropriate approach is to assume that she would have replaced the pontoon with a new heavy duty pontoon...” *ibid*). She also drew attention to the fact that the judge awarded the full reinstatement cost of the trot mooring (£24,000), and suggested that the pontoon was an indispensable part of the mooring as a whole in the strong river tide. She then submitted that the primary measure of loss is the replacement cost. Normally where there is a market for what has been lost (here, a second hand pontoon nearing the end of its useful life), the claimant gets the market value. Where, however, there is no relevant market, the claimant should still get the replacement cost, and the fact of betterment is ignored. Otherwise there would not be true *restitutio in integrum*. Even a lighter weight pontoon of only 6mm steel would have cost £24,000 and the judge rejected that alternative as inadequate (para 104). The judge ignored evidence that if, against the odds, a second-hand heavy duty pontoon had become available, it would have cost £30,000. She accepted that her appeal was on a pure point of law and that she therefore had to show that the judge had gone wrong as a matter of principle, but she submitted that only one answer was possible. The judge’s award had not done justice to the claim.
64. Mr Kay’s submission supported the judge’s reasoning and conclusion. He referred to Mr Watkiss’ evidence that the pontoon had been purchased second-hand as long ago as 1983/4, and that it was heavily corroded and holed and had been filled with sealed plastic drums to maintain buoyancy. It was separate from the trot mooring, and had been treated

by the judge as a separate item of loss under a separate heading. Each end of *Baltic Surveyor*, as well as the pontoon, had been moored to the buoys: thus even without the pontoon the vessel could not swing in the river, and the pontoon was merely a convenience for boarding her. As such it could be a danger as well as a convenience, as was shown by the loss of *Timbaktu*. As for the question of principle, the judge had been right to distinguish cases of total loss from those of repair: the absence of a new for old deduction for betterment only occurred in cases of repair. A special case where an asset had to be replaced in order to maintain the earning of profits did not apply here. In any event, *Baltic Surveyor* had been lost and would not be replaced, other than perhaps by a smaller yacht: Ms Voaden had no need for the pontoon to be replaced. The authorities showed that in the absence of a market for a replacement the assessment of loss had to take account of all the circumstances, that each case turned ultimately on its own facts, and that the final result had to be guided by and tested against the need for reasonableness and the avoidance of absurdity.

65. These competing submissions render it necessary to consider the authorities relied on by the parties.

66. *The Gazelle* (1844) 2 Wm Rob 279 was one of the cases cited by the judge. It concerned the repair of a vessel damaged by collision. A new for old deduction of one third had been allowed in the registrar's report. Dr Lushington considered that deduction as a matter of principle. He distinguished cases of contract (eg in insurance) from those in tort, where the deduction was not to be taken. He gave his reason as follows (at 281):

“The right against the wrongdoer is for *restitutio in integrum*, and this restitution he is bound to make without calling upon the party injured to assist him in any way whatsoever. If the settlement of the indemnification is attended with any difficulty (and in those cases difficulties must and will frequently occur), the party at fault must bear the inconvenience. He has no right to fix this inconvenience upon the injured party; and if that party incidentally derives a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden, which the law will not place on him.”

67. In *The Harmonides* [1903] P 1 the vessel was totally lost, not damaged. Gorell Barnes J held that in the absence of a market value the test was what the vessel was fairly worth to her owners from a business point of view. He said (at 6):

“If one goes to the root of the matter, it is obvious that what the ship-owners lose if a vessel like this is run into and sunk is what it would cost to replace them in the position they were in before the accident. But where a ship like this has gone to the bottom you cannot, speaking from a business point of view,

replace them in the position they were in before, because you cannot replace the vessel which is at the bottom of the sea; you cannot buy another like her in the market; you cannot get another made immediately, and if you bought another ship she would be new, and consequently more valuable, because she would start as a new ship from that day, and, therefore, you would have to discount her value down. So that the real test, where there is no market, is, as counsel on both sides agree, what is the value to the owners, as a going concern, at the time the vessel was sunk? You cannot get at this with any great certainty, for you cannot get at it from the market value. Possibly, for such a ship at such a time there would be no buyers and she would have to be sold for old iron. You cannot deal with it like an ordinary commodity being sold every day. You must look at it and see what is the loss to the owners. It has been pointed out that you may look at the original cost, plus the money expended on her, and so forth. That is of assistance, but it is not complete assistance, because it is a rough, and ready method. You may look and see also how the ship is paying. That, however, is not a complete test, because you cannot be sure that the way she has been paying will continue. But one thing is absolutely certain – you cannot say the test is her market value.”

