



Neutral citation no. [2019] EWHC 293 (Admlty)

Claim No. AD-2017-000136

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURT OF ENGLAND AND WALES

QUEEN'S BENCH DIVISION

ADMIRALTY COURT

Before Admiralty Registrar Jervis Kay QC

B E T W E E N:-

HOLLY ANN SCHOFIELD

Claimant

and

**(1) CEMAL GULTEPE
(2) ENIGMA BLUE LIMITED**

Defendants

Appearances

For the Claimant – Bernard Doherty instructed by Lanyon Bowdler Solicitors

For the Defendants – Sarah Prager instructed by Keystone Law

Hearing dates: 15th, 16th and 17th January 2019

JUDGMENT

(Handed down 15th February 2019)

Introduction

1. On 30th July 2013 Holly Schofield suffered serious injuries whilst swimming in the waters of Lindos Bay on the Island of Rhodes (“the bay”). The bay is situated about half

way down the Eastern side of Rhodes which is a Greek Island in the Dodecanese. At that time a rigid inflatable boat or RIB (“the tender”) which was under the control of the First Defendant was in the same bay. The RIB was the tender to the motor yacht “ENIGMA BLUE” (“Enigma”) which was lying in a Bay to the south of Lindos Bay, apparently known as Navarone Bay. The First Defendant was employed as skipper of the “Enigma” which is registered in the Isle of Man and owned by a company, the Second Defendant. It is probable that the Second Defendant was owned or controlled by members of the ‘King family’ who are resident in England. Mr and Mrs King were separated by the material time and Mrs King, her son, guests and the crew of the yacht were onboard the “Enigma”. However as the proceedings against Mrs King, originally the first defendant, have been discontinued the identity of those controlling the owning company is no longer material to the present claim.

2. The issue for the court is whether the Claimant’s injuries were caused by the tender and by the fault or negligence of the First Defendant for whom the Second Defendant would be vicariously liable. The Defendants deny that the tender was in collision with the Claimant. The Defendants’ case is that the injuries were probably caused by another unidentified boat or by a fall from the high rocks situated on the south side of the entrance to the bay which were a well known place from which people jumped into the sea.
3. The issues before the court are: (i) whether the tender collided with the Claimant and (ii) if so, whether the First Defendant was at fault and/or negligent in causing that to occur. Although there is no formal allegation of contributory negligence questions of whether it was appropriate for the Claimant to have been swimming in the probable area of the collision have been raised in relation to establishing fault.
4. The evidence presented was provided by witnesses who gave oral evidence and written evidence given to the local Coast Guard. I heard oral evidence for the Claimant from the Claimant herself, and from Helen Jane Smith, Louise Howard and Joanne Elizabeth Wakeman. Miss Wakeman gave evidence from New South Wales by video link. In addition the Claimant relied upon the record of the interview of Mr Melis by Coast Guard officers. Mr Melis is an Italian national who apparently works and resides in Belgium. Although he was questioned by the Coast Guard he has refused to provide further assistance by giving a witness statement or attending to give oral evidence. His witness statement has been tendered by the Claimant on the basis that he is beyond the seas and

cannot be compelled to attend to give his evidence. I also heard oral evidence on behalf of the Defendants from Mr Gultepe, the First Defendant, Mrs King and Mr David Magner.

5. At various places in the evidence references have been made to the 'police' however these are technically incorrect as the relevant authority throughout was the Hellenic Coast Guard which, as I am aware from my own experience in Greek waters, are the body which has regulatory jurisdiction over the coastal waters and harbours in Greece. They are a well organised, professional and uniformed service. It is not surprising that they have been referred to as 'police' but I have taken it that references to 'police' in this case should properly be considered as being references to the Coast Guard.
6. There is no dispute between the parties that at about 1830 on the 30th July 2013 the Claimant was in Lindos Bay, that she suffered serious injuries and that she was taken from the water by the First Defendant in the tender. There is a dispute as to where she was when she was taken from the water, how she came to be in the water, how she came to be injured and whether the injuries were caused by the tender. The nature of the pleaded injuries suffered by the Claimant are a haematoma to the brain, a large widening of the mediastinum, fracture to the sternum, left lung contusion with fractures of the ninth, eleventh and twelfth ribs on the left, left haemothorax which required drainage, a fracture of the left transverse process of the L5 vertebra, multiple fracture of the left ilium, a large haematoma of the left iliopsoas, an aortic injury, ischemia of the distal phalanx of the left index finger. She has been left with significant scarring, Cholecystitis and Phlebitis. After she was taken from the water she was taken to the shore, transferred to an ambulance and taken to hospital in Rhodes. Thereafter she was placed in an induced coma, transferred to a hospital in Athens and then repatriated to the Brighton and Sussex University Hospital. She subsequently went to another hospital in Sussex to further her recovery. The medical evidence is that the medical assistance she received was timely and well performed. I gained the clear impression that her injuries were very serious, that she was well looked after and that if she had not been she probably would not have survived her injuries. As it is the Claimant has made a good recovery. The fact that she was seriously injured is not in dispute although there is a dispute as to how her injuries were caused.
7. I was provided with Admiralty chart no. 1532 which includes Ormos Lindou or Lindos Bay. The bay faces towards the open sea to the East. The distance between the headland

to the North and the headland to the South at the entrance is about 2 cables. The southern headland has higher rocks from which swimmers are known to jump into the water. Further into the bay are lower rocks apparently known as the 'hot rocks' because they are a good place for sunbathing and a place from which to swim. Yet further into the bay there is a stone jetty which extends northward into the bay. At the outer end is a wooden jetty and, so it appears, a wooden pontoon. The jetty and the pontoon are used as a mooring place for, inter alia, boats including glass bottom tourist excursion boats. From that jetty a beach runs round the head of bay to the South West. There is a Coast Guard office about half way along the beach and another concrete jetty at the far, or Northern, end of that beach. To the North West there is a smaller bay in which yachts apparently moor stern to the shore. Vessels also anchor in the bay and, from the photographs, there appear to be a few permanent boat moorings in the bay. It was common ground that it is an attractive place which is well frequented by visiting vessels and that waters of the bay are quite busy.

The evidence of fact called on behalf of the Claimant

8. *The Claimant.* Her evidence was set out in signed witness statements dated 26th October 2017, 10th April 2018 and 20th April 2018. There was also an unsigned statement which bears the year date 2015. She also gave oral evidence under cross examination. The material effect of her evidence was as follows. At the material time she was residing and working in Lindos. Most evenings she would go to the Bay to swim. She stated that she had previously swum across the bay but only in company and never alone. She stated that it was her usual practice to swim from the area known as the 'hot rocks' and that she had never jumped from the higher rocks on the South side of the entrance to Bay. Her last clear recollection prior to the accident was on the evening before it occurred. Initially she had no recollection of the incident in which she was injured herself but when she was in hospital in England in the Royal Sussex Hospital some memories returned to her. The memories came back to her as one continuous episode. She then remembered the pain and terror of the accident, the sensation of being hit and "*seeing an open air dinghy type vessel with a man with his back to her appearing oblivious to what had happened*". At that point she called out. She remembers being dragged from the water and recalls seeing Jo (that is Joanne Wakeman) on the boat. She has said that these memories came back to her in one session and not over a period of time although she additionally refers to

reading an article which triggered a memory of the noise she had been making whilst in the tender. Miss Schofield gave her evidence in a clear and straightforward manner and I was impressed by her as a witness of truth. I have no doubt that she believes her memories are genuine and that they were not consciously reconstructed by her in order to improve her case. Miss Prager did not submit otherwise but she questions the extent to which reliance can be placed upon those memories, if any. I shall consider that aspect below.

