Neutral Citation Number: [2023] EWCA Civ 1320

Case No: CA-2023-000175

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
Stephen Houseman KC (sitting as a Deputy High Court Judge)
[2022] EWHC 3129 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 November 2023

Before :

LADY JUSTICE ASPLIN
LORD JUSTICE SNOWDEN
and
SIR LAUNCELOT HENDERSON

- -

Between :

ANGELIKI FRANGOU	**Appellant/ Claimant**
- and -	
IOANNIS (JOHN) FRANGOS	**Respondent /Defendant**

- -

Timothy Hill KC and Andrew Feld (instructed by **Wikborg Rein LLP**) for the **Appellant**
Oliver Caplin and Patrick Dunn-Walsh (instructed by **Waterson Hicks**) for the **Respondent**

Hearing dates : 4-5 July 2023

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Approved Judgment

Remote hand-down: This judgment was handed down remotely at 2 p.m. on Friday 10 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Snowden :

1. This is an appeal in relation to one aspect of a wider dispute between two members of a prominent Greek ship-owning family. The family was formerly headed by the late Captain Nikolaos Frangos ("Captain Nicos") who died in 2016 at the age of 90.

2. The appeal concerns the terms of an agreement dated 1 September 2011 (the "Taurus Two Agreement" or "TTA"). The TTA was entered into in connection with an arrangement, which was instigated by Captain Nicos, under which his daughter, the Claimant, Angeliki Frangou ("Angeliki") agreed that one of her companies would pay a premium to acquire a loss-making vessel known as the m/v Taurus Two from a company owned by her brother, the Defendant, John Frangos ("John"). Under the arrangement, Angeliki and her company assumed substantial obligations in order to bail out John and his company, who were unable to repay the substantial debt and guarantee liability which they owed to a bank in respect of the vessel.

3. Angeliki contends that a term of the TTA in effect required John to indemnify her for all capital and accumulated trading losses incurred up to the time at which the Taurus Two was subsequently sold by her company in 2020. John disagrees, contending that his obligation to indemnify his sister expired on 1 September 2015. That date corresponded to the end of the term of the new loan which Angeliki's company had taken from the bank in 2011, and was the same date upon which John had been entitled to exercise (but had not exercised) an option under the TTA to reacquire the Taurus Two.

4. Angeliki's claim, which was originally for US$11.86 million, was dismissed by Stephen Houseman KC (sitting as a Deputy High Court Judge) ("the Judge"): see [2022] EWHC 3129 (Comm) (the "Judgment"). Angeliki appeals that decision pursuant to permission granted by Males LJ.

The background

5. In paragraphs [11]-[18] of his Judgment, the Judge set out what he described as the entirety of the admissible matrix against which the TTA fell to be construed. That matrix was also reflected in the recitals to the TTA. The following is taken from those paragraphs of the Judgment and the recitals.

6. From July 2007, the Taurus Two was owned by a Panamanian company called Shipping Fortune Maritime SA ("SFM") which was ultimately beneficially owned by John. SFM was financed by a loan from lenders led by Hamburg Commercial Bank AG (formerly HSH Nordbank AG) ("HSH"). That original loan was secured by a mortgage over the vessel and an unlimited personal guarantee from John.

7. The Taurus Two was managed by John's company called Irika Shipping SA, but the trading income generated was insufficient to service the HSH loan. By mid-2011 the loan was in default, had been accelerated and payment of the sum due of about US$ 47.5 million had been demanded from SFM and under John's personal guarantee.

8. The amount due was not paid and HSH arrested the Taurus Two in Singapore pursuant to its powers as mortgagee on 22 August 2011. An agreement was then reached between John and Angeliki, at the insistence or interposition of their father, whereby

the Taurus Two would be acquired by a company called Brandon Maritime SA ("Brandon"), which was a subsidiary of another Panamanian company, Maritime Enterprises Holdings SA ("MEH"), which was ultimately beneficially owned by Angeliki. The intention was that the Taurus Two would thereafter be operated and managed by another of Angeliki's companies called Maritime Enterprises Management SA ("MEM").

9. The purchase price agreed for the Taurus Two was US$33.5 million. The Taurus Two was, however, about six years old at this time and was worth substantially less than US$33.5 million - somewhere in the region of US$22 million.

10. Brandon's acquisition of the Taurus Two was part-financed with a new term loan facility of US$26.8 million from HSH (the "Brandon Loan") which was personally guaranteed by Angeliki. Captain Nicos contributed a further US$7.8 million to Brandon to fund the purchase price and other expenses. The Brandon Loan was for a four year term maturing on 1 September 2015. The loan profile was 15 years, although the vessel may have had a projected maximum lifespan of another 19 years or so at this time.

11. In parallel with this sale, HSH also agreed a restructuring of SFM's outstanding debt and John's guarantee liability, which had been reduced to just over US$14 million following receipt by SFM of the US$33.5 million sale proceeds. John executed an acknowledgment of his guarantee debt to HSH and payment of the principal amount of SFM's and his personal debt was deferred until the same maturity date as the Brandon Loan, on agreed terms as to interest. This arrangement was recorded in a settlement and standstill agreement which was referred to by the parties as the "Styliani Loan", after the name of one of the other parties to the relevant document.