68. In *The Liesbosch* [1933] AC 449 Lord Wright in his famous speech cited *The Harmonides* with approval (at 466) and adopted the test as his own. That of course was also a case where a ship had been a total loss, but where a market replacement was available.

69. So far these authorities have been concerned with ships. The next authority, *Harbutt's "Plasticine" Ltd v. Wayne Tank and Pump Co Ltd* [1970] 1 QB 447, is not, nor is it a case in tort but in contract. The claimant's factory, an old five story mill, was destroyed by fire as a result of the defendant's design fault. The mill had to be replaced by a new, two story factory. The claimant was held entitled to the whole of the building cost without any new for old deduction. The alternative measure of damage contended for by the defendant was the diminution in value of the mill. Lord Denning MR said (at 468):

“The destruction of a building is different from the destruction of a chattel. If a second-hand car is destroyed, the owner only gets its value; because he can go into the market and get another second-hand car to replace it. He cannot charge the other party with the cost of replacing it with a new car. But when this mill was destroyed, the plasticine company had no choice. They were bound to replace it as soon as they could, not only to keep their business going, but also to mitigate the loss

of profit (for which they would be able to charge the defendant). They replaced it in the only possible way, without adding any extras. I think they should be allowed the cost of replacement. True it is that they got new for old; but I do not think the wrongdoer can diminish the claim on that account. If they had added extra accommodation or made extra improvements, they would have to give credit. But that is not this case.”

70. Widgery LJ regarded the case as one of repair rather than destruction, but said that the distinction between cost of repair and diminution in value of the damaged article as the appropriate measure of damage was not clearly defined (at 472). He went on to say (at 473):

“The plaintiffs rebuilt their factory to a substantially different design, and if this had involved expenditure beyond the cost of replacing the old, the difference might not have been recoverable, but there is no suggestion of this here. Nor do I accept that the plaintiffs must give credit under the heading of “betterment” for the fact that their new factory is modern in design and materials. To do so would be the equivalent of forcing the plaintiffs to invest their money in the modernising of their plant which might be highly inconvenient to them.”

Cross LJ reasoned to similar effect (at 476).

71. *CR Taylor (Wholesale) Ltd v. Hepworths Ltd* [1977] 1 WLR 659 was another case concerned with the destruction of a building by fire. The claim was made in tort. However, the claimant was holding the building purely for its development potential and had no intention of using it in its state prior to the fire; rather it intended to demolish it. Rebuilding was not therefore necessary to keep any business going, and May J held that a claim for reinstatement could not be made. He said (at 667):

“The various decided cases on each side of the line to which my attention has been drawn and to some of which I have referred in this judgment, reflect in my opinion merely the application in them of two basic principles of law to the facts of those various cases. These two basic principles are, first, that whatever damages are to be awarded against a tortfeasor or against a man who has broken a contract, then those damages shall be such as will, so far as money can, put the plaintiff in the same position as he would have been had the tort or breach of contract not occurred. But secondly, the damages to be awarded are to be

reasonable, that is as between the plaintiff on the one hand and the defendant on the other.”

72. In *Dodd Properties (Kent) Ltd v. Canterbury City Council* [1980] 1 WLR 433 at 456/7 Donaldson LJ said this:

“In the case of a tort causing damage to real property, this object [the principle of restitutio in integrum] is achieved by the application of one or other of two quite different measures of damage, or, occasionally, a combination of the two. The first is to take the capital value of the property in an undamaged state and to compare it with its value in a damaged state. The second is to take the cost of repair or reinstatement. Which is appropriate will depend upon a number of factors, such as the plaintiff’s future intentions as to the use of the property and the reasonableness of those intentions. If he reasonably intends to sell the property in its damaged state, clearly the diminution in capital value is the true measure of damage. If he reasonably intends to continue to occupy it and to repair the damage, clearly the cost of repairs is the true measure. And there may be in-between situations.”