9. *Joanne Wakeman*. She has provided a witness statement dated 12th October 2017. She gave oral evidence by video link from New South Wales. There were some technical difficulties with the link as contact was lost on a number of occasions. However they were not such as to detract materially from her evidence and I was able to obtain a clear appreciation of her evidence and her demeanour. I consider that she was an honest and reliable witness with a good recollection of the events. The effect of her evidence was that she was working in Lindos on a glass bottomed tourist boat, was a friend of the Claimant and had seen her walking in the direction of the hot rocks to go swimming. She herself was walking some dogs for another friend and was in the area of the beach close to the place where the stone jetty joins the land to the West of the 'hot rocks'. She did not see the incident in which the Claimant was injured but her attention was drawn to it by an Italian lady asking for help. That lady came from the direction of the hot rocks and said that someone had been hit by a boat. She then saw what was, in fact, the tender approaching the jetty with the Claimant lying over it. The driver of the tender was asking what he should do. There was a young boy in the boat. At that time someone onboard the glassboat was calling the 'police' by vhf radio. Miss Wakeman says that she swam about 20 metres to the tender, pulled herself onboard and sought to comfort the Claimant who was in a state of shock. She said that she also tried to calm the driver who was in shock and said "I did not see her, I did not see her" and was asking where he should go. At that time the Claimant was in forward part of the tender in front of the driver. Although it was put to her that she did not get into the tender it was Miss Wakeman's evidence that she did and remained in it whilst the driver of the tender went to the beach at the head of the South West part of the bay. The captain of the glass bottom boat had told the tender to go to the beach at Lindos. That was done and there was a police officer on the beach 'who told us to go to the jetty on the main beach'. That was the concrete jetty at the northern end of the beach. Once there people assisted in taking the Claimant to an ambulance but

she, Miss Wakeman, was not allowed to go in the ambulance with the Claimant. She believes that the Claimant's beach bag was put into the ambulance with her. She said that the following day she sought out the Italian, Mr Melis, who spoke very good English. The Italian did not want to be involved but she escorted him to the police station and remained whilst he gave a statement which she was asked by the policeman to sign and did so. It is to be noted that the Defendant challenges whether Miss Wakeman got into the tender at all and Mrs King who gave evidence for the Defendant expressed doubt about whether Miss Wakeman could have pulled herself from the water into the tender because she herself had never managed it without help. In my view that was not a satisfactory reason for disbelieving Miss Wakeman's evidence. She gave her evidence in a frank and clear way and I accept the truth of her evidence that she entered the tender and remained in it until the tender reached the stone jetty where the Claimant was taken to the ambulance.

10. *Miss Louise Howard*. She has provided a witness statement dated 19th April 2018. She has given evidence with respect to the making of the draft and final statement of the Claimant. She also stated that she had made contact with Mr Melis but that he had made it clear that he did not want to be involved and refused to assist.
11. *Miss Helen Smith*. She has provided a witness statement dated 12th May 2015. Her evidence was that she was once employed by the Claimant's solicitors, gave evidence that she had been visiting Lindos and been asked to take photographs of Lindos Bay which she identified. She had no direct connection with the conduct of the claim.
12. In addition, the Claimant served Notice of Intention to rely on the witness statement to the Lindos Port Authority. Mr Melis did not make a statement or attend to give oral evidence at the trial. However, there is a record of the sworn examination of Mr Melis by a Coastguard Officer on the 31st July 2013. The record is made of the questions he was asked and the answers he gave. That took place in the presence of Miss Wakeman. It contains the following:

“QUESTION: What do you know about the accident which took place on 30/07/2013 at the bay of Lindos? ANSWER: On 30/07/2015 (sic), at around 18:40 and while I was at the rocky area approximately fifty metres away from the wooden port of Lindos, I was looking at the bay of Lindos and noticed a person swimming, while at the same time an inflatable boat was moving towards her that person.

QUESTION: What did you notice when the boat approached that person? ANSWER: When the boat crossed the person in question. I heard a dull sound as if there had been a collision. Immediately after this I heard voices and realised that the person who was in the water was hurt and needed help.

QUESTION: What did you notice afterwards? ANSWER: The man who was on the boat with a child went back, towards the woman and tried to pull her onboard. However they couldn't transfer her inside the boat and, keeping her partially mounted on the boat, they took her to the wooden dock of Lindos.

QUESTION: What happened next? ANSWER: From what I was told, the woman was taken to the central beach, where an ambulance collected her.

QUESTION: When the incident took place, what was the boat's distance from the shore? ANSWER: Approximately 50-60 metres.

QUESTION: Do you believe that the boat hit the woman? ANSWER: What I can say is that, when the boat came next to the woman, I heard the sound, but I cannot be absolutely sure because of the distance.

QUESTION: At what speed was the boat travelling? ANSWER: I am not aware at what speed the boats need be travelling in sea. Perhaps the boat was travelling with a slightly faster speed than it should.

QUESTION: Is there anything else you would like to add? ANSWER: I have nothing to add and sign.

The account above is taken from the translation of the document set out in Greek. The Defendant also put forward a translation. Although there is a difference of some of precise words used I consider that there is no material difference in the effective meaning of the two documents.

The evidence of fact called on behalf of the Defendants.

13. *The First Defendant, Mr Cemal Gultepe.* The first record of his evidence is contained in the Coast Guard record of his unsworn statement made through an interpreter made on the 31st July 2013 at 0120. He was warned of his rights under the Greek Code of Criminal

Procedure which included the right to appear with an attorney “*to wholly or partly refuse to provide explanations, to take up to 48 hours to provide such . . .*”. The warning appears to be very similar to the caution which a person under suspicion of having committed an offence in England and Wales might be expected to receive before being questioned. Mr Gultepe stated that he did not wish to invoke the rights explained to him. There are two translations of the original Greek version. Although there are some differences in the wording these only relate to slightly different uses of words in the translation. In my judgment any differences are immaterial and the language used in both translations carries the same meaning and effect. For the present purposes I have relied upon the translation provided by the Claimant. The effect of Mr Gultepe’s replies conveys the following. He was the captain of the British flagged yacht Enigma. She had come to Rhodes from Marmaris in Turkey on the 27th July 2013 with her crew of 4 hands all told where she took onboard 4 members of the ‘owner’s family’. On the 30th July 2013 the Enigma was in the area of Psaltos where she was anchored and at about 1800 to 1830 he took the tender, with the owner’s 8 year old son onboard, to Lindos Bay to find a safe anchorage for the night. The tender entered and toured around the bay at Lindos keeping a safe distance from the shore. As they were exiting the bay he heard a shout “*Oh God!*” in English. He immediately looked back and saw a woman lying on her back of the surface of the sea. She came to the side of the tender and he helped her climb onto the tender in order to take her ashore. He moved towards another boat, moored nearby, and asked them to call an ambulance and the Port authority. “*At this place, there was also a friend of the injured person who came on the tender too.*” Then he moved to the “*other beach of Lindos*”, where the ambulance could collect the woman. He stated that the woman was talking normally to her friend and the only injury visible was a bruise on her buttocks. She was only wearing the lower part of her swimwear and had no blood or abrasions on her body. She was disembarked on the beach and an ambulance which arrived a few minutes later arrived. He stated that the tender was travelling at 6-7 knots and “*very carefully as I was inside the bay and had a child on the tender. Our distance from the shore was approximately sixty (60) meters and above. We were travelling at the centre of the bay*”. Before hearing the voice he saw “*absolutely nothing*”. He was standing in the boat and had full visibility. He stated: “*I am sure that, if the woman was at the surface of the sea, I would have seen her; the sea and the bay were completely calm. However, I didn’t hear, nor did I understand touching/hitting anything. If I hadn’t heard the voice, I wouldn’t have realised that something had happened*”. He stated that he was experienced

having been working at sea for 25 years and for 17 as a skipper. He had been working on this boat for 7 years, he had not consumed alcohol which was proved by a blood test. In answer to the question: *Is there anything else you would like to add?* He answered: *“I would like to insist on the fact that I am deeply sorry for what happened to the woman, but I honestly did everything possible to avoid such an event. My speed was very low, I was travelling in the centre of the bay, far away from the shore and had full visibility of the sea. Moreover, as soon as I heard the voice, I turned back immediately to find out what had happened and help. I have nothing more to add and sign.”*