12. Substantial documents giving effect to the sale of the Taurus Two, the Brandon Loan and the Styliani Loan described above were entered into by the various parties on or about 31 August 2011. HSH thereupon released the Taurus Two from arrest so that it was able to continue to fulfil its then current charter obligations.

13. The Judge described the arrangements outlined above as a family-led "bail out" for the benefit of John. Some part of its impetus concerned protection of the family name and goodwill. He stated that it was not a purely commercial or necessarily prudent solution to the problem of the Taurus Two as an unprofitable and distressed asset, but was instigated as a form of parental intervention or mediation by Captain Nicos.

14. The Judge also observed that this compromise solution imposed a burden upon Angeliki. She became personal guarantor of a new loan for a mortgaged vessel worth much less than her company had paid for it. The Judge found that this is not something Angeliki was likely to have undertaken as a matter of autonomous commercial judgment.

15. The Judge also pointed out that the deal provided a benefit to John which he may not have been able to obtain from the ship-financing market at that time or in the foreseeable future. The Judge recorded, however, that in spite of the benefits conferred upon him, John was nevertheless hurt by the loss of the Taurus Two in this way and wanted to buy it back. Providing an option for John to do that was one of the purposes of the TTA.

The Taurus Two Agreement

16. The TTA was a shorter form document than the other documents entered into as described above. It was drafted by what the Judge described as "long-standing in-house lawyers" acting for John and Angeliki, and was executed by them and dated 1 September 2011.

17. The operative provisions of the TTA were as follows (the Taurus Two being referred to as "the Vessel"),

> "1. [Angeliki] hereby irrevocably agrees, subject to fulfilment of the conditions stipulated herebelow upon maturity of the 4 years tenor of the [Brandon Loan] to consent the Vessel to be sold by [Brandon] (which will remain the registered owner of the Vessel until such time) to a company to be indicated to her by [John] or by his heirs, as the case may be, either of his or his family control or beneficially owned or controlled by a third party.
>
> 2. It is specifically noted that the earnings of the Vessel during the 4 years' tenor of the new loan will be disbursed so that to meet her running costs, management fees, the capital and interest repayments and any balance will apply at the end of the 4 year tenor, towards repayment of the equity contribution of [Captain Nicos to Brandon].
>
> 3. The conditions precedent to be fulfilled so that the above consent be granted by [Angeliki] are the following:
>
> a. The sale price of the Vessel will be at minimum the then current outstanding indebtedness of [Brandon] to HSH which will be the beneficiary of that portion of the proceeds of the sale, taking also into account the equity kicker agreed between HSH and [Brandon] plus any shortfall from the operation and management of the vessel from September 1, 2011 until the date of the sale that will be paid to [Brandon] or [Angeliki].
>
> b. The consent of the Bank will be obtained in accordance with the terms of new loan if the vessel is sold prior to its maturity.
>
> c. If the proceeds of such sale will exceed the then outstanding indebtedness of [Brandon] to HSH plus the amount corresponding to the application of the equity kicker and any losses from the operation and management of the vessel, the excess will be utilized against the then outstanding balance of the obligation of [John] to HSH under the terms of his personal guarantee or his above acknowledgement of debt.

> d. The personal guarantee of [Angeliki] will be formally cancelled so that she will be released from all her obligations whatsoever under such instrument.
>
> e. The sum of US$7,800,000 or any balance thereof subject to 2 above, shall be returned by [John] to [Captain Nicos].
>
> 4. Should the Vessel become in the meantime an actual or constructive total loss, the proceeds of the indemnity to be collected from the underwriters concerned shall be utilized firstly for prepayment of all of the outstanding indebtedness of [Brandon] to HSH and any losses from the management or operation of the vessel and of [John] to HSH whilst the balance will be placed to the order of [Captain Nicos] to the extent it is sufficient to meet repayment of the balance of his equity contribution and if a further balance exists will be placed to the order of [John].
>
> 5. If the conditions under 3 above have not been met and the vessel remains in the ownership of [Brandon] at the end of the 4 year tenor, [Angeliki] has the right to sell the vessel at fair market value or to refinance at best possible available terms at the time in order to cover the then outstanding indebtedness to HSH under the new loan. If the proceeds from the sale or refinancing are not sufficient to cover the outstanding indebtedness to HSH under the new loan plus any losses from the operation and management of the vessel from September 1, 2011, [John] hereby irrevocably and unconditionally guarantees the payment to [Angeliki] of any such shortfall and accumulated losses. However if the vessel will be refinanced and the proceeds of her employment during the course of such refinancing will be able to accumulate profits, then [John] will be entitled to receive back in full or in part the above shortfall which would have in the meantime paid to [Angeliki].
>
> 6. Any dispute arising in relation to the interpretation [or] enforcement of this agreement will be referred to the exclusive jurisdiction of the High Court of Justice in London. English law shall apply…"

Subsequent events

18. After its sale to Brandon, the Taurus Two was operated and managed by MEM. MEM incurred liabilities in that regard which it recharged to Brandon and which were left outstanding on intercompany loan.