73. *Bacon v. Cooper (Metals) Ltd* [1982] 1 All ER 397 concerned the repair of a damaged piece of machinery called a fragmentiser, used in the scrap metal trade. The claim was in contract against a defendant who had supplied unsuitable scrap to be fed into the machine, with the result that its rotor broke. The rotor had an average life of 7 years and could have been used for another 3¾ years if it had not been damaged. The rotor had to be replaced to enable the claimant to continue in business, and could only be replaced by a new rotor. The defendant contended that the claimant should only get that proportion of the cost of a new rotor which reflected the ratio of the outstanding life of the old rotor to the average life of such rotors. Cantley J held that the claimant was entitled to the full cost of a new rotor. He referred to both *The Gazelle* and to Widgery LJ’s reasoning in *Harbutt’s Plasticine* and merely added:

“In my view the law will not place this burden on the plaintiff to relieve the defendant from some of the unavoidable consequences of their wrong. I consider the plaintiff is entitled to recover the whole cost of the replacement rotor.”

74. *Dominion Mosaics and Tile Co Ltd v. Trafalgar Trucking Co Ltd* [1990] 2 All ER 246 was the other case referred to by Colman J. The claimant’s building was destroyed by fire as a result of the defendant’s negligence, a case in tort. It was impracticable to rebuild and so, to keep its business going the claimant bought a 36 year lease of another building with 20% more floor space. In the fire the claimant had lost some carpet-holding machines

which it had bought, almost new, for a bargain £13,500, but which would cost £65,000 to replace. It did not replace the machines, but claimed £65,000. The court of appeal held that it was entitled to succeed on both claims. Taylor LJ gave the leading judgment. He referred to the cases and extracts cited above beginning with *Harbutt's Plasticine* and continued to deal first with the claim for the cost of the lease. He said (at 252d):

“Although the ground area was somewhat greater at Waterden Road than their original premises, I consider that it falls within the sort of betterment for which no reduction should be made. It is not as case, as this court instanced in the *Harbutt's Plasticine* case, of a rebuilding deliberately incorporating enlargement, improvement or added facilities.”

75. He next turned to the case of the machines. The judge had awarded £13,500 “as a matter of reasonableness and fairness”, but this court awarded the full £65,000. Taylor LJ said (at 255c/f):

“Counsel’s arguments both before the judge and before us were based solely on the alternative awards of £13,500 or £65,000. No intermediate was canvassed. It was not suggested by the appellants, either in evidence or by submission, that there was any second-hand source of paternoster machines. The respondent’s evidence was that no such source existed to his knowledge. Where this is the case and the only way the owner of destroyed chattels can replace them is by buying new ones, the measure of damages is the cost of doing that, unless the result would be absurd...

“Had it been argued that in fairness to the appellants some discount from the £65,000 should have been allowed to reflect the depreciation of the machines in their few months of service, the point would have merited consideration. But no such submission was made nor was there any evidence on which to base an assessment of an appropriate discount. In these circumstances I consider that, of the two alternatives contended for, £65,000 was the proper sum.”

76. Stocker LJ added this comment on the question of the building (at 255j/256a):

“The cases cited seem to me clearly to point the distinction between a situation in which the proper and reasonable compensation for the plaintiff is diminution of the value of the building destroyed as damages on the one hand or reinstatement on the other, a distinction which, in most cases, will depend on

whether or not the building destroyed is a profit-making asset. Since in almost any other case if the plaintiff recovers as damages the diminution in value he will have been restored to his original position, reinstatement, or its equivalent, is only appropriate where such is the only reasonable method of compensating a plaintiff for future loss of profits derived from the asset destroyed.”

77. Finally, in *Ruxley Electronics and Construction Ltd v. Forsyth* [1996] AC 344 the House of Lords had to consider the case of a swimming-pool which had not been built in the diving area to the specified depth, a case of neither destruction nor damage, but where the choice nevertheless lay between remaking the pool at great expense or finding some other route to compensate the owner for what he had lost. It was of course a case in contract, not tort. It was found that there was no adverse effect on the value of the property and that it would be unreasonable to incur the cost of rebuilding. The judge therefore awarded nothing more than a sum of £2,500 for loss of amenity by way of general damages. The court of appeal split on the question, but by a majority awarded Mr Forsyth the cost of rebuilding. The House of Lords restored the decision of the judge, on the basis that reasonableness was to be considered as an important factor in assessing the loss and the need for reinstatement: see at 353A, 354F, 356C/359B, 359F and 361C, and 365F/372B. It would overburden this judgment to cite extensively from the speeches, and I run the alternative risk of lack of balance if I cite selectively: nevertheless I will do the latter. The main speeches were given by Lord Jauncey of Tullichettle and Lord Lloyd of Berwick. Lord Jauncey said (at 357E):

“Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party from which it follows that the reasonableness of an award of damages is to be linked directly to the loss sustained. If it is unreasonable in a particular case to award the cost of reinstatement it must be because the loss sustained does not extend to the need to reinstate.”

78. Lord Lloyd, after citing from “the celebrated judgment of Cardozo J...in *Jacob & Youngs v. Kent*, 129 N.E. 889” said (at 367B):

“Cardozo J.’s judgment is important because it establishes two principles, which I believe to be correct, and which are directly relevant to the present case; first, the cost of reinstatement is not the appropriate measure of damages if the expenditure would be out of all proportion to the benefit to be obtained, and, secondly, the appropriate measure of damages in such a case is the difference in value even though it would result in a nominal award.”

79. Lord Lloyd also said (at 369F/370A):

“It seems to me that in the light of these authorities...Mr McGuire was right when he submitted, and Dillon L.J. was right when he held, that mitigation is not the only area in which the concept of reasonableness has an impact on the law of damages.

“If the court takes the view that it would be unreasonable for the plaintiff to insist on reinstatement, as where, for example, the expense of the work involved would be out of all proportion to the benefit to be obtained, then the plaintiff will be confined to the difference in value. If the judge had assessed the difference in value in the present case at, say, £5,000, I have little doubt that the Court of Appeal would have taken that figure rather than the £21,560. The difficulty arises because the judge has, in the light of the expert evidence, assessed the difference in value as nil. But that cannot make reasonable what he has found to be unreasonable.”

80. Lord Lloyd also approved the decision in *Sealace Shipping Co Ltd v. Oceanvoice Ltd* [1991] 1 Lloyd’s Rep 120, the facts of which are closer to the present case. He said (at 371G/372B):

“I have confined my citation of authority to building cases, since that is the subject matter of the present dispute. But the principle that a plaintiff cannot always insist on being placed in the same physical position as if the contract had been performed, where to do so would be unreasonable, is not confined to building cases. In *Sealace Shipping Co. Ltd. V. Oceanvoice Ltd.* [1991] 1 Lloyd’s Rep. 120, there was a contract for the sale of a ship, including a spare propeller. When the ship was delivered there was no spare propeller. It was common ground that there was no market for second-hand propellers. So the only way of providing a spare propeller would have been to commission the manufacture of a new propeller at great expense. The arbitrator held that this would be unreasonable. Instead, he awarded the scrap value of the propeller, since that was all the buyer had actually lost by reason of the seller's breach. The arbitrator's decision was upheld in the Court of Appeal. Neill L.J. said, at p. 125:

“I can only read his award as meaning that he asked the question: what did these buyers really suffer as a result of the non-delivery of this spare propeller with this

vessel? And he gave the answer: they lost its scrap value which in circumstances was the only value which it had for them.””

81. A further matter discussed in the speeches was the relevance of the claimant’s intentions as to reinstatement. Lord Jauncey said (at 359D) that –

“Intention, or the lack of it, to reinstate can have relevance only to reasonableness and hence to the extent of the loss which has been sustained.”

And Lord Lloyd also said that intention was relevant to reasonableness, at any rate where the claimant does not intend to reinstate (at 372).

82. Lord Mustill added some thoughts with reference to the award of £2,500 on the particular role of contract in such circumstances: for instance at 360D he said –

“it was for the plaintiff to judge what performance he required in exchange for the price. The court should honour that choice. Pacta sunt servanda. If the appellant’s argument leads to the conclusion that in all cases like the present the employer is entitled to no more than nominal damages, the average householder would say that there must be something wrong with the law.”

83. In the light of these authorities and the principles discussed in them, I would draw the following conclusions. (1) Unless the parties are taken to have agreed otherwise, it is difficult to see that in the normal case of damage to or destruction of a chattel, it should make any difference whether the loss is caused by breach of contract or of tortious duty. The question remains, as Lord Blackburn said in *Livingstone v. Rawyards Coal Co* (1880) 5 App Cas 25 at 39, to find

“that sum of money which will put the party who has been injured, or has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.”

