Commission of Inquiry

into the Collision of Vessels near Lamma Island on 1st October 2012

Closing Submissions for the owners and operators of M/V Sea Smooth, Hong Kong & Kowloon Ferry Holdings Limited and Islands Ferry Company Limited (collectively called "HKKF")

A. Introduction

1. In exercise of the powers conferred by Section 2 of the Commissions of Inquiry Ordinance [Cap.86], the Chief Executive in Council appointed this Commission of Inquiry. The terms of reference of the Commission are to inquire into the facts and circumstances leading to and surrounding the collision between two vessels, namely the Sea Smooth and Lamma IV, that took place off the beacon off Shek Kok Tsui, Lamma Island at around 20:20 hrs on 1st October 2012 and to:-

    a. ascertain the causes of the incident and make appropriate findings thereof;

    b. consider and evaluate the general conditions of maritime safety concerning passenger vessels in Hong Kong and the adequacy or otherwise of the present system of control; and

    c. make recommendations on measures, if any, required for the prevention of the recurrence of similar incidents in future.

2. The first term of reference requires consideration of (i) why the collision occurred and (ii) why the Lamma IV sank so quickly[1]. These submissions will concentrate on the first of those two issues.

3. The Commission's terms of reference expressly exclude the determination and attribution of any civil or criminal liability in respect of the collision. Accordingly, it is submitted that the Commission is solely concerned to ascertain the real or proximate causes of the collision, and is not concerned with how those causes might impact on the attribution of fault for the purposes of Section 3 of the Merchant Shipping (Collision Damage Liability and Salvage) Ordinance [Cap.508], or upon the liability to make good the loss and damage arising from the collision.

4. This Commission should not be concerned with whether the situation in which the two vessels found themselves in the minutes leading up to the collision ought, for the purposes of the International Regulations for Preventing Collisions at Sea 1972 (the "Collision Regulations")[2], to be regarded as a "head-on situation" within Rule 14 of the Collision Regulations or a "crossing situation" within Rule 15 of those Regulations. Those Rules are of assistance in attributing fault for the purposes of civil liability, because if vessels ought to have been observed visually from one another, their navigational manoeuvres fall to be judged as if they were in fact in

[1] Commission Opening Submissions, paragraph 28

[2] The Collision Regulations apply to these two vessels by reason of regulation 5 of the Merchant Shipping (Safety) (Signals of Distress and Prevention of Collisions) Regulations, Cap 369N, and Rule 1(a) of the Schedule to those Regulations.

sight of one another[3]. However, it is clear on the evidence that although these two vessels ought to have been in sight of one another, they were not in fact in sight of one another until a close quarters situation was inevitable. The real or proximate cause of this collision was an egregious failure of look-out on both vessels contrary to Rule 5 of the Collision Regulations. That Rule mandates that a proper look-out be maintained "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". Both vessels were fitted with radar equipment which was fully operational. The failure of look-out included failure to make use of that radar equipment.

5. Finally, there is an issue of whether or not the "fog light" at the end of the breakwater of the HKE typhoon shelter impacted upon the visual look-out of the Sea Smooth.

6. This tragic accident claimed 39 lives. Such an incident should never happen again. Any recommendations made by this Commission which will serve to improve marine safety are to be welcomed, and HKKF will do all within its power to ensure compliance.

B. The Cause of the Collision

7. It is unlikely that human error will ever be eradicated from marine navigation. The proximate cause of this collision was human error. As submitted below, both vessels did not actually observe one

[3] Rule 3(k) of the Collision Regulations.

another until a close quarters situation was inevitable. It seems probable that the failure of look-out was caused by complacency. George Eliot observes in Chapter 5 of "Silas Marner"

> "A man will tell you that he has worked in a mine for forty years unhurt by an accident as a reason why he should apprehend no danger, though the roof is beginning to sink …".

The work of a coxswain is monotonous, and doubtless breeds complacency.

8. The rapid sinking of the Lamma IV, with consequent extensive loss of life principally from drowning, was the result of other earlier causes and others human errors. These series of errors allowed the Lamma IV, as was, to be permitted to ply the Hong Kong waters whilst unsafe and we would say unseaworthy. These issues, though highly material, will not be touched upon further in these Submissions.

BI. <u>The Lamma IV</u>

9. The Lamma IV set sail from the Hong Kong Electric pier on Lamma Island at around 20:15 hrs on 1st October 2012 to take Hong Kong Electric staff, their families and friends to Victoria Harbour to watch the National Day fireworks. Upon departure, the radar had been set to a range of 1 nautical mile, and a course of between 350° and 353° set by the coxswain upon leaving the breakwater when the speed

was also increased to 1,200 rpm or 12 knots[4]. The Lamma IV had a crew of three on board and was carrying 124 passengers.

10. It is self-evident that as this voyage occurred by night, navigation (and in particular avoiding other vessels) should necessarily have been by sight by reference to the navigation lights displayed by other vessels and by the judicious use of radar equipment.

11. The evidence of the coxswain of the Lamma IV, Coxswain Chow, is essentially:-

    a. That he did not visually see the Sea Smooth, with its flashing yellow mast head light (and both side navigation lights lit), until she was within 3 cables from the Lamma IV when the Sea Smooth was adjacent to the beacon off Shek Kok Tsui:

       "THE CHAIRMAN: When you first sighted the vessel that you later learned was Sea Smooth, was she adjacent to that light off Shek Kok Tsui?

       A. Yes, correct."[5]

    b. This equates, Captain Pryke opines, to around 30 seconds before collision at the time of 20:19:50 hrs[6]; and was

[4] Transcript [Day 34:94/1 and 101/12]
[5] Transcript [Day 35:59/23]
[6] Transcript [Day 3:69/16], [Day 45:51/4 and 14]

c. The point in time when the coxswain says he turned hard over to starboard[7], increased throttle to 1400 rpm to assist in turning and sounded a short blast of the vessels horn.

12. This is despite his testimony:-

a. of having previously spotted and tracked the Sea Smooth by radar from 1 nautical mile (which matter was never previously raised) before the said visual contact but that he did not take any action until such visual contact;

b. of having only seen the green starboard navigation lights in his original interview with the Police on 2nd October 2012; and that

c. the sighting of the yellow flashing mast light informed him [Chow] that a fast ferry of HKKF was approaching en route to Yung Shue Wan at the material time[8].

<u>The First Sighting of the Sea Smooth</u>

13. According to Coxswain Chow, having left the breakwater, he settled the Lamma IV on a course of 350° to 353° so as to pass the Shek Kok Tsui beacon by around 1 to 1½ cables:

> "Q. "I settled on a course of about 350 degrees to 353 degrees, which would bring us to a position to pass about 1 to 1.5 cables off No. 98 beacon."