19. It is common ground that the conditions precedent set out in clause 3 of the TTA to the exercise of John's rights under clause 1 of the TTA were not satisfied by 1 September 2015 and John did not seek to exercise his option under clause 1. The Taurus Two thus

remained in the ownership of Brandon and under the management of MEM on and after 1 September 2015.

20. By a letter dated 21 September 2017 (the "MEH Letter"), MEH recorded that as the holder of the shares in six named single-vessel-owning entities, which included Brandon, "we hold so far and shall continue to hold" the said shares "in equal parts" for each of two companies, Prosperity Overseas SA ("Prosperity") and Sangamo Corp. ("Sangamo"), which were beneficially owned by John and Angeliki respectively. Although the origins and precise nature of the MEH Letter were in dispute, the Judge recorded at [32] of his Judgment that it was common ground between the parties that at least after 21 September 2017 the Taurus Two was ultimately jointly owned by John and Angeliki. In context, the Judge's reference should more accurately be read as a reference to the beneficial ownership of the shares in Brandon.

21. Thereafter, by a suite of formal documents dated 27 December 2018, Angeliki arranged for the Brandon Loan to be extended by HSH for a further four years to a new maturity date of 1 September 2019. This was referred to by the Judge as the "2018 Financing".

22. On 31 December 2018, Angeliki and John signed a document that the Judge described as a "reconciliation" of the state of account between John and Angeliki in respect of MEM (the "2018 Reconciliation"). That document recorded an outstanding liability of US$6,281,763 owing from Brandon to MEM in respect of the Taurus Two. It also recorded that as a result of the various balances set out, MEM was owed a total of US$9,610,544 of which US$7,149,769 was shown to be due from John and US$2,647,161 was shown to be due from Angeliki.

23. The Taurus Two was eventually sold by Brandon in May 2020 for US$4,606,000, with delivery to the buyer taking place on 2 July 2020. By that date, Angeliki and Brandon had entered into a settlement agreement with HSH under which HSH agreed to a substantial reduction in the outstanding amount of the Brandon Loan and Angeliki's personal guarantee liability, to a total of US$5.25 million. The purchase price for the vessel was paid to HSH, and Angeliki paid the balance of US$644,000 owing to HSH in cash, together with a release fee of US$1,250,000 under the settlement agreement.

The Claim

24. The proceedings in the Commercial Court were commenced in September 2021. Angeliki claimed reimbursement from John under clause 5 of the TTA, alternatively damages, for two separate amounts:

    i) the sum of US$1,894,000 comprising (a) the US$644,000 balance paid by her to HSH in respect of the shortfall of the sale price for the Taurus Two compared to the (reduced) outstanding amount of the Brandon Loan; and (b) the US$1,250,000 paid by her to HSH as a release fee; and

    ii) the sum of US$9,770,290 said to have been incurred or suffered by Brandon as "accumulated losses" from the operation and management of the Taurus Two between 1 September 2011 and 2 July 2020.

25. The essence of Angeliki's claim was that there was no temporal limitation upon her right under clause 5 to arrange a sale of the Taurus Two or a refinancing of the Brandon

Loan. She contended that the 2018 Financing did not amount to a "refinancing" under clause 5, and that John's liability under that clause was triggered by the sale of the vessel on 2 July 2020.

26. John denied liability. His main pleaded defence was that on the true interpretation of the TTA, his payment liability under clause 5 was limited in duration. He contended that the obligation under clause 5 only applied if a sale of the Taurus Two or a refinancing of the Brandon Loan was completed on the 1 September 2015 when the Brandon Loan matured. This was referred to in argument as the "duration" argument.

27. John also contended that the TTA was only intended to have effect if and for so long as Angeliki remained the sole beneficial owner of Brandon, so that clause 5 was no longer binding upon him by (at the latest) 21 September 2017 when MEH acknowledged that Brandon was beneficially owned 50/50 by Angeliki and John. In the further alternative, John contended that the TTA had been impliedly rescinded by subsequent agreements between him and Angeliki. The agreements said to have this effect included the agreement evidenced by the MEH Letter, or the 2018 Reconciliation, which did not mention or take into account any liability of John to Angeliki under clause 5 of the TTA. These various arguments were referred to as the "durability" argument.

The Judgment

28. In his Judgment, given after a four-day trial, the Judge found in favour of John and dismissed Angeliki's claim.

29. At [22] of his Judgment, the Judge summarised his overview of the TTA and the dispute,

> "22. In essence the TTA contained two obverse and successive conditional options. First in both priority and time, it conferred a conditional buy-back option in favour of [John] (clauses 1 to 3). Secondly and contingently, it conferred a conditional option in favour of [Angeliki] as to what to do with the vessel if not re-acquired by [John] within time, together with a payment covenant imposed upon [John] in favour of [Angeliki] in the event of sale or refinancing in accordance with her option. The latter was made subject to a conditional claw-back in favour of [John] in the event he overpaid on such covenant. The temporal circumscription and interaction of this package of sequential rights lies at the heart of the present dispute."