84. As Lord Lloyd emphasised in *Ruxley v. Forsyth* at 366B, after citing a similar statement of principle from Viscount Haldane LC in *Westinghouse Electric and Manufacturing Co Ltd v. Underground Electric Railways Co of London Ltd* [1912] AC 673 at 689

“Note that Lord Haldane does not say that the plaintiff is always to be placed in the same situation physically as if the contract had been performed, but in as good a position financially, so far as money can do it. This necessarily involves measuring the pecuniary loss which the plaintiff has in fact sustained.”

85. (2) It follows that cases where a claimant recovers *more than* he has lost, as will happen where betterment occurs without a new for old deduction, ought as a matter of principle to be exceptional. Recognised examples of such exceptions, again whether in contract or in tort does not seem to matter, are cases of the repair of chattels (*The Gazelle*, *Bacon v. Cooper*) and also the destruction of buildings provided that a replacement building is necessary to prevent the collapse of a business or loss of profits (*Harbutt's Plasticine*, *Dominion Mosaics v. Trafalgar Trucking*). It may well be, therefore, that the distinction between repair and total loss relied on by the judge is not definitive, and that the exceptions are to be explained on a more fact sensitive basis. A factor mentioned in some of these exceptional authorities is that otherwise the claimant is exposed to an inconvenience or burden or the expenditure of money from which the law ought to protect him. I suspect, however, that the true principle is that in the relevant cases the betterment has conferred no corresponding advantage on the claimant. Take the ordinary case of the repair of some part of a machine. Where only a new part can be fitted or is available, the betterment is likely to be purely nominal: for unless it can be posited that the machine will outlast the life left in the damaged part just before it was damaged, the betterment gives the claimant no advantage; and in most cases any such benefit is likely to be entirely speculative. So in the case of replacement buildings: the building may be new, but buildings are such potentially long-lived objects that the mere newness of a building may be entirely by the way. Of much more importance to a business owner is whether the replacement answers the needs of his business. Even where the replacement is of a moderately bigger size (*Dominion Mosaics v. Trafalgar Trucking*), in the absence of any reason for thinking that the bigger size is of direct benefit to the claimant, he has merely mitigated as best he can. If, however, it were to be shown that the bigger size (or some other aspect of betterment) were of real pecuniary advantage to the claimant, as where, for instance, he was able to sublet the 20% extra floor space he had obtained in his replacement building, I do not see why that should not have to be taken into account. It is after all a basic principle that where mitigation has brought measurable benefits to a claimant, he must give credit for them: see *British Westinghouse v. Underground Electric Railways*, where defective machines were replaced by new machines of superior efficiency.

86. (3) Where in the case of a second-hand chattel there is no market to replace what has been lost, a problem of betterment will often arise because there is no automatic market mechanism for measuring the loss. In physical terms, the only way to replace the loss is to buy new. But the basic principle is not physically to replace what the claimant has lost but

to replace it financially, to make him whole in financial terms. If he is given the price of a new chattel, he will be made more than whole. (The problem of the wrongly constructed swimming-pool is different, but analogous: the claimant is not entitled to specific performance, but to financial compensation for what he has lost.) The authorities suggest that prima facie such a case is not within the range of exceptional situations where betterment is ignored. On the contrary, the proper approach appears to be to make a fact specific review of what the claimant has lost and then attempt to put a financial figure on it as best one can: *The Harmonides* approved in *The Liesbosch*; *Sealace Shipping v. Oceanvoice* approved in *Ruxley v. Forsyth*.