14. Mr Gultepe also provided a witness statement dated the 23rd October 2017. In essence the contents accorded with the examination referred to above but there are some material differences or additions which were: The Enigma was anchored in Navarone Bay prior to Mr Gultepe leaving her in the tender to go to Lindos Bay to look for a safe place to anchor for the night. The tender was travelling at 4-5 knots because he had a child onboard and he was aware of the speed limits that apply. When he reached Lindos Bay he took a loop around the bay keeping outside the buoys which indicate swimming areas. There were 15-20 yachts in the area including a 40 metre yacht. Having been in the Bay for about 10 minutes they were just starting their return to Navarone Bay. As he was leaving and almost out of the Bay he heard words shouted in English, *“Help”* or *“Oh My God”*. He then states: *“I turned the RIB around and went towards the sound. I saw ahead of me about 50 metres away that there was a lady in the water. It took me 30 seconds to reach her. The lady was in the middle of the bay. She was not in the swimmers area at all. She was a long way outside that area. She was out in the middle of the Bay towards open sea. She was lying on her back. I went over to her because of her shout. She was not swimming. . . When I went to help her she was saying she wanted to go home. I was not sure if she had fallen from a boat or nearby rocks or whether she had been swimming”*. He has also stated that she was wearing a two piece bikini, he pulled her onboard the RIB, he didn't allow the owners' son to help because Mr Gultepe was afraid he might be hurt. He further states: *“There were no swimmers near to where I found the lady. We were travelling outside the buoys marking the swimmers area. There is a place called the “Rocks” where there was a group of young people jumping to the sea. The Claimant was about 200 metres away from the rocks. She was in the middle of the bay. . . She was far beyond the signs where it says ‘no swimming beyond this point’*. He states that: *“Outside the swimming area there were lots of boats, jet skis and small motorised boats that can be*

hired for a day or for a few hours. I cannot remember whether we passed any other moving boats or vessels before we heard the shouts from the Claimant in the water. She was in the middle of the bay when I saw her. There were lots of boats around but not too close to her I think.” He then states: “After I managed to help the Claimant into the RIB I went to look for somewhere to land to get her some help. . . . As I approached Lindos Bay it was full of jet skis, boats and other RIBs. I cannot say whether this was normal, because it is not a place I go to often. It seemed fairly busy to me at the time. It was high ‘peak’ season.” He states that he passed the wooden jetty which “was too high”, he did not have a phone or radio so as soon as he approached the beach he shouted for help, when he arrived at the concrete jetty the Port Police and an ambulance were waiting, there were a lot of people on the beach who tried to talk to the Claimant. He says: “I recall a lady who appeared to be a friend of the Claimant (I do not know her name)”. The Claimant was put into the ambulance and left. He also refers to the Port Police wanting to see the Engima’s documentation. He and they went back to Enigma and the documentation was shown to them. Thereafter he went to the police station in Lindos Bay for questioning. Then he went to Hospital and gave a blood test. He was interviewed until around 3pm. He was not given a copy of the statement or the alcohol tests. He says that most of the officers were kind and friendly and reassuring save for one who became angry and shouted that he must have hit the lady. Mr Gultepe insisted that he had saved her from the water. He says that later in the evening the Port Police looked at some television screens in the office which showed images from Lindos Bay. He states that after the officers had looked at those images: “the officer was satisfied that I had nothing to do with the Claimant’s injuries and that I had only been the rescuer as I had told them. His attitude towards me immediately changed and I was told I was free to go back to the yacht. I cannot remember how long it took for the tests in the hospital but I was finally allowed to go back to the Yacht at about 3 am.” He says that Port Police visited the yacht the following day and told him that they were happy that I had nothing to do with the incident. With respect to the translation of the statement to the Port Authorities he says that he does not agree with that statement and that there are matters which are incorrect, namely: (i) that no one else got into the boat before it got to the shore where ambulance was; (ii) that he did not stop at another yacht and pick up the Claimant’s friend. “She never travelled with Us in the RIB to the shore”; (iii) that when he said “I am sorry about what happened to the lady” he just meant that he felt sorry for her. He did not tell the police that he had injured her but repeatedly stated that he had rescued her. He complains

that the Port Police have made no reference to his statements that he had rescued her and make it look as though it was his fault; (iv) he does not understand why the Port Police have made no reference to the camera evidence.

15. On examination in chief by Miss Prager, Mr Gultepe said, with reference to paragraph 21 of his witness statement which has the reference to the swimming areas and the signs which state '*no swimming beyond this point*', *I have been in Lindos Bay many times*". He stated that he picked up the lady 150 metres from the shore and that the area is busy with rented boats and fishing boats. However, he stated that he wanted to change his evidence in paragraph 21 as there are no signs which is what he had said in his statement.
16. In cross examination by Mr Doherty Mr Gultepe stated that he weighed about 88 or 89 kilos in 2013, that he knew Lindos Bay very well, that he does not agree with what he stated in paragraph 23 about his knowledge of the bay, that when he turned around his was the closest boat to the lady, that when he heard the shout he did not turn round but just turned to the voice, that other boats were not too close, the nearest was about 200 metres away, it was Ramadan and he had had nothing to eat. He denied that Miss Wakeman got into the tender and said that her evidence on that was wrong and that the statement to the Port Police on that aspect is wrong. He stated that where the Enigma was anchored was Navarone Bay and Psaltos is another name for the same place. He said that he showed the police on his mobile phone. He says that the Claimant was topless when he took her from the water and that paragraph 16 of his signed statement is wrong on that aspect. Mr Doherty asked Mr Gultepe what he knew about the fact that he had been charged with a criminal offence by the Greek authorities arising from this incident. Mr Gultepe claimed that he is not being prosecuted in Greece and knew nothing about it. However he agreed that an attorney had been appointed to act for him in Greece. He stated that he had been asked to do that by the Defendants' solicitors and that he had been sent the relevant power of attorney by them. With respect to whether his boat had been in contact with the Claimant he said she would have been struck by the propeller. He stated that he had never hit anyone before but that if the boat 'bucks' he can feel it but he would not know the feeling of touching a swimmer. With respect to the Claimant he said: "*Her eyes were turning. Of course I was upset to see someone so injured*". Further with respect to where he picked up the Claimant he stated that it was about 200 metres from the rocks to the south, it was outside the swimming area but he agreed that it was not up to him

where people might swim, he denied that the distance was only about 50-60 metres from shore as stated by Mr Melis and suggested that if it had been he would have expected him to come to help. He did not explain how Mr Melis was to do that. He did not deny that about 7 hours after the incident he said it was 60 metres or more but said that he checked the next day. He agreed that there were people jumping from the rocks on the South side of the bay. He confirmed that he was probably travelling at about 6-7 knots before he turned but stated that he then increased speed to pick up the Claimant. He stated that the top speed of the tender was 29-30 knots but that he had to go slow because he had a child onboard. He agreed that in open water he would go to 10 because of the boy being onboard as he would go slower for his safety. He stated that he was almost out of the bay. When asked whether he would expect to find swimmers when almost out of the bay he responded: "*I did not think of anything like that*". With respect to the speed of the boat he denied that he was going fast and stated the he would not have heard the shout from the Claimant if he had been going fast.

17. In re-examination by Miss Prager he said that he heard the voice first, then he "*looked round right behind*" him and could see her. He looked over his right shoulder. Then he turned [the boat] round stopped it and started talking to her, told her to calm down. He shouted to help from the shore. He lifted her out of the water over the left side of the boat which was heading towards the West, her eyes were turning.
18. He told the court that he had entered the bay looking for a berth to moor to the rocks but there was no place. He therefore needed to find an alternative place to moor for the night after discussing it with the owner. He stated that Falikri was a safe mooring area and that was 15 miles from the Enigma. If he went fast Engima could make 20 knots but her usual cruising speed was 10-12 knots. Sunset was predicted for 8.40 pm (2040). He did not think that would be a problem. The engine speed of the tender when leaving Lindos Bay was 500 rpm. To make 30 knots the rpm would be 2,000 rpm. The tender would go onto a plane at 1,000 rpm.
19. *Mrs Carin King*. She has provided a witness statement dated 15th December 2015. She was onboard the Enigma at the material time and could give no direct evidence as to the incident itself. She has provided evidence as to what she was told and as to what occurred when the police came to the vessel following day when a senior police officer told her that they had checked everything and there was no doubt that Mr Gultepe had nothing to

do with the incident other than rescuing the Claimant. She stated that if Mr Gultepe had hit the lady he would have told her because of his religious convictions. She also stated that she could not climb into the RIB from the sea unaided, that Mr Gultepe was the best captain they had had, as to her knowledge of the amount of traffic using the bay. She agreed that she was aware that Mr Gultepe was being prosecuted but had not discussed this with him. She referred to a conversation with the Claimant's sister when she asked for financial help to get the Claimant back to England. Mrs King refused because she thought that it was 'a try on'.