30. Having noted that the TTA made numerous references to the 4 years tenor of the Brandon Loan, the Judge expanded upon this analysis at [65],

> "65. The TTA thus mentions and accommodates the existence of three distinct and avowedly successive periods:
>
> (i) The first period covers the four year term of the Brandon Loan. [John's] conditional buy-back option has to be exercised within this period.

> (ii) The second (and contingent) period commences on the date of maturity (aka "*at the end of*") the four year term of the Brandon Loan. [Angeliki's] conditional option to sell or refinance [the Taurus Two] arises on this date if subsisting in light of (i) above. [John's] liability to compensate or indemnify [Angeliki] arises upon receipt (by Brandon) of "*the proceeds from the sale or refinancing*" pursuant to the prior exercise of such option by [Angeliki].
>
> (iii) The third (and also contingent) period spans "*the course of such refinancing*" of [the Taurus Two] in the event that [Angeliki] validly elects to refinance the vessel pursuant to (ii) above. Since the duration of any potential refinancing was unknown at the time of the TTA, this period is defined functionally rather than by reference to a known term.

31. At [66], the Judge then summarised the rival contentions of the parties in relation to the duration argument,

> "66. The conceptual crucible is the end-point of period (ii) above. [John] says that was 1 September 2015 irrespective of any restructuring or extension to the Brandon Loan, absent a consensual extension of <u>both</u> parties' options under the TTA. AF says it was open-ended to accommodate any such restructuring or extension which was itself reasonably foreseeable at the time of the TTA. With one wrinkle about timing, the choice is between these two interpretations…"

32. The Judge then indicated that he preferred John's interpretation, "subject to one temporal mitigation". He explained his reasoning as follows,

> "68. The first sentence of clause 5 confers a conditional option upon [Angeliki] as to the future fate of the vessel. That option involves an election to be made on the face of things on the date of maturity of the Brandon Loan, i.e. 1 September 2015. It is expressed as a "*right to sell the vessel […] or to refinance…*" on certain conditions. That right is capable of being exercised by election being made on the relevant date itself. Such election is irrevocable by its nature. That is the essence of election.
>
> 69. If [Angeliki] elected to sell, she need not *by that date* have concluded a sale contract for the vessel. Likewise if [Angeliki] elected to refinance, she need not *by that date* have concluded refinancing terms with a (new) lender. But the election between these options, and indeed between either of them and neither of them, needed to be made by that date on the face of things. It is, after all, just an election. It need not even be written.
>
> 70. The alternative for [Angeliki] was to choose neither of the steps that would trigger her right of indemnity in clause 5.

> She was free to keep the vessel, negotiate extended financing terms from HSH and seek to trade through to potential profitability under her ultimate control via MEM. That was a commercial call for her to make on 1 September 2015 if otherwise free to do so. She might get that call right or wrong as matters turned out. But it was her call to make.
>
> 71. If she decided to keep the vessel without refinancing it and claiming any shortfall from [John], she did so at her own risk from that moment. She forfeited the clause 5 indemnity. In so far as this may operate harshly by requiring an irrevocable election to be made by [Angeliki] on a specific date - which is a difficult premise to accept given the sophistication of the parties and the clear words of their agreement - any such harshness would be mitigated by [a] *de minimis* allowance or a period of reasonable time in which to exercise such option/election. This is the temporal mitigation or wrinkle alluded to above. It makes no difference in the present case because [Angeliki] did not purport to exercise her option/election until 2020. I nevertheless use the phrase "*on/about 1 September 2015*" to reflect this point in so far as it matters.
>
> 72. The contrary construction is that [John's] indemnity was applicable or extendable for the operational lifetime of the vessel (a further 15 years or so by 1 September 2015) and/or outstanding loan profile (a further 11 years by that date) at [Angeliki's] unilateral election. This would mean that [John's] financial covenant would hang over him for a very long period of time into the future notwithstanding the fact that [the Taurus Two] itself was under the sole operational control and direction of [Angeliki] throughout such period. Against that, it would also mean - by reciprocity or symmetry of treatment - that his own buy-back option was extended in the same way and to the same extent."