[7] but accepted it is not shown on the VTC track reports
[8] Transcript [Day 35:30/19]

A. Yes, correct."[9]

14. This heading is contrary to the course over the ground as tracked by the VTC radar tracking report (Expert Bundle/316 and 317)[10] but more importantly, as will be dealt with below, it is contrary to the course plotted for the Lamma IV by Captain Pryke (Expert Bundle/361-1).

15. The coxswain's evidence as to which side navigation lights he first sighted is a little less clear. In his first statement on 2nd October 2012 to the Police, he twice states that he saw the green starboard light of the Sea Smooth, as confirmed when giving evidence[11]. But he later said that he forgot to mention that he saw both navigation lights when sighting the Sea Smooth dead ahead.

16. In any event, Coxswain Chow was fairly certain that when he first saw the flashing mast light [of the Sea Smooth] it was 3 cables away and adjacent to the beacon off Shek Kok Tsui.

17. Engineer Leung provides a different (and it is submitted, more credible) account concerning the sighting of the Sea Smooth. He says that he entered into the wheelhouse a few minutes after departure and walked past Lai Ho-yin coming out of the wheelhouse. Upon entering, he looked at the engine panel in front

[9] Transcript [Day 34:104/17]
[10] This is admitted by Coxswain Chow in evidence at Transcript [Day 35:74/2 and 75/14] though says that although this is the case he really did helm hard to starboard at 3 cables [Day 35:76]
[11] Police Bundle/3324-7 and Transcript [Day 35:70/20]

of the coxswain from the latter's starboard side. He was clear that Coxswain Chow did not appear to him to be panicked or unduly concerned. After a few seconds he walked over to the port side of the wheelhouse and within seconds of standing there sighted a catamaran [the Sea Smooth] from the left portside forward wheelhouse window about 2 to 3 boat lengths [100m] away heading towards the Lamma IV at about 30 degrees to its bow. He shouted out and thereafter noticed the coxswain turn to starboard. Moments later the collision occurred.

> "Q. How much time do you think elapsed between your going into the wheelhouse and your standing to act as an additional look-out?
>
> A. A couple of seconds.
>
> Q. You then say in paragraph 21:
>
> "No sooner had I stood there I noticed through the port side window a fast-moving vessel sailing towards us at a speed at least above 20 knots."
>
> A. Yes, after I had checked the navigational light, I was standing on the port side of the wheelhouse…
>
> Q. Right. Okay. So for how long were you standing there before you saw it?
>
> …
>
> A. Yes, about a few seconds.
>
> …

Now, it's right, isn't it, that you estimate that the distance between your vessel and the other vessel when you first saw it to be about two boat-lengths? Is that right?

A. About 100 metres far. About two to three boat-lengths."[12]

The Purported use of Radar

18. On the 1st day of Coxswain Chow's evidence, consistent with his previous 3 statements, he expressly stated that he did not sight the Sea Smooth by radar, *inter alia*[13]:

"Q. "There were no other vessels ahead or around the immediate vicinity and I could see the usual glow of the anchored vessels in the North-west Lamma Anchorage ahead."

A. Yes, correct…

Q. Is there any reason -- can you explain why you didn't see it earlier?

A. Because there was only me on the bow of the vessel, and the Sea Smooth was -- the track of Sea Smooth was not shown on the radar screen yet. And also, the from the North-west Anchorage was blinding my sight." (emphasis added)

19. Then the following day when being questioned, his story in regard to use of the radar changed and for the very first time he claimed that

[12] Transcript [Day 37:29/1, 67/1, 69/1 and 71] and paragraphs 20 and 21 of his witness statement [RSRB/1596]
[13] Transcript [Day 34:105/4 and 106/8]

he had sighted the Sea Smooth within 1 nautical mile, long before he sighted her visually or took action, *inter alia*[14]:

"[when did you first become aware it was a HKKF ferry]

A. When the vessel was 1 nautical mile away from my vessel.

…

A. When I saw the yellow flashing light 1 nautical mile away from me."

…

"THE CHAIRMAN: So after you'd first seen it at 1 nautical mile, did you continue monitoring its progress towards you on the radar?

A. Yes."

…

"THE CHAIRMAN: So you saw the target moving across the 1-mile ring on your radar, coming closer and closer to you; is that what we're to understand is your evidence?

A. Yes, correct."

20. He later asserted that he did not mention this previously for the simple reason that he had forgotten about it[15]. This implausible excuse was then exacerbated by his insistence three times under re-

[14] Transcript [Day 35:31/11, 32/3 and 79/3]
[15] Transcript [Day 35:82/16]

examination about the clarity of his recollection of the fateful voyage and collision[16].

The Flashing Yellow Mast Light

21. The evidence of Coxswain Chow was that he was familiar with a yellow flashing mast light, that these belonged to high speed crafts and that when seen in the vicinity of Shek Kok Tsui would inform that a high speed ferry of HKKF was making for Yung Shue Wan[17]:

> "Q. That's of course true, but it's right, isn't it, that a yellow flashing light on a vessel off Shek Kok Tsui indicates a high-speed ferry making for Yung Shue Wan?
>
> A. Yes.
>
> Q. And that you don't see many yellow flashing lights off Shek Kok Tsui except on high-speed ferries making for Yung Shue Wan?
>
> …
>
> A. Yes, it's not that often.
>
> Q. Right. So it's a reasonable assumption to make, is it not, that if you see a yellow flashing light off Shek Kok Tsui, you are looking at a high-speed ferry making for Yung Shue Wan?
>
> THE CHAIRMAN: Well, he's agreed with that."

[16] Transcript [Day 36:73/20]
[17] Transcript [Day 35:30/19 and 32/5]

…

"MR SUSSEX: And from your experience, you must have known, must you not, that Hong Kong & Kowloon Ferry operate the ferry service to Yung Shue Wan on Lamma Island?

A. Yes.

Q. So it's a fact, is it not, that when you saw that flashing light, you knew that that ferry was heading for Yung Shue Wan?

A. I will not make this assumption[18]."

22. Frankly, the last answer was avoiding the question. The clear evidence is that this experienced coxswain knew that a flashing yellow light approaching in the vicinity of Shek Kok Tsui would mean that it was a HKKF ferry en route to Yung Shue Wan. Mr. Ng of HKKF confirmed that:

"…Other than your company's ferries, are there any other ferry operators or vessels that are fitted with a flashing masthead light that operates in the vicinity of Yung Shue Wan?