87. (4) It is in any event an error to think in terms of the correct answer lying only at the extremes, such as, at one end, the cost of replacement from new. Several of the cases, even those which have on appeal been driven by the way in which the case has been argued to select the answer from a limited choice, have commented on this factor: *The Harmonides*, *Dominion Mosaics v. Trafalgar Trucking* and *Ruxley v. Forsyth* itself.
88. (5) In such circumstances the test of reasonableness has an important role to play. This role goes further than the proposition that replacement from new has to be *absurd* for it to be rejected as the measure of loss. The loss has to be measured, and where what is lost is old and second-hand and coming towards the end of its life, it is not prima facie to be measured by the cost of a brand-new chattel, even where the market cannot supply a closer replica of what has been lost; and where such a measure would not be a reasonable assessment of what has been lost, it should not be used. As May J said in *Taylor v. Hepworths*, cited with approval in *Dominion Mosaics v. Trafalgar Trucking* and (at 356G and 369G) in *Ruxley v. Forsyth*, damages ought to be reasonable as between claimant and defendant. I do not see why in the realm above all of remedies the common law cannot mould its principles flexibly to the needs of the situation, and as so often the test of reasonableness lies to hand as a useful tool. It may also be possible to speak in terms of proportionality, a closely analogous but not necessarily identical test: see Lord Lloyd in *Ruxley v. Forsyth* at 367B and 369H.
89. In the present case, the judge did not explicitly adopt a test of reasonableness: but he correctly saw that what had been lost was not the cost of replacing a substantially more valuable brand-new pontoon but the value of the old pontoon, and that the notional value of the latter would, in the absence of a relevant market, have to be arrived at by inference and extrapolation. His citation of *Dominion Mosaic v. Trafalgar Trucking* in this connection indicates that he had to mind all the principles discussed in that case, including the test of reasonableness and the opportunity of reflecting a depreciation from the cost of a new machine to reflect its status at the time of loss. It will be recalled that in *Dominion Mosaic* the machines were “nearly new” (at 255b); the fact that they had been bought at a price described as a “unique bargain” (at 254b) was clearly of little, if any, ultimate relevance; this court therefore had no other option than to adopt by default the only other value contended for, which was the cost of new machines; but even so the court went out of its way to say that, if contended for, a discount “in fairness to the

appellants” to reflect the depreciation of the machines in their few months of service would have “merited consideration” (at 255f). Miss Bucknall submitted that the principles exemplified by *Dominion Mosaic* supported her appeal: but in my judgment they point in the opposite direction. It seems to me that the approach adopted by the judge was correct in principle, and that to award £60,000 would have been unfair and unreasonable. In such circumstances it does not seem to me that it is open to this court to criticise the actual detail of the judge’s assessment. I note, however, that his choice of eight years as the outstanding life of the old pontoon and his decision that the life of a new pontoon should be taken as thirty rather than fifty years certainly were not unfavourable to Ms Voaden. Down to 7 June 1999 Ms Voaden’s claim in respect of the pontoon had been pleaded at £10,000.

90. I do not think that the comparison of the judge’s treatment of the trot mooring is of any assistance. The judge treated the trot mooring as a separate rather than an integral item. The dispute in that case merely revolved about the extent of the reinstatement necessary. In this respect the judge preferred the evidence of Ms Voaden’s expert, Mr Howard, to that of the respondent.

91. There was some discussion before this court as to the relevance of Ms Voaden’s intentions with regard to the replacement of the pontoon. Since the judge said that the appropriate approach was “to assume that she would have replaced the pontoon with a new heavy duty pontoon”, but otherwise made no other finding as to her intentions, I do not think it would be right on the appeal of this issue, which is accepted as being an appeal on a pure point of law, to allow the question of her intentions to enter into a discussion of the reasonableness of the judge’s approach. I would merely point out that the judge did not *find* that Ms Voaden would have reinstated the pontoon, but merely approached his task on the assumption that she would have done. That is certainly not unfavourable to her. For the rest, submissions from both sides indicated that the precise facts or inferences concerning Ms Voaden’s intentions would have been in dispute before this court, were this issue to have extended on appeal to embrace such factual matters.

92. I would therefore dismiss Ms Voaden’s appeal on the second issue.

The third issue: loss of personal use.

93. The judge considered Ms Voaden’s additional claims for loss of chartering income and loss of personal, ie private, use at paras 62/81. He referred to her personal use as “use of the BS as a holiday home and an office for the purpose of operating it as a charter vessel” (para 64). He considered *The Liesbosch*, which it was common ground was the leading authority on the subject, in some detail. There was no submission that his analysis of that case departed in any material way from that of this court in *Kuwait Airways Corporation v. Iraq Airways Co (Nos 4 and 5)* [2001] 3 WLR 537 at paras 587/598. In the light of his analysis the judge held that the claim for loss of chartering profits was “wrong in principle” (at para 76). He said:

“She was currently in a position analogous to Lord Wright’s seeking ship and, as such, her potential as a profit-earning engine in future chartering seasons would be reflected in her replacement value. If interest were to run on that sum from the date of the loss, the owner would be sufficiently compensated for loss of use during the period to the date on which the vessel could reasonably have been notionally replaced. There can, in principle, be no additional compensation for loss of personal use.”