33. The Judge dealt at [73] with a series of points that he said satisfied him that it was not disproportionate or unfair for the risks inherent in the bail out of John to fall on Angeliki. Among the points made was the view that if Angeliki had wanted to "keep her options open … beyond the year period" she could and should have stipulated for that ([73(i)]); the point that the inherent uncertainties in the outlook for the Taurus Two were known to both parties as "experienced maritime businessfolk" ([73(ii)]; and the following two points,

> "(iii) [John] undertook to repay the US$7.8m injected as cash by their father as a condition (if itself triggered) under clause 3e. of the TTA. However, [Angeliki] undertook no such or similar obligation as the vessel's new ultimate owner and operator. [Angeliki] thereby took the benefit of this cash injection as a parental gift, albeit taking on a personal guarantee for a much larger amount. The whole deal was a family-led and

> father-inspired bail out for [John]. It involved mutual compromise and sacrifice.
>
> (iv) [Angeliki]'s personal guarantee is something Captain Nicos presumably felt was acceptable subject to the siblings agreeing some form of mechanism for the fate of the vessel and allocation of any shortfall as and when such fate was determined at the end of the new financing cycle. It is far from inconceivable that any shortfall not remedied through that chosen mechanism, i.e. what became clause 5, might itself be compensated by Captain Nicos himself. It is far from clear whether the clause 5 indemnity was something either side expected to see contested or enforced *inter se* during their father's lifetime. That never transpired because he passed away a year or so after the initial contemplated term of the TTA at a time when there was no crystallised shortfall or demand for payment under clause 5."

34. The Judge then brought his reasoning on the duration argument to a conclusion at [74], stating,

> "74. Ultimately this comes down to the words in the TTA. Those words contemplate its expiration on 1 September 2015 and crystallisation of any payment liability under clause 5 referable to an election being made on/about that identified date. No other date or time marker appears in the agreement. It would require something strong in the admissible matrix or an intolerable commercial injustice or absurdity to modify the meaning of those express words. As explained above, I find neither impetus in the context of this family-led arrangement."

35. Because of his finding on the duration argument, the Judge dealt with the durability argument rather shortly. He indicated that if he had accepted that the TTA survived beyond the absence of an election by Angeliki on or about 1 September 2015, he would have accepted the arguments put forward on behalf of John that long before the sale of the Taurus Two in 2020, his liability under clause 5 had expired or had been discharged, because by the date of the MEH Letter of 21 September 2017 (at the latest), the beneficial ownership of Brandon had been divided equally between John (via Prosperity) and Angeliki (via Sangamo).

36. The essence of the Judge's reasoning in this respect was that because clause 5 of the TTA envisaged payment by John directly to Angeliki of compensation calculated by reference to the entirety of the shortfall on a sale of the Taurus Two or a refinancing of the Brandon Loan by Brandon, together with the entirety of the losses suffered by Brandon from the operation and management of the vessel since 1 September 2011,

> "The premise for this liability is that Angeliki fully owns Brandon. Brandon's loss is treated as her loss as a contractual fiction or shorthand."
>
> [77(iii)].

The Judge therefore held that because Angeliki was no longer the sole beneficial owner of Brandon by (at the latest) 21 September 2017, John's covenant under clause 5 would not have subsisted at the time of the sale of the Taurus Two in 2020.

37. The Judge also held, at [100]-[101], that if he had been wrong on the earlier parts of his decision, and clause 5 of the TTA had remained binding on John, he would not have accepted John's arguments that the TTA was impliedly rescinded by any subsequent agreement that might have been contained in or evidenced by the MEH Letter or the 2018 Reconciliation. The Judge held that neither of those documents was necessarily or fundamentally inconsistent with the continued existence of John's liability under clause 5 of the TTA.

The Arguments on Appeal on the Duration Argument

38. On appeal, Angeliki contended that the Judge misconstrued the TTA. She contended that, viewed objectively, the TTA was an agreement which formed part of arrangements under which, to assist John out of his financial difficulties, she agreed (via her company Brandon) to incur the financial detriment of acquiring the Taurus Two at an overvalue and to keep and operate the vessel for four years (during which time she would otherwise have been free to cut her losses and sell it) in order to provide John (or his nominated third party) with the opportunity to repurchase the vessel. She submitted that in return for this assistance, and whether or not John exercised his option to reacquire the vessel, John agreed to indemnify her for any losses that she sustained.

39. Angeliki contended that the Judge had gone wrong in his overall approach by mischaracterising her right to an indemnity as the limited price which John gave for his repurchase option, instead of being the quid pro quo for her wider agreement to bail him out. She contended that the Judge had no basis in the wording of the TTA or commercial common sense for introducing the concept of her having to make an election as to whether to sell or refinance the Taurus Two by the same date as the date upon which John had to exercise his option; and that there was no commercial reason, or basis in the wording of the TTA, to impose a time limit by which she was required to sell or refinance the vessel or lose her right to an indemnity.

40. In response to the appeal, John drew attention to what he termed "the peculiar family bail-out context to the TTA". He emphasised the Judge's findings that Angeliki had acted at the behest of her father and that she would not ordinarily have entered into the arrangements "as a matter of autonomous commercial judgment". He submitted that this meant that it was necessary for the court to give serious pause for thought before approaching the interpretation of the TTA "through the lens of normal commercial actors".

41. John also contended that the Judge was right to characterise the TTA as primarily concerned with his option to repurchase the Taurus Two, and that "at its highest" clause 5 was a *quid pro quo* for that. He submitted that except as regards the limited possibility of a "claw-back" in the situation envisaged in the final sentence of clause 5, the TTA was only designed to regulate the fate of the Taurus Two and the relations of John and Angeliki for the same 4 year period as the term of the Brandon Loan.