A. As far as I know, there isn't."

Use of Signals: Horn and/or Searchlight

[18] This was, of course, after Captain Pryke had given evidence that such an assumption would not necessarily be made.

23. Coxswain Chow is the only witness who claims to have heard the horn or whistle he claims to have sounded once upon first [visually] sighting the Sea Smooth:[19]

> "Q. Do you agree that if you did in fact sound one short blast, it should have been audible to others on the Lamma IV?
>
> A. Yes, that should be the case."

24. Engineer Leung did not hear any horn or see any flashlight. Likewise, there is not a single other witness who heard the horn, whether crew or passengers of either the Lamma IV or Sea Smooth. It is noted that Dr. Armstrong said the horn would be "astonishingly loud" for everyone on the open deck[20].

25. Further, Coxswain Chow states expressly in his cautioned statement on 2nd October 2012 that he did not use the flashlight to warn prior to impact[21].

> "... Besides warning the other party with a short blast, did you also apply other methods?
>
> Answer: No. I didn't apply flashlight..."
>
> "MR SUSSEX: So it's right, isn't it, that on 2 October, you told the police specifically that you didn't employ a light signal?
>
> A. Yes, correct.

[19] Transcript [Day 35:88/15]
[20] Transcript [Day 26:41/3]
[21] Police Bundle/3324-12 and Transcript [Day35:89/23 and 90/6]

THE CHAIRMAN: Why did you tell them that, since you tell us something quite different?

A. Because at that time, I didn't remember it. I was still lying in the hospital."

Helm to full Starboard

26. Coxswain Chow says that he turned the helm full over to starboard immediately after sighting the Sea Smooth. That this was about 1 minute, later he agreed it to be 30 seconds, before the collision and that the Lamma IV began to turn 2 seconds thereafter.

27. He disagreed, however, that his first visual sighting of the Sea Smooth was at a closer proximity or time[22]:

"Q. Right. But what I'm going to suggest to you is the fact is you didn't even see Sea Smooth until a very few seconds before the collision, considerably fewer seconds than one whole minute, and considerably fewer seconds than half a minute.

A. I don't agree.

Q. And when you saw her for the first time, she was very much closer than 3 cables away.

A. No. At that time, it was within 3 cables.

Q. It was within 3 cables?

A. Yes.

[22] Transcript [Day 35:86/22]

Q. I'm suggesting to you that when you first saw her, she was very much less than 3 cables away; indeed was no more than a few boat-lengths away.

A. I don't agree.

Q. And that you saw her on your port side.

A. No. From dead ahead.

Q. And she was showing a green starboard light to you.

A. Because I have helmed -- I have applied full helm, and she also did that, and that was why I saw her starboard light.

Q. What I suggest to you is that you saw her so shortly before the collision that there wasn't much time to react.

A. No."

The evidence, as shown below, suggests that the application of full helm was much later, if not a matter of 7 seconds before the collision.

28. Engineer Leung states that upon entering into the wheelhouse he passed Lai Ho-yin leaving and eventually stood on the port side. Very soon after he says he saw the Sea Smooth through the portside window and did not notice if either vessel was turning at the time, he shouted to the coxswain "A ship is coming at us", the coxswain then turned to starboard and seconds later there was impact.

29. Lai Ho-yin provides similar evidence concerning the coxswain's reaction. When giving his evidence he stated that he saw Coxswain Chow turn to starboard after he had seen the Sea Smooth about 100m away and to the left of the Lamma IV[23]:

> "Q. You first saw this dull grey ferry, as you described it, at a distance?
>
> A. Yes.
>
> Q. Which you described in your statement as being "about 100 metres ahead"?
>
> A. Yes, this is my estimation.
>
> Q. Right. But it's only an estimation, isn't it?
>
> A. Yes.
>
> Q. When you say it was ahead, was it right ahead -- was it right ahead of Lamma IV, or was it right ahead of where you were, or what was its position?
>
> A. The other vessel was at the location that was approximately on the left-hand side in front of Lamma IV
>
> …
>
> Q. Can you remember what the master was doing with his hands when he was looking straight forward?
>
> A. He should be holding the steering wheel.
>
> Q. Is it your recollection that he was holding the steering wheel?

[23] Transcript [Day 6:57/15, 65/17 and 69/3]

A. I believe so.

…

Q. And it was only after you grabbed hold of the brown part, as you describe it, that you saw the master turn the steering wheel to the right; is that right?

A. I believe so.

Q. That is your recollection; is that right?

A. Yes."

30. Likewise, Sailor Leung's evidence was that upon entering the wheelhouse, he saw a vessel approaching very quickly from the left (10-20 degrees on portside [Marine Bundle/63-4][24]), immediately alerted the Coxswain and he then steered to avoid it[25]. Although he said in evidence that he did not know when the Lamma IV was turned to starboard as he was not watching the coxswain, this is contradicted by paragraph 16 of his witness statement where he states that he noticed that the coxswain steered hard to starboard[26]. Sailor Leung also confirms that the collision happened 10 to 20 seconds after he saw the Sea Smooth[27].

[24] Sailor Leung confirms this in evidence [Day 38:29/13]
[25] Paragraph 4, Q&A.1 and 3 to cautioned statement on 2nd October 2012 [Police Bundle/3343-3 to 5]
[26] Transcript [Day 38:28/1], [Marine Bundle/63-4]
[27] Transcript [Day 38:28/11-20]

31. Further, the VTC tracks[28] do not support a hard turn to starboard at either 1 minute, 30 seconds or even 3 cables before the collision. This, together with the direct witness accounts, suggests that the estimated time and distance between sighting, turning and impact was far more likely to be a turn to starboard when less than ½ cable or 10 seconds away. This is consistent with Captain Pryke's timeline testimony.

Navigation Lights and Emergency Battery

32. It remains in issue whether or not the navigation lights were on, powered and/or working on the Lamma IV during its short voyage prior to the collision. This has been the subject of detailed evidence and questioning.

The Visual Evidence

33. The navigation lights on the Lamma IV were seen lit at the Hong Kong Electric pier. A green starboard light was seen by Engineer Leung Pui-sang[29] and all front navigation lights were seen by Sailor Leung Tai-yau[30], both at around 6 p.m. Further, the coxswain of the Lamma II saw lights on the Lamma IV upon leaving the pier but not thereafter though the vessel remained in sight[31].

34. Upon departure, the lights in the Lamma IV's wheelhouse and upper deck (both inside cabin and open deck) were switched off.