94. There is no appeal (for permission was refused) in respect of loss of chartering income, only in respect of loss of personal use.
95. Ms Bucknall submitted that the judge’s reasoning was unclear and unsatisfactory, in that it suggested that the award of interest was attributable only to the loss of chartering income and thus there was no award at all for loss of personal use. *Baltic Surveyor* was a unique vessel and in any event Ms Voaden, as a legally aided claimant, was without funds to replace her until compensated by damages. When a private pleasure yacht is lost, her owner is entitled to two separate heads of damage: value *and* loss of use. It is just like the loss of a limb in personal injury cases: the claimant is entitled to general damages for pain and suffering *and* for loss of amenity, which may differ from person to person, plus loss of earnings. Interest on the other hand is merely compensation to reflect the fact that the claimant is kept out of his money until damages are paid. *The Liesbosch* itself (and earlier cases in Admiralty) reflected the fact that damages may be payable for loss of use, disturbance and prejudice going beyond the value of a vessel and interest. It followed therefore that if an owner makes little personal use of his boat, there is no additional payment to be made under this head of damages, but if he makes a lot of use of it, it is otherwise. On the facts, the evidence was that *Baltic Surveyor* gave enormous pleasure to Ms Voaden in all kinds of ways: the vessel could be seen and enjoyed where moored in the river from Ms Voaden’s home on land; she was a home from home giving different views back on to the land, a weekend retreat, a holiday home, a pride and joy.
96. In her submissions on the facts, Miss Bucknall came close to putting a case based not so much on loss of use as on the mental element of distress implicit in the deprivation of so much pleasure. However, I do not think it would be right to regard it in this light. The claim had never been pleaded or advanced in this way. On the contrary, in Ms Voaden’s original statement of claim this head of claim was confined to loss of chartering income, and even in the re-re-amended statement of claim the heads of claim were not divided, but an additional sentence under “Loss of use” stated: “For the avoidance of doubt, loss of use includes a reasonable sum to reflect loss of personal use.”

97. Perhaps the best example of the courts awarding a head of damages called “loss of amenity” outside personal injury was one interestingly enough not relied on by Miss Bucknall *in this context*, and that is *Ruxley v. Forsyth* itself. There, it will be recalled, the trial judge had held that the basic damages for the failure to build in accordance with specification were nominal, but he had awarded a sum of £2,500 in respect of loss of amenity. This award was not challenged in the House of Lords and Lord Jauncey therefore preferred to express no opinion about it (at 359E). It had not been in issue in the court of appeal either. Lord Lloyd explained the forensic reasons for the omission of any challenge to the award (at 373G/H), but went on to express the view, obiter, that it was supportable in principle provided that it was confined to a modest, almost conventional sum (at 374). However, that was a case in which the essential reason for the trial judge’s award was the absence of any other damages. In the present case, Ms Voaden has succeeded in obtaining a full award for the value of her lost yacht, together with 8% interest from the date of loss. On the increased award in this court of £145,000 the interest amounts alone to £11,600 per annum.

98. The House of Lords has recently upheld the concept of an award for loss of amenity in compensation of non-pecuniary loss arising out of breach of contract in *Farley v. Skinner* [2001] 3 WLR 899. The judge’s award there was £10,000, which Lord Steyn described as “at the very top end of what could possibly be regarded as appropriate damages” (at 911E). The award was recognised as exceptional, dependent on the facts that a major or important object of the contract was to provide pleasure or peace of mind (at 910B) or that the claimant had specifically requested the defendant to disclose whether the property might be affected by aircraft noise (at 916C), alternatively as arising where a claimant had been deprived of a contractual benefit and it is apparent that he has been deprived of something of value but the ordinary means of measuring the recoverable damages are inapplicable (at 928E). None of this, however, applies to the present case.