42. John contended that this meant that the Judge was right to regard clauses 1 and 5 of the TTA as containing two mutually exclusive options, demarcated by the maturity of the

Brandon Loan on 1 September 2015. The first option was in John's favour and could be triggered by his exercise of the right to reacquire the vessel on 1 September 2015; while the second was in favour of Angeliki, under which she also had to elect on 1 September 2015 to sell or refinance the vessel and claim an indemnity, or lose the right to do so.

43. In this respect, John placed particular reliance on the words "at the end of the 4 year tenor" in clause 5 of the TTA, which he contended served to limit the time by which Angeliki had to exercise her right to sell or refinance the vessel so as to be able to make a claim against him under the clause. John contended that the parties should not be taken to have intended that if he did not exercise his option on 1 September 2015, Angeliki would thereafter have an unfettered and open-ended right to sell or refinance the vessel at any time during its remaining lifetime (which could be up to 15 years), and then to make a claim against John under clause 5.

44. In his skeleton argument for the appeal, John supported the Judge's solution to what he described as the "distraction" or "nuance" of precisely when and how Angeliki had to exercise her option under clause 5, i.e. that she had to make the election "on/about" 1 September 2015, and that any sale or refinancing had to be completed within a reasonable period after that. In the alternative, John reiterated an argument that he had advanced at trial, which was that clause 1 had to be interpretated to require him to elect whether to exercise his clause 1 option a reasonable time in advance of 1 September 2015, so as to give Angeliki sufficient time to decide whether to exercise her option under clause 5 and complete a sale or refinancing by 1 September 2015 if she was to retain her right to an indemnity.

Analysis of the Duration Argument

45. The relevant principles of contractual interpretation were not in dispute and can be shortly summarised. In outline, in interpreting a written contract, the court seeks to ascertain, objectively, the meaning which the words used by the parties would convey to a reasonable commercial person having the relevant background knowledge available to the parties.

46. In carrying out such exercise, the text of the agreement must be assessed in light of the natural and ordinary meaning of the words used, the other relevant provisions of the contract, and the overall purpose of the clause and the contract. The process is an unitary and iterative one in which the rival interpretations are checked against the provisions of the contract and the commercial consequences are investigated.

47. The court will generally favour an interpretation that would have been perceived as commercially sensible by a reasonable person at the time that the contract was made. However, the concept of commercial common sense should not be applied retrospectively to rescue one of the parties from a bargain that has turned out badly, nor should it be used to remake a bargain for the parties that seems to the court to be more reasonable or fair than the bargain that the parties did in fact make.

48. In the instant case, John argued for a gloss on these principles. He submitted that the particular family context in which the bail-out occurred and the TTA was signed meant that the court should not approach the interpretation exercise "through the lens of normal commercial actors". The exact implications of that submission were unclear,

but it seemed to invite the court to depart from the normal exercise of seeking to ascertain, objectively, the meaning that the words used would convey to a reasonable person having the background knowledge of the parties.

49. The suggestion appeared to be that because the Judge found as part of the background that Captain Nicos had prevailed upon his daughter to assist her brother in a way which she would not have done so if acting pursuant to her own independent commercial judgment, so the TTA should not be construed by reference to the meaning that the words used would convey to a reasonable commercial person, but should instead be construed on the basis that Angeliki would also have been prepared to agree terms with her brother that were against her commercial interests and which would not normally be reasonable for her to agree.

50. A further suggestion was made – reflecting a point made by the Judge at [73(iv)] of his Judgment - that such an approach could also be justified because a reasonable observer could think that Angeliki would have been prepared to agree a limited indemnity from John under clause 5 on the basis of an expectation that Captain Nicos might ultimately make good any shortfall in the losses that she had suffered by acting at his instigation.

51. I do not accept such submissions. It is true that the Judge found that Angeliki was prevailed upon by her father to assist John resolve his financial difficulties with HSH. She did so by causing her company (Brandon) to acquire the Taurus Two at a significant overvalue and by assuming a personal guarantee obligation to HSH for the Brandon Loan. The Judge also found that these steps were not something that Angeliki was likely to have done as a matter of her own autonomous commercial judgment.

52. However, the Judge did not find, and it does not follow from the fact that Angeliki was prepared to act against her own commercial interests when buying the Taurus Two and taking on external liabilities to HSH, that she would also have agreed to act in a similarly uncommercial way when entering into the TTA with her brother to address the consequences of taking on such external risks.

53. Nor is such a submission consistent with the terms of the TTA. In particular, although Angeliki was prepared to give John an option to reacquire the Taurus Two after four years, it is crystal clear that if John wished to exercise that option, he could not simply do so at the then prevailing market value of the vessel, leaving Angeliki and Captain Nicos to bear the consequences of having co-operated to bail him out. Clause 3 of the TTA clearly provided that John could only exercise his option under clause 1 on condition that he paid or procured the payment by a third party of a price sufficient to see Brandon, Angeliki and Captain Nicos made whole for all losses and expenditure that they had incurred from bailing John out of his difficulties in 2011.