[28] Expert Bundle/316 and 317]
[29] Witness statement para.16 [RSRB/1595]
[30] Witness statement para.12 [RSRB/1610]
[31] Police Statement para.7 and Q&A 11 and 20 [Police Bundle/1114-4, 6 and 7]

35. After the collision, Engineer Leung says that he fell over and upon getting up saw that all 4 navigation lights on the panel were still on[32].

36. On the other hand, there is the evidence from the Sea Smooth witnesses, none of whom saw coloured [navigation] lights on the Lamma IV.

Battery Power

37. It appears that the source of power for the navigation lights when the main switch on navigation light panel is turned to figure 2 is from the emergency battery [33]. When so switched the electrical circuit via the 24V switchboard is likewise operated via the emergency battery. Thus when the circuit breaker on this switchboard breaks, the distribution board power would also cease.

38. The emergency battery was a dry-cell battery with a lid that was not apparently fixed or sealed[34]. It was located on the port side of the engine room[35].

39. The same battery that supported navigation lights also supported the emergency lights[36] (which circuit breaker also tripped on the Main switchboard).

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[32] Transcript [Day 37:19/3]
[33] Transcript [Day 37:58/10-25 and p.59/15]
[34] Transcript [Day 37:94/15]
[35] Dr. Armstrong Transcript [Day 28:115/15] when referring to photograph at Police Photo Bundle/514
[36] Transcript [Day 37:100/8]

40. The expert evidence suggests, at best, that the navigation lights were on just before they came into contact with, most likely, seawater and the filaments oxidized[37]. As stated by Dr. Armstrong[38]:

> "… I notice that in one of the pictures the circuit-breaker has tripped for the navigation lights, and I do not know when that happened, of course. It may have happened after the vessel was brought ashore, for all I know."

He then goes on to fairly say that:

> "… The colour red indicates to me that that circuit-breaker has tripped. I thought it was interesting that that had tripped, although, as I say, I do not know when it tripped.
>
> MR SHIEH: And that is the circuit-breaker for?
>
> A. For the navigation lights.
>
> Q. How would you interpret that, Dr Armstrong?
>
> A. Well, as I say, Mr Shieh,] I don't know when it happened. But if it happened before the vessel was recovered, then I would interpret it -- clearly it can only trip when there is power to something that short-circuits. So a possibility is when a light broke, for example, and the seawater then allowed it to arc across the contacts. That would create --
>
> Q. A surge of electrical current?"

[37] Dr. Cheng's Expert Report paras. 4.6, 5.9 [Expert Bundle/375, 378] and Supplemental Report paras.3-5 [Expert Bundle/1096-7]
[38] Transcript [Day 28:116/12 and 117]

41. However, what makes this issue all the more curious is that, given the Lamma IV sank stern first with water ingress into the Engine room (where the battery is located), the battery continued to work after being submerged when the stern light was not examined as the source of the circuit breaker tripping. Also unexplained is how the navigation lights could still be powered upon sinking when the likely cause of the navigation panel circuit breaker tripping was the stern light and other lights[39].

42. Further, for the first time during his oral evidence, the coxswain of the Lamma IV gave evidence that turning the navigation light master switch to be powered by generator lead the navigation lights bulbs to fail around twice a week[40]:

> "A. Usually because if we dial to "1", then the power will be too high and would often lead to failing of the light bulbs. And we are concerned that during the -- while we are steaming, we have no time to change the bulbs. So we usually dial it to "2", which is the reserve battery, because it would be charged by the generator.
>
> …
>
> Q. Was this a regular problem?
>
> A. Yes. It happened quite frequently.
>
> ….

[39] Professor Ho on [Day 47:77/4]
[40] Transcript [Day 35:43/14]

A. Usually there will be two incidents of light bulb failure in a week.

THE CHAIRMAN: When you say "light bulb failure", do you mean navigation light bulb failure?

A. Yes, the navigation light bulb."

43. This problem was later stated by Engineer Leung to have been remedied some years before[41], and that the coxswains and/or engineers knew to only power the navigation lights with use of the emergency battery[42]. It is curious that there appears no written record of such anomaly, that such practice was not general or instructed by the Marine Section.

44. How the emergency battery could have been providing power to the navigation lights when the battery apparently (according to Coxswain Chow) failed soon after the collision[43], being a likely scenario when submerged and without being in a watertight container[44], remains unanswered.

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[41] Engineer Leung's evidence was that the generator problem was fixed about a year ago but they continued to use the battery to power the lights because the battery was more stable than using [the fixed] transformer issue.

[42] Transcript [Day 37:36/20 to 37/13]

[43] This is contrary to the evidence of Fire Services officer Tam Kam-lun who confirmed that when attaching the morring line to the starboard light area, the green light was lit (Transcript [Day 10:110/23]

[44] Transcript [Day 37:61/16]

Minimum Manning

45. The Lamma IV is licenced to sail with a minimum manning of 4 crew. However, the evidence shows the Lamma IV was invariably staffed by an official crew of 3 when in operation. This was the case on 1st October 2012.

46. The *ex post facto* rationalization by those from Hong Kong Electric, including Mr. Francis Cheng and Tang Wan-on, of providing an ad hoc person to make up the 4th crew member, when often neither that person or the official crew were aware of his position, duties or responsibilities or the fact that he was crew, to 'comply' with the licence is simply disingenuous[45]. In any event, such act is unlikely to comply with the Lamma IV's operating licence:

    a. Li Kin-pong an officer from Harbour Patrol section of Mardep, on Day 13, 11th January 2013, states[46]:

    "…As the senior marine officer of the Harbour Patrol Section, you say that you're responsible to enforce marine legislation and regulations, and to ensure navigational safety; correct?

    A. Correct.

    Q. Do you consider adequate manning on ships to be a safety issue within your or your department's remit?

    A. Of course.

[45] Captain Pryke on [Day 45:95/7]
[46] Transcript [Day 13:80/15]

Q. So would I be correct to say that in terms of enforcing legislation, one of those legislations would be the Marine Shipping (Safety) Ordinance, Cap 369?

A. Correct.

…

Q. Thank you. In any event, Officer, in your experience, would you consider an undermanned vessel to be seaworthy?

A. In that circumstance, they should be sufficiently manned."

b. Definition of crew in 548 is Cap 548, section 2 and it is defined to mean: "*The coxswain and any other person employed or engaged in any capacity on board a local vessel* <u>*on the business*</u> *of the vessel*." The issue is therefore whether an ad hoc staff of Hong Kong Electric can be said to be employed on the business of the vessel.

47. In any event, of some surprise is the evidence of officer Li[47] that he was not aware of any provision or consequence to the owner or operator of a local vessel for breach of its licence conditions. What then are such requirements or conditions for?

"Q. Maybe I'll put it another way. If a vessel has less manning than is permitted by its operating licence, would it be considered seaworthy?