99. In my judgment there is nothing in *The Liesbosch* or in any of the earlier Admiralty cases cited by Miss Bucknall (but only in her skeleton) to justify in this case an award of more than £145,000 plus interest from the date of loss. As Lord Wright said in *The Liesbosch* at 464:

“...The true rule seems to be that the measure of damages in such cases is the value of the ship to her owner as a going concern at the time and place of her loss...”

100. It is true that that was said in the context of a commercial vessel; but then *Baltic Surveyor* was presented in Ms Voaden’s claim primarily as a charter-earning vessel, even though she may have been chartered out for only a comparatively very small part of the year. Even if she is presented primarily or even exclusively as a pleasure yacht, a chattel purely for personal use and enjoyment, that is precisely the use for which an owner pays

for her. The finding of her market value as such a yacht then brings with it as much (or as little) personal use as an owner wishes. Miss Bucknall accepted that the loss caused by the destruction of such a yacht (or any other chattel whose virtue lies in its attractiveness or private use) does not depend on how much or how little use her owner actually puts her to. A Hepplewhite chair, much as it might delight its owner by its uniqueness, irreplaceability or beauty, and however much difficulty the assessment of its value in the case of loss may cause, once that value has been found, is not to be made the subject of a further head of damage for loss of use depending on whether it is more or less used or more or less loved. As the Earl of Halsbury LC said in *The Mediana* [1900] AC 113 at 117 –

“When I say deprived of their vessel, I will not use the phrase “the use of their vessel”. What right has a wrongdoer to consider what use you are going to make of your vessel? More than one case has been put to illustrate this: for example the owner of a horse, or of a chair. Supposing a person took away a chair out of my room and kept it for twelve months, could anyone say you had the right to diminish the damages by shewing that I did not usually sit in that chair, or that there were plenty of other chairs in the room?”

101. It seems to me that that applies as much to a claimant who seeks to recover, on top of the full value to him of a lost chattel, and interest, a further head of loss for personal use.
102. It is of course different if, because of the circumstances in which a vessel is destroyed, special losses are suffered, as in *The Liesbosch* itself the claimant was entitled to the special losses caused by (a) the need to adapt, transport and insure a suitable replacement for the purposes of the claimant’s current employment of the dredger in a project at Patras and (b) the delay, disruption and loss caused by reason of the interruption of that project. But no such special losses have been claimed in this case.
103. One comes back to the figure of £145,000 as the value of *Baltic Surveyor*. Is there any reason to think that the way in which that figure has been arrived at fails fully to reflect “the real value” of that vessel to Ms Voaden (see *Kuwait Airways v. Iraq Airways* at para 595(v))? In my judgment, no. In the first place, the figure reflects (within £5,000) the price which Ms Voaden herself had set on the vessel’s sale, and the discount on that price reflects an anticipated margin for negotiation. Secondly, that price is intended to reflect, by comparison with *Bluebird*, the fact that *Baltic Surveyor* could be chartered out, whereas *Bluebird* could not be without considerable further expenditure. Thirdly, that price was intended to reflect the excellent appearance, paintwork and interiors of *Baltic Surveyor*, which were part of the attractiveness of the vessel. In those and the other circumstances considered above in arriving at a value for *Baltic Surveyor* by comparison with *Bluebird*, I do not think that there is anything under the heading of “loss of personal use” which has gone uncompensated.

104. It is true that between the time of loss and replacement Ms Voaden has had no use from *Baltic Surveyor* or any other yacht. But that is what the payment of interest from the date of loss is designed to compensate. On £145,000 that is £11,600 per year. If on the other hand *Baltic Surveyor* were in Ms Voaden's possession, she would not only lose that further compensation provided by the interest, but would also have all the expenses of insuring and maintaining the yacht. No special reason has been put forward why such interest (and the absence of the expense of ownership) does not meanwhile compensate Ms Voaden in full for her loss of use.

105. In my judgment therefore Ms Voaden's appeal on this third issue fails.

Conclusion

106. I would therefore allow Ms Voaden's appeal on the first issue to the extent of increasing the judge's award from £82,000 to £145,000, but otherwise dismiss her appeal.

Lady Justice Hale:

107. I agree.

Lord Justice Schiemann:

108. I also agree.

Order: Appeal allowed in part; order as minuted by counsel.

(Order does not form part of the approved judgment)