20. *Mr Thomas David Magner*. He has provided a witness statement dated 11th October 2017. He visited Lindos and Marmaris in July 2016 and October 2016 apparently to view the Enigma, the tender and the location. Attached to his statement were a number of photographs of the area. These included a satellite photograph which indicates the position of a line of buoys which are marked as defining the 'swim/non swim areas'. These appear to be the same orange buoys shown in later photographs. There was a photograph of the area described as 'The Rocks' which appear to show that place from which people jump into the sea. He has also taken photographs of the 'Port police station' and the camera mounted on the 'Police station'. He has stated: "*It was presently indeterminate whether the system was designed for detection, recognition or identification of objects*". He has further referred to the "*Application of the observed characteristics of the station mounted PCC camera to a plan of Lindos Bay*" and expressed the opinion that "*it is likely that the camera would only have been able to: (i) Detect an individual in the water up to a maximum range within the field of view of an expected 350m of the camera in clear daylight conditions. This would essentially cover the bathing zone which lies between the shoreline at Megali and Mikro Beaches and the line of buoys. (ii) Recognise or identify an individual within an estimated 100m of the camera in clear daylight conditions*". Also attached to the statement are photographs of the Enigma and the tender or RIB. In cross examination he stated that there are no signs prohibiting bathing and there are no bye-laws about swimming areas. With respect to the cameras he said that there were no recordings and that recordings are only kept for 48 hours.

The expert evidence

21. *The Law.* Although the pleadings indicated a dispute as to whether English or Greek law should apply I was informed on the third day of the trial that the parties had agreed: (i) the general law of tort in Greece is similar to that in England; (ii) the duties which are relevant and applicable in this case are the requirement to keep a good lookout and to use a safe speed whether or not the rules contained in the Collision Regulations are strictly applicable; (iii) there are no restrictions with respect to swimming applicable in the bay pursuant to the General Harbour Regulations No.20; (iv) there is no dispute that the owners may be vicariously liable for the acts of the First Defendant. This accords with the Greek Civil Code, Article 923. For these reasons the parties had agreed that it was not necessary to call Mrs Kyriake Balta, the Greek lawyer instructed by the Claimant and Mr Nicholas Gerassimou, the Greek lawyer instructed for the Defendants. However, I consider that the Greek regulations as to navigation discussed by the experts may have relevance to safe speed. I will consider their applicability and effect below.

22. *Pathology.* The Claimant called Dr Cooper a forensic pathologist of the Royal Victorian Infirmary at Newcastle upon Tyne and the Defendants called Dr. Carey, a forensic pathologist of Forensic Pathology Services based in Oxfordshire. In addition to their initial reports they provided a joint report to the Court dated the 6th February 2018. The following matters were agreed: (i) it is likely that the Claimant's injuries were suffered soon before and no more than 30 minutes before she was recovered from the water; (ii) One explanation was that she was struck by a boat or launch; (iii) Although there were no propeller related injuries that does not mean that the boat did not have an exposed propeller; (iv) The pattern of injuries could be sustained as a result of a fall from height into water; (v) the injuries were not sustained from a fall from height landing on rocks; (vi) to cause the injuries suffered by the Claimant a fall into water would have had to be from a considerable height. The essential area of difference between these experts is over whether the injuries to the Claimant could have been caused by a boat travelling at about 6-7 knots. Dr Cooper considers that the most likely cause of the injuries is that she was struck by a boat whilst swimming and that they could have been suffered by the tender making about 6-7 knots although the faster the boat is travelling the more serious the injuries would be and, as I understood his evidence, the more likely that it was that the injuries were caused by the boat in question. Dr. Carey considers that it is unlikely that the injuries were caused by a boat making 6-7 knots but they could have been caused by a boat making a greater speed. Dr Carey reached his conclusion by comparing the type of

damages inflicted in automobile accidents. Furthermore he considers that the effect of being in water would have a cushioning effect on the body hit which would reduce the effect of the blow. Dr. Cooper considered that this incorrect because water cannot be compressed and acts similarly to a solid object thus having a crushing effect on the body caught between the water and the boat. As he put it water will produce more resistance to a body being pushed away from the force colliding with it than air. Dr Carey further contended that Dr Cooper was incorrect because he had taken no account of the effect of gravity pinning the victim to the ground. In addition he considered that the injuries suffered by the Claimant could have been caused by a fall from height and put that forward as a real alternative to the Claimant having been hit by a boat. In oral examination it was put to Dr Carey that, given the possibility of the Claimant drowning, it was likely that the Claimant was picked up very quickly after the collision. Dr Carey agreed that she was probably picked up within minutes, at the most, of being struck and it was very unlikely that the Claimant could have been in the water without drowning for any length of time.

23. *Neuropsychology*. The Claimant instructed and called Professor Andrew Worthington and the Defendant instructed and called Professor Gus Baker to consider the issue of whether the Claimant's post traumatic recall of events are reliable memories or were unwittingly, and perhaps subconsciously, confabulated or fabricated by reason of information given to her. In addition to their initial reports they provided a joint report to the Court dated the 29th July 2018.

Consideration

24. The issue is whether the Claimant's case, that she was struck by the Enigma's tender driven by the First Defendant, is sufficiently proved on a balance of probabilities and, if so, whether this arose as a result of the fault of the First Defendant, that is a failure to take due care.
25. On these matters Miss Sarah Prager, for the Defendants, has submitted: (a) The Claimant's recollections of the day she sustained her injuries are not reliable, since her description of recovered memories is less plausible than a reconstruction arising from information given to her by her sister and others; (b) The Claimant cannot show that it is even possible for the RIB to have caused her injuries, since there is no literature on the subject and the pathologists disagree; (c) Even if it were possible for the RIB to have

caused her injuries, she cannot show that this is more likely than not to have been what happened, since Mr Gultepe was travelling slowly, keeping a good lookout, and was not aware of having struck anything; (d) There is a more plausible alternative, namely that she was struck by another vessel, perhaps heavier or moving more quickly, or both. This, the Defendants submit, is more likely than that Mr Gultepe, who was a very experienced skipper, struck her without realising it.

26. *The Claimant's recollection.* A considerable amount of time has been taken considering whether the Claimant's recollections were genuine or whether it was a confabulation arising from what she had been told after the event, mostly it is suggested, by her sister. Expert evidence on these matters was provided. My impression of the Claimant is that she is an honest witness who genuinely believes that her recollections are true and Miss Prager does not suggest that she is acting so as to deliberately mislead the court. After the incident the Claimant was placed in a medically induced coma. The Claimant has given evidence that she began to come out of the coma on about the 19th August 2013. She was repatriated to the Royal Sussex County Hospital (the "Royal Sussex") by a flight commencing on the 7th September. Her evidence is that it was only when she was in the Royal Sussex that memories of the incident came back to her. She is not able to put a precise date on when that occurred but was sure that it was not before the 10th September 2013 on which date she received occupational therapy. She thinks it was after the catheter was removed which was about 7 weeks after the incident. That places the recall occurring around the 18th September 2013. An attempt has been made to throw doubt about whether the recall occurred at that time by reference to the contemporary medical records at the Royal Sussex. However, it is to be noted that the 'OT entry' which was on the 10th September 2013, referred to by Professor Baker, was 6 weeks after the incident and therefore before the most probable date of recall and before the occupational therapy referred to above. In these circumstances it seems to me that, contrary to Professor Baker's view, that entry is irrelevant. On the other hand an entry about a week later refers to the Claimant '*appearing to be processing the trauma emotionally*' which, in Professor Worthington's opinion, could be interpreted as contemporaneous evidence supporting the Claimant's account. That is close in time to, and consistent with, the period in which the Claimant considers that the recall took place. In addition, Professor Worthington has stated that clinical notes often leave a great deal to be desired. I accept Professor

Worthington's evidence and consider that it would be inappropriate to reject the Claimant's testimony upon the basis of the notes as Professor Baker appears to suggest.