A. I can only say that it has violated the regulation in respect of manning…

[47] Transcript [Day 13:85/12]

MR ZIMMERN: I was trying to find out from you is whether, if the vessel was manned with less than four people whilst at sea, it would be considered either unfit or unseaworthy. Are you able to assist us there?

A. (In English) It's perfectly clear, stipulated that the minimum manning for that vessel --

THE CHAIRMAN: What counsel is asking is this: is there a consequence if you are undermanned, and if so, where do we find it?

A. (In English) I can only say it is undermanned."

48. Section 67(1) of the Merchant Shipping Safety Ordinance, Cap. 369 ("MSSO"), reads:

"If-

(a) a ship in Hong Kong; or

(b) a ship registered in Hong Kong which is in any other port,

is, having regard to the nature of the service for which the ship is intended, unfit by reason of the condition of the ship's hull, equipment or machinery or by reason of undermanning or by reason of overloading or improper loading to go to sea without serious danger to human life, then, subject to subsection (2), the master and the owner shall each commit an offence ..."

49. Section 3(d) of the MSSO precludes the application of the ordinance for local vessels unless otherwise provided. However, ship is

defined under section 2 as including "*any vessel used in navigation other than a vessel propelled by oars or a junk*". The issue then arises as to whether s.67(1)(a) would include local vessels as being "*otherwise provided*". Unfortunately, there does not appear to be any authority on point. However, the simple issue is one of interpretation and whether a local vessel is otherwise provided for in the phrase "*a ship in Hong Kong*". Clearly it is such a ship.

50. Seaworthiness is defined in Layton's Dictionary of Nautical Words and Terms as "*In a limited sense, is a vessel's fitness to withstand the action of the sea, wind and weather. In a broader, and legal sense, it requires that the vessel must be handled and navigated competently, fully manned, adequately stored, and in all respects fit to carry the cargo loaded*."

51. It is noteworthy that when HKKF crew were seconded to man the Lamma IV between 21st November and 21st December 2011, that there was a variation to the contract to provide 4 crew to man the Lamma IV at the request of HKKF[48].

52. In this situation undermanning (where according to Coxswain Chow the radar could not apparently be properly operated[49]) renders the vessel unseaworthy such that there ought to be consequences for failure to comply with the licence. If the above legislation is inapplicable to local vessels, the only other legislated consequence

[48] Evidence of Mr. Ng Siu-yuen, Transcript [Day 34/3/21]
[49] The need for an extra qualified crew to assist in viewing the radar was suggested by Coxswain Chow (Transcript [Day 36:10/8])

appears to be Section 11 of the Merchant Shipping (Local Vessels) (General) regulations, Cap.548F.

Summary

53. It is submitted that:-

a. The first sighting of the Sea Smooth was very much later than the coxswain had sought to portray to this Commission and more a matter of seconds. This was the clear evidence of Engineer Leung as corroborated by Lai Ho-yin. It also tallies with the accurate historic radar data.

b. The purported use of radar and the sighting of the Sea Smooth at 1 nautical was a fabrication by Coxswain Chow. If not, and having tracked the Sea Smooth without visual contact until too late (as suggested above), this would only go to compound his negligent conning.

c. The weight of evidence shows that there was no use of the horn by Coxswain Chow nor was there use of the searchlight by him prior to the collision.

d. The turning to starboard by Coxswain Chow was simply too late and was more likely when the Sea Smooth was 2 to 3 boat lengths away which according to Engineer Leung and Lai Ho-yin was when they saw Coxswain Chow turn full starboard. After all, Coxswain Chow's own evidence is that taking action

around 3 cables is the usual practice in Hong Kong[50]; and the accurate historic data from the VTC radar track records do not support any hard turn to starboard over the 30 second period and/or that the 3 cables would have shown.

Save for the time of Coxswain Chow's first sighting of the Sea Smooth, the above analysis is ad idem with the timeline testimony of Captain Pryke[51] as follows:

20:18:40 hrs – The two vessels were 1 nautical mile away[52]
20:19:30 hrs – Sea Smooth altered course to port
20:19:50 hrs – Lamma IV first sighted Sea Smooth
20:20:10 hrs – Lamma IV turned to starboard
20:20:14 hrs – Sea Smooth first sighted Lamma IV
20:20:17 hrs – Collision

54. Whether the navigation lights of the Lamma IV were lit during the eventful voyage is questionable. It is also suggested that the Lamma IV was undoubtedly undermanned and in breach of its licence which breach we submit rendered it unseaworthy.

BII. <u>The Sea Smooth</u>

55. At around 20:00 hrs on 1st October 2012, having done 9 return trips between Central and Yeung Shue Wan, Lamma Island that day, the

[50] This is contrary to Captain Pryke's evidence that the Coxswain Chow would have to have been slick to avoid collision at 3 cables.
[51] Transcript [Day 45:51/14]
[52] Dr Armstrong's Report [Expert Bundle/1806]

Sea Smooth again departed from Central pier at around 2000 hrs heading towards Yung Shue Wan pier.

The First Sighting of the Lamma IV

56. The evidence from Coxswain Lai of the Sea Smooth is that he did not see the Lamma IV until it appeared as a black shadow (probably being in front of the fog light) about 2-3 boat lengths away[53]. He also stated that he set the radar to a range of 0.75 nautical mile though conned the vessel visually during that journey and did not look at the radar "by any specific moments" given the good visibility [54].

57. The evidence from the crew of the Sea Smooth is that at the point of leaving the wheelhouse near the beacon off Shek Kok Tsui, none of them saw any navigation lights or vessels in the vicinity of the Sea Smooth. The crew left the wheelhouse around 30 seconds before impact.

Action taken

58. Upon this last seconds sighting of a vessel, Coxswain Lai's testimony is that he put the engines to full astern and turned the joystick full starboard[55]. That the Sea Smooth did appear to slow down moments before the collision is corroborated by:-

[53] Transcript [Day 42:30/5]
[54] Transcript [Day 42:16/21]
[55] Transcript [Day 42:39/14]

a. Lo Pui-kay, the engineer, who felt it suddenly slow down so much so that he grabbed the bulkhead to keep balance (Witness Statement para. 25 at HFW/135) and Wong Yung-shing, the sailor (Witness Statement para. 18 [HFW/144]).

b. Passengers:

i. Kong Yuen-kan was sitting in seats 118-120 of main deck[56]:

"Q. So would I be right to infer that you were fully awake when you felt the vessel slow down?

A. Yes.

Q. And you concluded at that stage that because the vessel was slowing down, she must be reaching her destination on Lamma?