54. The Judge's comment at [73(iv)] that "it is far from inconceivable that any shortfall not remedied through [clause 5] might itself be compensated by Captain Nicos himself" also appears to be pure speculation, and does not appear to have been based upon any evidence forming part of the admissible matrix of fact.

55. Accordingly, I do not consider that there is any basis in the admissible background or in the TTA itself to justify a departure in this case from the ordinary principles of objective interpretation of commercial documents.

56. I therefore turn to the wording of clause 5 itself. As will be recalled, the first sentence of clause 5 provides,

> "If the conditions under 3 above have not been met and the vessel remains in the ownership of [Brandon] at the end of the 4 year tenor, [Angeliki] has the right to sell the vessel at fair market value or to refinance at best possible available terms at the time in order to cover the then outstanding indebtedness to HSH under the new loan."

57. Contrary to John's argument, the simple fact is that this sentence contains no express time limit upon the exercise by Angeliki of her right to sell or refinance the Taurus Two. The words upon which John relies, namely "at the end of the 4 year tenor", are included in the first part of the sentence, and are separated from the remainder of the sentence by a comma. The natural reading of the words is therefore that they serve to identify and describe the situation which will exist if John has not been able to satisfy the conditions under clause 3 and hence has not validly exercised his option under clause 1, with the result that the vessel remains in the ownership of Brandon at the end of the 4 year period of the Brandon Loan. In other words, as a matter of the ordinary use of language, the words "at the end of the 4 year tenor" relate to the time by which John must satisfy the conditions under clause 3. They do not apply to, or serve to limit, Angeliki's rights which are the subject of the second part of the sentence.

58. That natural reading of the opening part of clause 5 also explains why the Judge was right not to accept the argument advanced by John at trial which was sought to be revived by a Respondent's Notice before us in the event that the Judge's interpretation was not upheld. As indicated above, that alternative argument was that in order to trigger John's obligations under clause 5, Angeliki was required to arrange *and complete* a sale or refinancing of the Taurus Two on or before 1 September 2015.

59. Although the wording of clause 5 clearly indicates that Angeliki's right to sell the Taurus Two or to refinance would not arise until the end of the 4 year term of the Brandon Loan, there is nothing whatever in the wording to suggest that such right not only had to be exercised, but that the entire sale or refinancing process also had to be completed, on or before 1 September 2015. That is not what the clause says. Moreover, no limitation on the time for Angeliki's exercise of her rights to sell or refinance can be inferred from the words "at best possible available terms at the time" or "the then outstanding indebtedness" in the second part of the first sentence of clause 5. As a matter of ordinary use of language, the "time", and the reference to the "then outstanding" indebtedness, are both references to the time of the sale or refinancing, and are not a reference to the position on 1 September 2015.

60. It would, moreover, be contrary to the natural meaning of clauses 1 and 3, and would make no commercial sense, to read clause 5 in this manner. The natural reading of clause 1 is that John had four years until 1 September 2015 to procure the fulfilment of the conditions in clause 3, whereupon he could require Angeliki to consent to a sale of the Taurus Two to him, to one of his companies, or to a third party nominated by him (or his heirs).

61. It would be commercially nonsensical to think that whilst it was still open to John to satisfy the conditions in clause 3, Angeliki would speculatively have to arrange for, and

to enter into, a conditional contract to sell or refinance the Taurus Two for completion on or before 1 September 2015, all subject to the possibility that she might be required to consent to the sale of the vessel to John or his nominated third party. It is self-evident that no sensible marketing process or negotiation of a refinancing could be conducted by Angeliki if it were subject to the possibility that the vessel might not be available because it might actually have to be transferred to John or at his direction. Moreover, far from it being possible for Angeliki to obtain the fair market value or the best possible terms for a refinancing so as to minimise John's potential liability under clause 5, any price or terms offered in such a scenario would very likely be substantially reduced to reflect the inherent uncertainty and conditionality of the agreement.

62. Undoubtedly conscious of such points, John was forced to accept that to accommodate this interpretation, "clause 1 would need to be interpreted so as to require John to elect to exercise, or not, his 'buy back' option a 'reasonable time' in advance of 1 September 2015 … [so as] … to ensure that Angeliki would have sufficient time in advance of that deadline to decide which, if any, of her options she wished to exercise and to bring that exercise to its fruition".

63. There is simply no basis for reading such an imprecise mechanism into the TTA. Clause 1 provides for Angeliki to have to give her consent subject to fulfilment by John of the conditions in clause 3 "upon maturity" of the Brandon Loan. There is nothing in the wording of the TTA to suggest that there would be an earlier date by which John would have to fulfil the conditions in clause 3 and exercise his rights under clause 1, or give notice to Angeliki that he was not going to do so. Nor is there any clue in the TTA as to how John would be able to acquire the information needed to predict reliably how far in advance of 1 September 2015 Angeliki would need to be given such notice so as to be able to arrange and complete any subsequent sale or refinancing by that date.