27. Furthermore, although it has been submitted that the draft statement made in about 2015 undermines the Claimant's evidence. I disagree. Paragraph 8 of that document states: "*I have very limited recollection of the accident itself. Some memories have returned to me over time but I do not have a complete recollection. I can remember calling out after I had been hit and I can also remember being pulled out of the water and lifted into the boat.*" In my view that is consistent with her present evidence of having had a limited recall at some point. Further, since it is Miss Louise Howard's evidence that she prepared that draft from information given to her it is also clear that the Claimant must have drawn this aspect to the attention of her solicitor before that draft was made. During his oral evidence Professor Worthington told the court that being placed in an induced coma has the effect of placing the mental processes of recollection 'on hold' and that process would not re-commence until she came out of the coma. It seems to me to follow that the relevant period during which the process of the recollection took place is not 7 weeks but rather 4 weeks. The evidence of both the experts was that recall over a period of 7-8 weeks was not unknown and I understood it to be agreed that the shorter the period between the commencement of the mental recall process and the recollection itself the more likely it is that the recollection is genuine.
28. Although Professor Baker has expressed his opinion that her present memories have been triggered by information given to her by her sister that appears to be in the context of a memory which has come back to her after 3-4 years. However, that is not what we are concerned with in the present case because, in my view, the actual recall took place about 7 weeks after the incident and about 4 weeks after the Claimant had come out of the coma. In addition, I consider that it is relevant to take account of the nature of the recollections. It is difficult to see how information provided by the Claimant's sister could generate memories about the Claimant shouting at the departing boat or of the actual pain involved in being pulled out of the water. So far as I am aware the only other information about the shout emanates from Mr Melis. Nobody else has spoken about it. The report from the Lindos Port Authority was not, according to Miss Howard's evidence, received until October 2015 which makes it highly unlikely that either the Claimant or her sister had the details of Mr Melis' account in September 2013. It is also significant that because

Miss Howard's evidence is that the draft witness statement was made following discussions between her and the Claimant which took place in 2014, those discussions predate receiving notice of Mr Melis' evidence to the Coast Guard. In these circumstances I accept Professor Worthington's opinion that it is plausible for the Claimant to have recovered a limited recollection whilst she was in the Royal Sussex and that is the most likely explanation in this case. It follows that I do not accept Professor Baker's opinion on this aspect. In doing so I note Professor Worthington's criticism of Professor Baker's approach of comparing the statistical likelihood of an event occurring in the general population to a specific individual. I consider that criticism is well made for the reasons he has given and it further undermines the reliance I can place on Professor's Baker's evidence.

29. *The evidence of Mr Melis.* It is to be noted that the Claimant's recalled memories only indicate that she can recall being hit, that she called out to a boat going away from her, that she has recollections of being hauled onboard a boat and seeing Joanne Wakeman looking down at her. This evidence, of itself, does not rule out the Defendant's explanation that the Claimant was already injured by a fall or being hit by another vessel and that she was only rescued by the First Defendant. However, Mr Melis' answers in examination by the Coast Guard officers provides more information which, if accepted, is very strong support for the Claimant's case that she was hit by the tender driven by Mr Gultepe. It was placed before the Court, pursuant to the provisions of the Civil Evidence Act, and it has to be born in mind that he refused to give a statement to the Claimant's solicitors and has not been available for cross examination. In these circumstances the court should give careful consideration to the weight to be given to his evidence. On this aspect it is to be noted that there is no suggestion that he is connected with either party or has any reason to be biased. Further the evidence was given under oath to Coast Guard Officers who have the relevant jurisdiction over the Port. It was made the day after the incident and, aside from the record of the examination of the First Defendant, is the most contemporaneous evidence before the court. I do not consider that the fact Miss Wakeman was present during the interview detracts from the weight to be accorded to that evidence. The questions and the answers given are straightforward and, in my judgment, there is no reason not to give due weight to the evidence supplied.

30. Mr Melis' evidence is that: (a) he was in a position to look over the bay and he could see a person swimming; (b) he saw a boat which 'crossed' that person; (c) he heard a dull sound and heard voices and realised that the person needed help; (d) the boat, which had a child onboard, went back to the person and tried to pull the person from the water; (e) when the incident took place the boat was about 50-60 metres from the shore. The person who was pulled from the water was, on any view of the evidence, the Claimant. When asked if he believed the boat hit the woman he answered: "*What I can say is that, when the boat came next to the woman, I heard the sound, but I cannot be absolutely sure because of the distance*". It is significant that the Claimant was visible before the boat closed her position, there was a dull sound, there was a voice calling for help and the boat which had been close to her position was the one which picked the Claimant up was the tender with the child in it. That account is corroborated by two pieces of evidence. The first is the recollection of the Claimant, which I accept as being a true memory, of shouting to a boat which was going away from her. The second is the account of the Mr Gultepe himself that after he heard the voice he looked right round, ie. behind the tender, saw the Claimant and then turned the tender back to her. His evidence was that he had been on an Easterly heading when he heard the shout and was on a Westerly heading when he came back to the Claimant. In other words, he returned over his outward track. It follows that he must, at the very least, have passed very close to the position of the Claimant. The facts are that there was a shout and the boat which closed the position of the Claimant was the Defendants' tender. That accords with the account given by Mr Melis. In my judgment Mr Melis' evidence, including the evidence that he heard a dull sound, should be accepted and this points very strongly to the conclusion that the Claimant was struck by the tender.

31. *The cause of the injuries.* An issue raised by Miss Prager is whether a collision with the tender could have inflicted the injuries which were suffered by the Claimant. On this aspect the parties each called the forensic pathologists referred to above. I have set out the areas of agreement above. There are two issues which must be decided: (i) whether the injuries could have been caused by a fall from the rocks and (ii) whether the injuries could have been caused by the tender.

a. *The fall or jump from the rocks.* A considerable amount of the experts' time was spent on this aspect. However in examination Dr Cooper, who has practical

experience of these matters with respect to people jumping from the bridges in Newcastle, gave his opinion that unless the fall was from at least 80-100 feet the type of injuries sustained would be unlikely and De Carey accepted that a fall of at least 100 feet would be necessary and from 40-60 feet there would be much less likelihood of injury if any at all. The original proposition had been made on the basis that the Claimant had been injured in a jump or fall from the higher point of the Rocks area. There has been no attempt to measure the height of these rocks but the photographs provided suggest that they are considerably less than 100 feet and they are an area from which people jump on a regular basis which strongly suggests that they are not sufficiently high to cause serious injury if any at all. In my view the suggestion that the Claimant might have been injured by a fall from the rocks onto water was, without the relevant information as to whether there was a relevant place where height of the rocks was sufficient to cause the relevant injuries, entirely speculative. In any event I accept the Claimant's evidence that she had never jumped from the rocks in the past. In the circumstances it is beyond the bounds of reasonable probability that she would have suddenly changed her habits and done so on the day of the incident. For these reasons I reject any suggestion that the Claimant's injuries were caused by a fall or by jumping from the rocks on the South side of the bay.

- b. *Whether the injuries could be caused by the tender.* It is not in dispute between Dr. Cooper and Dr Carey that a person could be hit and injured by a propeller driven boat without receiving injuries from the propeller nor that the injuries could be caused by a boat. It was also accepted by Dr. Carey that the type of injuries could be caused by an impact from either the inflated rubber parts or the grp (glass reinforced plastic or fibreglass) parts of a boat. It was also common ground that there are no publications about bodies being struck whilst in water. With respect to the disagreement between them, as to whether the Claimant's actual injuries could have occurred as a result of being struck by a vessel making 6-7 knots, this is related to their difference in approach to the effect of water acting on the struck object. Having heard both experts I am persuaded that Dr Cooper's approach is correct. It was agreed that water cannot be compressed. It follows as a matter of simple physics that water must create a much greater resistance than air. I was not persuaded by Dr Carey's apparent attempt to support his own theory by referring

to the effect of gravity holding the person struck to the ground. Whilst I accept that it may have some initial momentary effect as the body is struck thereafter the effect of being struck is to push the body away from the force exerted upon it which is, as I understand it, the basis upon which the analysis of injuries to persons being struck by automobiles has been made. In my view the effect of an impact of a vessel against a body in water is much more likely to be akin to the body being pushed against a fixed object than where no such object is present. In fact it appears to me that this is most clearly demonstrated by Dr Carey's own evidence of injuries caused by falling or jumping into water from height. A body may free fall through air without suffering impact damage. It is only on hitting the water that injuries occur. What is interesting is that it is the height of the fall and therefore the speed of the impact which is critical. Dr. Carey also accepted that the type of injuries could be suffered if the boat was making a greater speed than 6-7 knots and it was Dr Cooper's view that, although he considered that the injuries could be caused by a boat making 6-7 knots, a higher speed of the boat would enhance the likelihood that injuries of the nature suffered by the Claimant would occur. I accept Dr Cooper's evidence that a boat making 6-7 knots could have caused the injuries and that if the tender was exceeding that speed it strengthens the probability that it caused these injuries. Insofar as the Defendants seek to argue that the nature of the injuries can be taken as a reason why the tender driven by the First Defendant could not have collided with the Claimant that approach should be rejected unless the evidence demonstrates that the tender's speed was substantially less than 6 knots.