A. Yes, it should be about that time.

Q. Right. Then you say that all of a sudden, you heard a bang, followed by the feeling of a violent collision.

A. Yes. Yes, it was a very loud sound.

Q. Are you able to give us any estimate of the interval of time between the slowing down and the collision?

A. It was very close."

ii. Wan Ho-yin was in seat 20 of the upper deck port side[57]:

[56] Transcript [Day 6:112]
[57] Transcript [Day 7:121/23]

"…I felt that the ferry decelerated. I thought that it had reached Lamma Island, and so I intended to stand up to take a look."

iii. Witness A, sitting on the port stern of the open deck, also felt a change in course, "brake was applied to Sea Smooth and swerved to the right" (Witness Statement para. 5 at [Misc Bundle/76]).

c. It is noted that Captain Pryke fairly reconsidered whether this action would have amounted to a collision avoidance manouevre but opined that it was simply too late[58].

Navigation Lights

59. The evidence is such that no witness from the Sea Smooth, in particular its crew, saw the navigation lights of the Lamma IV at any time before the collision.

60. Mr. Rebanks saw a bright light (not navigation lights) and Mr. Niu saw a yellowish row of lights.

61. It is noted there is no issue that the navigation lights of the Sea Smooth were all on and operating that night.

[58] Transcript [Day 45:54/4]

The Hong Kong Electric Fog Light

62. The preponderance of evidence also points to the fact that the fog light situated at the breakwater of the shelter to the Hong Kong Electric pier does impair visibility when travelling towards its beam.

a. Cheng Muk-Hei, coxswain on Lamma II, said in evidence that the fog light did cause some impediment on visibility when going south past the Shek Kok Tsui beacon[59]:

"MR SUSSEX: …If you are sailing south beyond Shek Kok Tsui in the direction of the Hongkong Electric pier, does the fog light that we were talking about before lunch have an impact on the visual look-out that you can achieve?

A. Yes, it does have some impact.

Q. Is that impact that it's more difficult to make out lights, such as navigation lights, which are dimmer than the very bright fog light?

A. Yes."

b. The evidence of Coxswain Lai was as follows:

"Q. Have you ever felt that the intensity of this light in the evening had somehow hampered your ability to notice approaching vessels from a distance?

A. Yes.

Q. How did that happen?

[59] Transcript [Day 9:61/25]

A. I would have to pay very great attention before I can detect that there was a vessel, or that there must have been navigation lights.

Q. Did you that evening pay particular attention to approaching vessels, because of the presence of this light?

A. Yes." [60]

63. Curiously, this bright light, using two 1000W bulbs, is apparently on 24 hours a day and in all weather, foggy and not.

64. We then get the somewhat confusing and novel evidence of Coxswain Chow that the light did at one time cause impairment to lookout but that following complaints this impairment was remedied. However, again Hong Kong Electric has no record whatsoever of such purported complaint[61] or remedial works.

"Q. And you gave evidence yesterday that you've never experienced a problem with visibility by reason of that fog light?

A. Yes, correct.

Q. So is it your evidence that you'd never had any occasion to talk to the management about the fog light?

A. I did previously.

Q. Why was that?

A. Because previously it was pointing directly to the north, and it affected our vision. So we requested that it should be

[60] Transcript [Day 42:14/8]
[61] Email from RSRB dated 20th February 2013 [HFW/1104]

changed to another direction, and now it is pointing directly towards south horizon."[62]

"Q. So is it your evidence that the fog light can be discounted as a factor contributing to this collision?

MR SHIEH: "Not sure". "Not certain"."[63]

65. When Captain Pryke was questioned about the fog light his evidence was as follows[64]:

"…it doesn't line up exactly, but round about 20:20 the fog light would have appeared behind Lamma IV to Sea Smooth's vision."

….

"Q. And the question was, would you support a recommendation by this Commission, if it thought it appropriate, to remove that?

A. Yes, I would indeed, yes."

Glancing Off

66. Originally there was a suggestion that the Sea Smooth may have purposefully separated itself from the Lamma IV and that may have allowed the Lamma IV to sink. It is clear from the evidence that this matter was wholly misconceived. Not only did the Sea Smooth not

[62] Transcript [Day 35:27/4]
[63] Transcript [Day 35:29/13]
[64] Transcript [Day 33:60/5 and 65/1]

purposely back out or separate itself from the Lamma IV but more importantly, due to the breaking off of the Sea Smooth's port hull moments after impact, there was no part of the Sea Smooth's hull to back out from the Lamma IV. As Dr. Armstrong said[65]:

> "A. I'm referring to the probably fairly natural thought that if a vessel is embedded within your vessel, then it may be blocking the inflow of water into the hull; and if it is reversed out, then it may be making the hole bigger and the ship you are on will sink all that much quicker. So in certain situations, it can be advantageous to leave one vessel embedded within another.
>
> What I'm trying to say here is, some of the passengers may have thought that, but in reality there was no part of Sea Smooth within Lamma IV below the deck. So that scenario was not the case. But the passengers would not be aware of it, because they could not see below the decks."

67. This glancing off from the impact is consistent with the general body of evidence, and for instance, of Engineer Leung who said that he saw the Sea Smooth 2 to 3 ship lengths away from the starboard side of the Lamma IV from the main deck outside corridor having checked the engine room soon after the collision[66].

[65] Transcript [Day 24:80/2] and paragraph 35 of Second Supplemental Report [Expert Bundle/935]
[66] Transcript [Day 37:31/1-17]

"It's Hong Kong Electric Again"

68. One witness, Mr. Niu, claims to have heard a member of the crew of the Sea Smooth utter words to this effect.

69. No evidence has been given of what these words could have meant, even if they were in fact uttered. There has never been a near miss between a HKE vessel and a HKKF ferry.

Leaving the Scene

70. The evidence is that the Sea Smooth left the scene for 3 reasons. First, the passengers on board were screaming and the scene was chaotic. Second, some passengers were thought injured. Third, water had entered and continued to enter through the bow of the vessel as well as 2 forward port bilge manholes with the damage to the hull causing the Sea Smooth to list slightly to port, exacerbating the passengers' state of panic. Upon his own judgment, Coxswain Lai informed MARDEP of his intention to sail to the close by pier at Yung Shue Wan.

BIII. The HKKF

71. HKKF, as a group, owns a total of 13 passenger ferry vessels. On any given day 8 vessels are in service of which 7 operate on its 3 local ferry routes, with 1 vessel kept on standby.