- c. *The length of time that the Claimant can have been in the water after the collision without drowning.* Dr Carey gave evidence that it was unlikely that, having suffered the injuries which she did, the Claimant could have been in the water for more than "*minutes at the most*" without drowning. It follows that the vessel which caused the injury must have been sufficiently proximate to her only a short period of time before she was taken from the water.

32. *Speed of the tender.* This is an important issue in this case because it has an impact upon the issue of whether the tender could have caused the injuries and, if it is found to have done so, upon whether the First Defendant was at fault in his navigation of the tender.

The examination of Mr Melis records that in answer to the question: “*At what speed was the boat travelling?*” he answered: “*I am not aware at what speed the boats need be travelling in sea. Perhaps the boat was travelling with a slightly faster speed than it should*”. The answer is not a clear response to the question asked but that is, I think, understandable in the context that it was given by an observer from the shore. It does not convey the impression that the tender was proceeding at speed which would have been obvious if Mr Gultepe had opened the throttle wide and taken the tender up to her full speed approaching 30 knots but nor does it convey the impression that the tender was proceeding slowly. However, I consider that it does convey the impression that the tender was making way with some speed greater than what could be considered to be moving slowly. The only other direct evidence as to speed comes from Mr Gultepe himself.

33. *Mr Gultepe’s evidence.* A significant feature of Mr. Gultepe’s evidence was that it contained a number of inconsistencies. The most significant of these were: (a) That he gave the speed at which he was travelling in response to questions by the Coastguard as being 6-7 knots but this was reduced to 4-5 knots in his witness statement and subsequent oral evidence; (b) In response to questions by the Coastguard he stated that he picked up Miss Schofield 60 plus metres from shore but changed that to 100-150 metres from shore in his subsequent witness statement. In his oral evidence he sought to give the impression that the position was about halfway across the bay which would have been about 200 metres from the shore; (c) As to what Miss Schofield was wearing there was an inconsistency as whether it was a two-piece bikini or only the bottom part; (d) With respect to the question of whether anyone, such as Miss Wakeman, boarded the tender when it was near the wooden jetty to which the glass tourist boat was moored and stayed in the tender until the Claimant was put ashore. In his answers to the Coastguard he stated: “*I helped her [the Claimant] climb aboard [the tender] . . . and aimed towards another vessel . . . asking them to call . . . for an ambulance. . . A female friend of hers was also there, and she too joined us in the tender. Next I took them to the shore of Lindos across the water, which was accessible by the ambulance*” (emphasis added). However Mr Gultepe has since stated in his witness statement and in oral evidence that Miss Wakeman did not board the tender and has gone so far as to call evidence the evidence of Mrs King, as to whether it would be possible; (e) His witness statement contained a reference to the fact that there were signs up forbidding swimming which stated “*no swimming beyond this point*”. Although he abandoned that evidence in oral evidence I

agree with Mr Doherty that it is difficult to understand how it ever came to be in a witness statement signed with a statement of truth.

34. It is to be noted that the answers given to the Coastguard were made within hours of the incident. They were given voluntarily and there is no sensible reason why they should have been wrongly recorded by the Coastguard. I do not consider the apparent fact that Mrs King was unable to board the tender from the water without assistance as of any relevance as to whether Miss Wakeman did board the tender. Photographs of the tender are available and there were, in my view, sufficient handholds to allow a person of reasonable fitness and ability to climb onboard the tender without assistance. In my judgment Miss Wakeman was clearly a truthful witness and I accept her evidence as to boarding the tender. That evidence was consistent with Mr Gultepe's version of events given to the Coastguard and I consider that it is the correct version. I do not consider that the dichotomy as to how the Claimant was reunited with her beach bag throws any doubt about the truthfulness of Miss Wakeman.
35. In addition, Mr Gultepe's evidence in his witness statement and in oral evidence, to the effect that the CCTV exonerated him in the eyes of the 'police', was inconsistent with the fact that he is being prosecuted with respect to this incident by the Greek authorities. Whilst I have some doubt about whether Mr Magner can be regarded as a witness who has the expertise to express an opinion as to the efficacy, or otherwise, of any CCTV footage which might have been recorded at the Coast Guard office it was evidence tendered by the Defendants and is inconsistent with the proposition that the Coast Guard could have concluded that the tender was not involved in the incident by that means. Mr Magner also gave evidence that no recording of the incident has apparently been retained by the Coastguard which strongly suggests that the CCTV did not provide assistance with regard to the incident.
36. Further on this aspect Mr Doherty submitted that Mr Gultepe's refusal to accept that he was being prosecuted for causing injury to Miss Schofield was extraordinary. I agree that it was, at least, very strange. There is no doubt that a prosecution has been commenced and is ongoing. It is very difficult, if not impossible, to accept that Mr Gultepe is not aware of that. In this respect it is apparent that a lawyer on Rhodes has been appointed to act for him and he could give no explanation of what that might be for if not to represent his interests in the prosecution. Whether his denial is disingenuous or just a failure of

memory is unclear. It may be that the alterations of his evidence are as a direct consequence of the prosecution and an attempt to reduce the impact of his examination before the Coast Guard in the criminal proceedings, for example with respect to his speed, the distance from the shore and the possible effect of Miss Wakeman's evidence. Whatever his reasons for altering his stance it is apparent that Mr Gultepe is now doggedly sticking to a version of events which is contradicted by his own contemporaneous account and the evidence of others.

37. In my judgment, bearing in mind the inconsistencies referred to above and having seen his demeanour whilst giving evidence, I do not consider that I can place reliability upon the evidence which he has given to the court unless it is supported by other reliable evidence. However, I do accept his evidence that he did not see the Claimant before the incident. That was corroborated by the evidence of what he said in the presence of Miss Wakeman very shortly after incident occurred. With respect to whether Mr Gultepe "felt" the collision I accept the evidence of Mr Melis that he heard a "dull sound" and that this was probably caused by the collision. Mr Gultepe has stated that he has never been in contact with a swimmer before and I think it probable that he did feel something but, as he had not seen a swimmer, he did not associate it with having hit anyone.

38. *Speed.* With respect to the speed of the tender I conclude that Mr Gultepe's more recent account that the tender was making 5-6 knots cannot be accepted and that his earlier account of 6-7 knots is more reliable. I therefore conclude that the tender was making not less than 6-7 knots at the material time.

39. Mr Doherty has submitted that it was likely that the tender was exceeding that speed. In my view he is probably correct for the following reasons:

- a. Mr Gultepe explained that the Enigma was moored in Navarone Bay and that he had taken the tender to Lindos Bay to find a better mooring for the night. He had circled that bay and had concluded that there was no space for Enigma. The alternative mooring which he had in mind was at Falikri which is, about, 15 miles distant but he would consult Mrs King before moving there. If he used the Enigma's cruising speed that would take about 1½ hours. Time for returning to the Enigma, swinging the tender onboard, consulting Mrs King, summoning his

crew, weighing anchor and finding an alternative anchorage and mooring place at Falikri needs to be added so that it was unlikely that the Enigma would be repositioned in anything much less than 2 hours. He told me that sunset was at 2040 hours which is, I consider probably correct at that time of the year. Although he told me that he had no concerns about the timing I consider that a sensible charter skipper would be expected to move to a new anchorage in daylight if possible. In the circumstances, having decided that there was no space available in Lindos Bay, it is probable that Mr Gultepe wished to return to the Enigma as soon as possible to start the operation of moving her and would be intent upon making a speed commensurate with that bearing in mind his protective concerns about Denis, Mrs King's son, who was with him.