72. On behalf of HKKF, Mr. Ng Siu-yuen, candidly admitted on several occasions that the previous guidelines and practice of HKKF, which

followed industry practice, had much room for improvement[67] in terms of dissemination and specificity. It was also his evidence that following the collision, improvements by HKKF had been made and were being made including installing of televisions to provide safety demonstrations, larger pictorial instructions for the donning of life jackets clearly placed on the vessels, the hiring of additional staff in operations and the creation of a specific safety executive whose duties are to improve safety systems, guidance, training and operations, instigation of monthly emergency training drills by crew and the drafting of a comprehensive handbook[68].

73. As stated above, HKKF is committed to ensure the safety of its passengers and any recommendations made by this Commission with regard to marine safety are welcome and will be well received.

C. The Proximate Cause of the Collision

74. Both coxswains were, as far as the evidence shows, far too late in sighting the other vessel. That egregious failure of look-out was the real or proximate cause of the collision on 1st October 2012. This failure of look-out was compounded by the failure to make use of the radar equipment with which both vessels were fitted.

75. There is no other or proper explanation as to why both coxswains failed to see the other vessel until too late, on a night of clear visibility. The evidence of the Sea Smooth engineer and sailors, all of whom were in the wheelhouse when rounding the beacon of Shek

[67] Transcript [Day 31:86/13, 95/18, 99/15, 105/11] and [Day 32:76/23]
[68] Witness Statement at paragraphs 21, 25 to 33 [HFW/6]

Kok Tsui, is that none of them saw the navigation lights of any other vessel approaching or in the vicinity when they left the wheelhouse to prepare for arrival at Yung Shue Wan pier. This is despite that the Lamma IV was within 3 cables away around that time.

76. Had either coxswain and/or even crew been alerted to the other vessel, and in good time, this tragic accident should have been avoided. A reference to the radar should clearly have shown the other vessel's echo.

77. The real cause of the collision was the failure of look-out, and that included the failure to make proper use of radar equipment. This would amount to a clear breach of Rules 5 and 7 of the Collision Regulations.

78. Captain Pryke has expressed the view that the turn by the Sea Smooth to port was the proximate cause of this collision. But it is clear from the evidence that that manouevre was a navigational manouevre preparatory to docking at Yung Shue Wan ferry pier, and was not a collision avoidance manouevre and therefore a "blatant breach" of the Collision Regulations. The overwhelming probability is that the turn to port was completed before either vessel sighted the other. We submit that this is apparent from Dr. Armstrong's time distance table.

79. There is also an issue concerning whether the fog light at the end of the HKE breakwater was causative of this collision.

80. It is not appropriate for this Commission to indulge in the attribution of blame by reference to an *ex post facto* analysis of the navigational manoeuvres by reference to the Collision Regulations. Captain Pryke has expressed the view that this was a clear head-on situation when the risk of collision attached. He is wrong. But that is not a matter that needs to detain this Commission[69].

> "Q. The rule is "reciprocal or nearly reciprocal courses".
>
> A. Yes. And looking at the chart of the two vessels' courses and their coming together, I would say instantly that that is head-on or nearly head-on. I mean, as I said before, we don't go into this business with slide rules. It's a judgment."
>
> "Q. So it follows, does it not, that at 20:18 we must be looking at a fine crossing situation?
>
> A. Well, that's a matter of judgment, isn't it."

D. <u>Analysis of the cause of the Collision in terms of navigational manouevres</u>

81. If, contrary to the above submissions, this Commission nevertheless considers it appropriate to analyse the navigational manouevres of these vessels in terms of the Collision Regulations (despite the overwhelming probability that those navigational manouvres occurred at a time when the vessels were ignorant of the presence of one another), the ultimate question is whether the collision should be considered under Rule 14 (head-on) or Rule 15 (crossing) of the

[69] Transcript [Day 33:15/18]

International Regulations for Preventing Collisions at Sea 1972 ("Colregs").

82. Once risk of collision exists and the approach situation can be classified, subsequent changes do not affect the original classification[70]. This position was also agreed to by Captain Pryke[71].

83. Rule 7(d)(i) of Colregs provides a test to determine when the risk of collision arises, *inter alia*:

> "(*d) In determining if risk of collision exists the following considerations shall be among those taken into account:*
> *(i) such risk shall be deemed to exist if the compass bearing of an approaching vessel does not appreciably change*;"

84. Applying this and as many times agreed to by Captain Pryke, the risk of collision arose latest at 20:18 hrs:

> "Q. So when do you say the risk of collision attached?
>
> A. Well, I would go for 20:18, and I would go for -- because Sea Smooth now has a steady bearing for over a minute." [72]
>
> "…Well, what we're looking to do, as I understand it, is on taking the view that the risk of collision attaches at 20:18,

[70] Farwell's Rules of the Nautical Road, 8th Ed., pg. 368, citing *Gulf Coast Transit Co. v. The Anco Princess*, 1978 A.M.C2471 (E.D. La. 1977); *A/S Skugas v. The P.W.Thirtle*, 1964 A.M.C. 565 (D. Md. 1964)
[71] Transcript [Day 32:102/13]
[72] Transcript [Day 32:101/5]

we want to assess whether this is a rule 14(a) situation at that time.

A. Can I help you a bit here. The reason I said for Sea Smooth the risk of collision can be clearly seen to exist at 20:18 is because she's had a full minute with having this steady bearing on the port bow at 4 degrees. Nothing to do with lights or anything else. It's a steady bearing on the port bow. Risk of collision exists."[73]

…

Q. "Captain Pryke, yesterday I think we reached a measure of agreement on one point, and that was that the risk of collision between Sea Smooth and Lamma IV existed at 20:18.

A. Yes.

Q. So even if it existed earlier, it unquestionably existed at 20:18?

A. Yes, indeed."[74]

85. Rule 14(a) of Colregs, which has been applied by Captain Pryke, requires actual courses to be reciprocal or nearly reciprocal. It is obvious that in order for courses to be reciprocal they need to be 180° apart from each other and that "*courses may be considered*

[73] Transcript [Day 32:118/11]
[74] Transcript [Day 33:1/11]

nearly reciprocal if within five to six degrees of the actual reciprocal."[75]

86. Given that the voyages were at night, Rule 14(b) provides for a visual aspect assessment ["ahead or nearly ahead if…"] of whether approaching vessels can be deemed to be within the rule. This is when sight of the navigation lights becomes relevant. As stated by Farwell "*Rule 14(b) describes for the mariner the day and night visual aspect that will deemed to satisfy the definition of a head-on situation when the vessels are close enough to permit such observations. ...there is no sound reason that a mariner cannot apply the definition in Rule 14(a) to the radar and visual bearing ... to determine whether the approaching vessel is meeting on a course that is reciprocal or nearly reciprocal so as to involve risk of collision. Courts often imply such an approach when they ask not what lights the mariner on a vessel did see, but rather what lights the mariner would have seen."*[76]

87. Rule 14(c) of Colregs can, we suggest, be ignored for present purposes as neither coxswain was actually in any doubt. To the contrary as alluded to above, neither coxswain saw the other vessel until moments before impact and certainly neither was even aware of the other's existence at 20:18 hrs.