- b. In addition, Mr Gultepe told the court that when he heard the shout and turned the tender he was about 50 metres past her position. It is to be noted that if the tender had been making 5-6 knots that would mean the 'advance' would, at 5.5 knots (with 1852 metres to the nautical mile), be 2.829 metres per second. So, 50 metres would have taken 17.67 seconds. At 7 knots the advance would be 3.6 metres per second so that 50 metres would have taken 13.88 seconds. Although it is not possible to precisely calculate the time it would take for the Claimant to have been hit, called out and for Mr Gultepe to have looked round and seen the Claimant in the water I consider that either of these periods are overlong for that to have happened. At 9 knots the relevant period is 10.799 seconds and at 10 knots is 9.7 seconds. On the assumption that Mr Gultepe's estimate of 50 metres is correct it is very probable that the tender was making in excess of 6-7 knots and probably something of the order of 9-10 knots. If, however, Mr Gultepe's 50 metres was an overestimate this would reduce the time between the collision and hearing the shout accordingly but even if the distance is halved this has the effect of reducing the time between the collision and the shout to about 5 seconds which I consider is more consistent with the circumstances of this incident. Taking these factors into consideration I judge that the tender was making at least 6-7 knots and probably 1-2 knots more.

40. *The position of the collision.* Although Mr Gultepe's recent evidence is to the effect that the incident took place about 100-150 metres from the shore his initial statement to the

Coast Guard was to the effect that the distance was of the order of 50 metres or a little more. In my judgment the earlier contemporaneous estimate is much more likely to be correct and accords with the estimate given by Mr Melis. It is to be noted that during Mr Gultepe's oral evidence he was asked about the people jumping from the rocks. He indicated that it was happening within his line of sight and to his right. I take this to be evidence that he had not passed the area where jumping was taking place and I consider that this accords with the Claimant swimming in a position off the rocks where she indicated that she left her beach bag and where she probably entered the water. The photographs indicate a row of yellow buoys to the East of the wooden jetty which probably mark an exclusive swimming area. From the evidence available I consider that they were probably in place at the relevant time but in any event, they appear to be considerably less than 50 metres from the shore line, and I consider that the collision took place outside the line of those buoys in a position about 60 metres from the shore. The Claimant suffered injuries which included those in the area of her left buttock. It is therefore probable that she was swimming in a direction, which was substantially away from the direction from which the tender was approaching. Miss Prager submitted that it was significant that the Claimant had no recollection of the tender approaching but this is not surprising if she was hit by a boat coming from behind her.

41. *The law relevant to liability, the duty to maintain a proper lookout and to proceed at a safe speed.* The parties did not consider that it was necessary to call the Greek lawyers to give oral evidence on the basis that regardless of whether English or Greek law applies there would be a duty upon a person to navigate keeping a good lookout and to proceed at a safe speed. That approach accords with the observations of Sheen J. in *Steedman v Scofield* [1992] 2 Lloyds Law Rep 163. That case raised the issue of whether a "jet-ski" came within the definition "ship" used in the Merchant Shipping Act 1894 with respect to the application of the limitation provisions contained in s.8 of the Maritime Conventions Act 1911. I should mention that those acts have been superseded by the provisions of the Merchant Shipping Act 1995 which contains provisions to similar effect. Sheen J. held that a jet ski was not a ship or vessel within the meaning of s.742 of the Merchant Shipping Act 1894. Under the Act a "vessel" includes any ship or boat, or any other description of vessel used in navigation. To reach his conclusion the judge considered the meaning of the words of a 'vessel or boat used in navigation'. The learned Judge referred to the International Collision Regulations and said: "*These regulations apply to all vessels*

upon the high seas and in all waters connected therewith navigable by seagoing vessels”. He also stated: *“Even though I hold that a jet ski is not a boat or other description of vessel used in navigation, the Collision Regulations contain a standard of care to which the driver of a jet ski should conform. Any failure to conform to that standard of care would amount to negligence”*, however there can be no doubt that if he had found that the jet ski was ‘*a boat or other description of vessel used in navigation*’ he would have held that the jet ski ought to comply with the Collision Regulations themselves. Although a jet ski did not conform to that description I have no doubt that a RIB such as the tender does and therefore, in English law, the Collision Regulations do apply to the navigation of vessels in waters navigable by seagoing ships, which Lindos bay clearly was.

42. Part A of the Collision Regulations provides:

“1. Application

(a) These rules shall apply to all vessels upon the high seas and in all waters connected therewith navigable by seagoing vessels.

(b) Nothing in these Rules shall interfere with the operation of special rules made by an appropriate authority for roadsteads, harbours, rivers, lakes, or inland waterways connected with the high seas and navigable by seagoing vessels. Such special rules shall conform as closely as possible to these Rules.”

43. Part B of the Collision Regulations section 1 refers the conduct of a vessel in any condition of visibility and provides:

“ 5. Look-out *Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.*

6. Safe speed *Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions.”*

44. It follows that where there are local rules for waters connected with the high seas these will be applied by an English Court. That being so if there are local rules relating to the

relevant waters which set a standard of navigational behaviour these will be relevant. Against that background it is interesting to consider whether the Collision Regulations apply in Greece. It is common ground that in 1974 Greece ratified the Collision Regulations which have been incorporated into Greek law. Although Mr Gerassimou contends that they only apply in cases where there has been an actual collision between vessels it is clear on their actual wording that they are intended to regulate the general conduct and navigation of vessels on the high seas and waters connected therewith navigable by seagoing vessels. It is difficult to accept that Greek law does not expect the navigation of vessels to comply with rules 5 and 6 at all times. That is Mrs Balta's view and I accept that view is probably correct.

45. It follows that if Greek Law applies the Collision Regulations that it also incorporates 'local rules' by reason of rule 1(b). In these circumstances, whether Greek Law or English Law applies, regulations made by an appropriate authority are relevant to the navigation of a vessel. This is of particular importance if they provide guidance as to what may be considered a safe speed.
46. The experts have referred to the General Harbour Regulations No.20 ("GHR") as having been made by the Greek Ministerial Decision No.313/1999. The experts agree that it is binding in Greek Law whether it is applied by reason of the Collision Regulations or not. In my view it is relevant to consider whether the 'local rules' provide any guidance as to what may be regarded as a safe speed. The experts agree that, by Art 2(1), the GHR applies to the type of vessels which includes the RIB tender in question. However whether Art. 2(2) of the GHR applies is open to interpretation. The experts agree that although Lindos Bay has not been characterised as a '*bathing facilities*' area within Art 2(2) of the GHR nonetheless it is open to the discretion of a court to make a decision on this aspect based on the evidence put before it. However the parties made no submissions on these aspects and I do not consider that the court has been provided with sufficient information to decide whether the waters of the bay should be considered a *bathing facilities* area for the purposes of the Greek regulations.
47. The experts also referred to Art. 20(4). It provides:

"4. The sailing of the speedboat, unless otherwise prescribed by some other provisions of the present regulations, is forbidden:

- (a) *within a distance less than one hundred (100) meters from the external parts of the floating buoys of articles 26, which mark the space in bathing facilities areas. In case the area presents particularities (e.g. small bays) the Committee of Article 35 may determine that this distance be fixed at less than one hundred (100) but certainly not less than fifty (50) meters.*
- (b) *Within a distance less than two hundred (200) meters from the usual point where the swimmers usually reach swimming in bays whereby buoys have not been placed.*
- (c) *At a speed higher than five (5) knots when sailing within a distance smaller than two hundred (200) meters from the seashore in places where there are no swimmers. In case the area presents particularities (eg. small bays) the Committee of Article 35 may determine that this distance be fixed at less than two hundred (200) metres.”*

48. In their Joint Report it is stated: *“if the UK Court finds that the RIB was sailing in a bathing facilities area and within a distance less than one hundred (100) meters from the buoys, it falls within the scope of Art.20(4)a” and “Art 20(4)c clearly refers to areas which do not fall into the definition of a “bathing zone”. Under these circumstances sailing within a distance of two hundred (200) meters from the seashore is limited to five (5) knots.”*

49. Thus it appears that they agree to the application of Art. 20(4)(a) if the court decides that the area is a ‘bathing facilities area’. However, as I have already set out above I do not consider that sufficient information has been provided for that purpose. Further the experts did not agree as to whether Art.20(4)(b) applies because it is uncertain whether the area was equipped with buoys in July 2013. However it does appear that they both accept that Art. 20(4)(c) restricts speed to 5 knots within 200 meters of the shore even where the area is not considered to be a ‘bathing zone’ and whether there are swimmers in the area or not. The experts have also referred to Art.20(5) which restricts the speed of motorboats departing from or returning to the shore to 5 knots. The experts are unable to agree whether this would apply in this case because although the tender closed the shore whilst looking for a mooring place for the Enigma it did not actually ‘depart from or

return to' the shore. As they both agree that 20(4)c applies to all vessels within 200 metres of the shore I do not consider that this dispute needs to be resolved.

50. The experts also referred to Article 31 which deals with the passage of boats to and from their mooring places, including ports, marinas, shelters and slipways, which appear to indicate that vessels may move for this purpose providing they use the channels designated and move at a speed of less than 3 knots if there are no bathers within a distance of 100 meters or if there are bathers they move at a safe speed not exceeding one (1) knot whilst keeping a course directly to or from the open sea. Again there is a difference between the experts as to whether this article is applicable based upon the argument as to whether the tender was approaching or leaving a mooring place.
51. Whilst it has not been possible to ascertain whether the individual regulations apply to the particular circumstances of Lindos Bay it is clear that the general purpose of these regulations is to preserve the safety of swimmers. The experts are in agreement that Art.20(4)(c) is of general application to vessels within a distance of 200 meters from the shore and sets a speed limit of 5 knots. Clearly any vessel within that area which exceeds that speed is not operating a safe speed as contemplated by the regulations.
52. Whilst I consider that there may be room for doubt as to whether Article 31 rule is strictly applicable to the movements of the tender in this case the Article is of considerable interest because it indicates what the makers of the regulations consider are safe speeds when navigating in the vicinity of swimmers. In that case 1 knot is considered to be the safe speed unless the swimmers are in excess of 100 metres from the boat in which case upto 3 knots is considered safe. I consider that these are sensible standards to be adopted whenever swimmers are in the water near to a vessel whether or not in areas which have been specifically designated as a *bathing facilities area*.

Conclusions

53. Having heard the witnesses and considered submissions of counsel it is necessary to decide whether the Claimant's case is made out on a balance of probabilities.
54. With respect to whether the Claimant was struck by the tender driven by the First Defendant I consider that there can be no real doubt that she was:

- a. I find that, at the material time, the tender driven by the First Defendant was leaving the bay on an Easterly heading at a distance of about 60 metres from the shore. When the First Defendant heard the shout, the tender had passed the position where the Claimant was in the water. On Mr Gultepe's own evidence, as to how he turned his vessel and returned to the Claimant, the tender must have passed very close to if not over the position in which the Claimant then was.
- b. That conclusion conforms with the evidence of Mr Melis, which I accept, that he saw the Claimant in the water and that he saw a vessel cross her position. That was the same vessel which returned and picked up the Claimant which, it is common ground, was the tender driven by Mr Gultepe. I also accept that Mr Melis heard a "dull sound". In my view that was caused by the tender colliding with the Claimant.
- c. With respect to the relevance of whether Mr Gultepe was aware of having struck anything. Mr Melis' evidence is that he heard a "dull sound". Noise travels across water and it is not uncommon for those outside a boat under power to hear noises emanating from it even though the same sounds may be less audible or even inaudible to those within it. As to whether the driver of a RIB would actually feel a movement caused by a collision with a body depends upon the nature of the collision itself. In my view it is possible for a RIB making 6-7 knots or more to strike a person and for the driver to be unaware of the collision or, if the driver did feel something, for him to be unaware of the reason for such sensation. Mr Gultepe did not see the Claimant and was not paying attention to the presence of swimmers. Therefore, he would have no reason to immediately associate a noise or similar sensation with striking a person. In any event I did not consider that Mr Gultepe was a reliable witness and I do not consider his assertion that he was not aware of something unusual before he heard the Claimant shout as a good basis for rejecting the evidence of Mr Melis.
- d. I do not accept Miss Prager's argument that the Claimant had been injured at an earlier stage, either by jumping or falling off the rocks at the entrance to the bay or by being hit by another vessel. The Claimant's evidence was that she had never jumped from the rocks in the past and the evidence of the pathologists makes it clear that the Claimant's injuries could not have occurred as a result of jumping or

falling from the rocks as they were not of a sufficient height. However, I find that the evidence of the pathologists is to the effect that the Claimant's injuries were consistent with being struck by a vessel making 6-7 knots or more.

- e. The Defendant's expert also stated that it was improbable for the Claimant to have been in the water in an injured state for a matter of more than a few minutes without drowning. The evidence as to how busy the bay was at the material time was contradictory, but the evidence was that the tender was the only vessel actually in the vicinity of the Claimant at the material time. There is no evidence of any other vessel being sufficiently close to the Claimant to have inflicted her injuries within the time span of a few minutes of her being picked up by the First Defendant.
- f. I accept that the First Defendant did not see the Claimant before he heard the shout but, in my judgment, whilst heading on an exit route from the bay about 60 meters offshore he should have seen her if he had been keeping a proper lookout whether or not it was his vessel which was involved in the collision. He admitted that he did not have the possible presence of swimmers in mind. However, he was operating in an area where he could see that there were swimmers, and, in my judgment, he certainly should have had the presence of swimmers very much in mind. In my view, having found that there was no mooring place for Enigma in the bay, he was probably concerned to get back to the yacht and get under way for an alternative mooring place for the night. He had Dennis in the tender and it highly probable that the attention of both Dennis and Mr Gultepe were distracted by the presence and antics of the young people jumping from the rock nearer the entrance of the bay. In my view these may have been, and probably were factors, as to why Mr Gultepe failed to see the Claimant in the water before he heard the shout.
- g. It is noteworthy that the Claimant was seen by Mr Melis prior to the collision but she was not seen by the First Defendant. That is consistent with my view that he was not keeping a proper lookout as he should have been. He was in an area where there were known to be swimmers, it was high summer, there would have been persons swimming from boats moored in the bay and he could see the persons jumping from the higher rocks. He should, in my judgment, have been

particularly vigilant for people swimming but it was his own evidence that he was not thinking about swimmers. In my view he should have been keeping a good lookout for swimmers and if he had been he should have seen the Claimant. Aside from the evidence of Mr Melis it is a striking feature of this case that, on his own evidence, Mr Gultepe must have passed very close to her and did not see her. Even if she had been injured by another vessel and was simply floating in the water as he approached it is not explained why he did not see her at that time.

- h. For the reasons already given I find that, at the material time the tender was making not less than 6-7 knots and probably a speed of 1-2 knots more. As I have said that finding as to speed is consistent with the pathologists' evidence as to the cause of the Claimant's injuries. I therefore reject Miss Prager's submissions that it was not possible for the tender/RIB to have caused the Claimant's injuries.

55. With respect to whether the injuries were caused by the negligence or fault of Mr Gultepe I have no doubt that they were. For reasons already set out I consider that Mr Gultepe failed to keep a good lookout and consider that if he had he should have seen the Claimant, reduced speed and taken care to avoid the Claimant. It has often been observed that good seamanship is a matter of common sense and I also consider that the speed at which the tender was being navigated was excessive in the conditions and place where the tender was being operated. In my judgment a proper speed whilst operating in an area where swimmers are known to be is 3 knots or less. If swimmers are known to be in close proximity then a lower speed should be used or the vessel should be stopped until the safety of the swimmers is assured. This view is supported by the terms of the local regulations. It is also to be noted that for a speed boat, which includes this tender, to make in excess of 5 knots within 200 metres of a shoreline is prohibited by the regulations. Making as it was at least 6-7 knots and most probably 1-2 knots more the tender was being navigated at an improper speed.

56. Further it is significant in the present case that the speed of the vessel materially contributed to the extent of the injuries suffered by the Claimant. If the tender had been making 1-3 knots, as I find it should have been, not only would Mr Gultepe have been more likely to see the Claimant, but it is probable that her injuries would have been significantly reduced.

Decision

57. For the reasons set out above I find that the First Defendant is liable for the Claimant's injuries. Furthermore, as it is accepted by the parties that the principles of vicarious liability apply in this case it follows that the Second Defendant is also liable for such injuries.

Dated this 15th day of February 2019