88. Given risk of collision occurred at 20:18 hrs, a review of the vessels' relative courses shows that only one conclusion that fairly can be reached and that the correct rule to apply and consider is Rule 15 of

[75] Farwell p.366
[76] Farwell p.371-2

Colregs both by their courses being greater than 6 degrees of reciprocal and that neither would have seen both navigation lights[77], when risk of collision first occurred.

"Q. Right. But giving it your best effort, you put Sea Smooth on a course of 180, and Lamma IV on a course of 350.

THE CHAIRMAN: At which point in time?

MR SUSSEX: 20:18.

THE CHAIRMAN: Thank you.

A. Yes, that's correct.

MR SUSSEX: The vessels are then not on reciprocal courses, are they?

A. No.

Q. The reciprocal of 180 is obviously 360 --

A. They're on a nearly reciprocal course.

Q. Well, the reciprocal of 180 is 360. Lamma IV is 10 degrees off that. That's right, isn't it?

A. Yes. At 20:18."[78]

"Q. So, knowing as we do the courses of the vessels -- they're 10 degrees off reciprocal -- they would not have been exhibiting both sidelights to one another, would they?

A. Probably not, no[79].

[77] Rule 21(b) of Colregs sets out the requirements for the side navigation lights, which cross over the fore midship by between 1° and 3°
[78] Transcript [Day 33:22/3]

…

Sea Smooth at 20:18 would only be exhibiting a red sidelight to Lamma IV, would she not?

A. Yes.

Q. And Lamma IV at 20:18 would only be exhibiting a green sidelight to Sea Smooth?

A. Yes."[80]

89. Although Captain Pryke continued to insist that the vessels were nearly reciprocal, clearly at 20:18 hrs, on his own plotting the vessels' admitted courses were greater than 6° apart. Not only did he agree to these courses, he also agreed that neither would have seen both sidelights from the other. As this is the time when the application of the relevant rule engages, it is Rule 15 that applies.

90. Rule 15 of Colregs provides:

"*When 2 power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel*."

---

[79] It is instructive that in *The "Lok Vivek"* [1995] 2 Lloyd's Rep. 230 the issue of whether or not a collision fell to be assessed by reference to the "head-on" rule was determined by asking the Elder Brethren whether each vessel in the prevailing conditions would have been able to see both sidelights of the other vessel (at p.239).

[80] Transcript [Day 33:29/10 and 24]

91. As the Lamma IV would at 20:18 hrs have had the Sea Smooth to her starboard side, she was the give way vessel that was obliged to act.

> "Q. Yes. And Lamma IV has Sea Smooth to her starboard.
>
> A. Correct.
>
> Q. She is exhibiting a starboard sidelight --
>
> A. Yes.
>
> Q. -- to Sea Smooth? So rule 15 mandates that Lamma IV should keep out of the way and shall, if the circumstances admit, avoid crossing ahead of Sea Smooth?
>
> A. That's correct, yes."[81]
>
> "Q. If we are dealing with a crossing situation, then from 20:18 we have, I suggest, Lamma IV as the give-way vessel and Sea Smooth as the stand-on vessel?
>
> A. Yes, predicated by the fact that if we are dealing with a crossing situation."[82]

92. As the give way vessel, the Lamma IV was obliged to "*take early and substantial action to keep well clear"* of the Sea Smooth. From 20:18 hrs until collision not only did the Lamma IV not take early or substantial action, she did what she was mandated not to do and that was to turn starboard thereby crossing ahead of the Sea Smooth. Had Coxswain Chow really seen the Sea Smooth 1 nautical mile (as

[81] Transcript [Day 33:32/2]
[82] Transcript [Day 33:34/14]

alleged) then, we submit, he would and should have taken earlier avoidance action and not waited until the very last 10 seconds as envisaged by this Rule.

93. As the stand on vessel, Rule 17 of Colregs would then apply to the Sea Smooth. Subsection (a)(i) of this rule provides:-

> *"(a) (i) Where one of two vessels is to keep out of the way the other shall keep her course and speed*."

94. It is said in Marsden, Collisions at Sea, 13th Ed., para. 6-354 that "*The rule requiring a ship to keep her course and speed must be strictly observed.*" *The duty is, however, subject to a number of qualifications…(b) The second qualification is that "course and speed" in this rule mean "course and speed in following the nautical manouevres in which to the knowledge of the other vessel the vessel is at the time engaged". It does not mean that the stand on vessel must maintain a constant heading or a constant speed.*"[83] (emphasis added)

95. As the flashing mast light of the Sea Smooth would have informed Coxswain Chow of the Lamma IV that a HKKF ferry was heading to Yung Shue Wan, we suggest that this would mean that the Sea Smooth was entitled to continue its navigational manouevres to Yung Shue Wan, which unfortunately is exactly what it did.

[83] Applying *The Roanake* [1908] P.231 at 239 per Lord Alverstone C.J. followed also in *The Echo* [1917] P. 132 and *The Dona Myrto* [1959] 1 Lloyd's Rep 203.

E. Conclusion

96. It is submitted that the above analysis is only relevant to the attribution of blame for this collision, and is not relevant to this Commission's remit to identify the cause of the collision. That remit necessarily involves real or proximate causes, and not *ex post facto* analysis of the navigational manouevres when each vessel was "deemed" by the Collision Regulations to be in sight of the other when the risk of collision attached.

97. The Commission should only analyse this collision on the basis of the information known to those navigating the vessels. Their navigational manouevres effected when ignorant of the presence of one another should form no part of the Commission's consideration. The real cause of this collision was human error, which took the form of an egregious failure of look-out and wanton use of radar by both coxswains.

98. In light of the tragic accident off Lamma Island on the night of 1st October 2012, on behalf of HKKF, we would like to offer our sincere condolences to the friends and families of the deceased and to all those injured or affected by the incident.

99. We would also like to commend the bravery and hard work of the Hong Kong emergency services and to all other persons for their rescue efforts and the saving of lives.

Dated 10th day of March 2013

Charles Sussex SC

Richard Zimmern

Counsel for the owners and operators of Sea Smooth

Messrs Holman Fenwick Willan

Solicitors for the owners and operators of Sea Smooth

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