64. Although the Judge was (rightly) not attracted to such an argument, he was also not persuaded by Angeliki's argument that her right under clause 5 to arrange a sale or refinancing and claim an indemnity from John was open-ended. The Judge's rejection of Angeliki's argument appears to have been based upon his views that the essential structure of the TTA was that it comprised "two obverse and successive conditional options", focussed on the date of 1 September 2015 (see [22]); and that apart from the possibility of a claw-back in favour of John under the final sentence of clause 5, the wording of the TTA contemplated its "expiration" and the crystallisation of any liability under clause 5 on that date (see [74]).

65. These views led the Judge to interpret clause 5 as containing an option which Angeliki had to exercise by making an election on 1 September 2015, either (i) to sell the Taurus Two or (ii) to refinance the Brandon Loan if she wished to preserve her right to claim any losses from John under that clause: see [68]. The Judge held that this did not require Angeliki to have concluded a sale contract or refinancing terms by 1 September 2015, but that she needed to have made her election between these two alternatives by that date – albeit that he added that such election "need not even be written": see [69].

66. I do not agree with the Judge's interpretation.

67. If one starts with the words of the TTA, there is simply no mention of Angeliki being granted an option by anyone, or being required to exercise any such option by making

an election at all. Nor does the TTA contain any provisions setting out the method by which such option was required to be exercised or such election was required to be made.

68. Instead, the first sentence of clause 5 is perfectly understandable as no more than a statement of the position that the parties to the TTA would be in if John did not satisfy the clause 3 conditions and exercise his rights under clause 1 by 1 September 2015. During the period covered by clause 1, Angeliki was, by necessary implication in order to be able to give her consent as required by that clause, prohibited from causing Brandon to sell the Taurus Two. If John had not satisfied the conditions in clause 3 by 1 September 2015, such implicit prohibition would fall away, and Angeliki would be free to exercise her right, as ultimate owner and controller of Brandon, to arrange a sale of the vessel or a refinancing of the Brandon Loan.

69. Accordingly, although, in [74], the Judge stated that "ultimately this comes down to the words in the TTA", that "those words contemplate …an election being made on/about [1 September 2015]", and that there was nothing in the admissible matrix "to modify the meaning of those express words", the reality is that there were no express words of option or election in the TTA at all.

70. The Judge's introduction of an option and the need for Angeliki to make an election on 1 September 2015 would also give rise to real practical and commercial problems. Most obviously, on the Judge's interpretation, John had until 1 September 2015 to satisfy the conditions in clause 3 and call upon Angeliki to consent to his repurchase or directed sale of the Taurus Two pursuant to his rights under clause 1. But the Judge also held that Angeliki had to make her (successive) election on the same date or lose her clause 5 indemnity altogether. The Judge gave no indication how, as a practical matter, those two matters were to occur sequentially on the same day. Nor, as a commercial matter, did the Judge explain how it could reasonably be thought that Angeliki could, whilst there was a fundamental uncertainty as to whether John would be able to satisfy clause 3, investigate the possibility of a sale of the vessel or for refinancing the Brandon Loan, so that she would be in a position to make an informed choice between those two possibilities on 1 September 2015.

71. The Judge's only nod in the direction of these issues was to suggest, at [71], that any "harshness" of requiring Angeliki to make an irrevocable election on a specific date could be "mitigated by a *de minimis* allowance or a period of reasonable time in which to exercise such option/election". But giving Angeliki a "*de minimis* allowance" would not solve the problem of her practical inability to investigate a sale or refinancing in the run up to 1 September 2015. Moreover, the concept of Angeliki having to exercise her option within a "reasonable time" after 1 September 2015 runs flat contrary to the Judge's main thesis, namely that the words of the TTA "contemplate its expiration on 1 September 2015 and crystallisation of any payment liability under clause 5 referable to an election being made *on/about* that identified date". It also introduces yet another layer of uncertainty, not least because the Judge did not explain by reference to what yardstick a "reasonable time" would be measured.

72. The interpretative solution proposed by the Judge was also clearly motivated by the belief, expressed at the start of [72] of his Judgment, that the parties could not have intended that John's liability under clause 5 would continue to "hang over him" for what might be a very long time until Angeliki sold the Taurus Two or refinanced the

Brandon Loan. But the interpretation of clause 5 adopted by the Judge provided no answer to his own concerns in this regard. On the Judge's interpretation, as explained in [69], all that Angeliki was required to do was to make an election on or about 1 September 2015 to sell the vessel or refinance the loan. As the Judge said, "It is, after all, just an election. It need not even be written."

73. What the Judge did not go on to consider was whether, having made such election, there was any time limit thereafter by which Angeliki actually had to make the arrangements for and complete any such sale or refinancing in accordance with her election. Rather, as the second sentence of clause 5 makes clear, John's obligations under clause 5 are triggered "If the proceeds from the sale or refinancing are not sufficient" to cover the amount outstanding under the Brandon Loan and "any losses from the operation and management of the vessel from 1 September 1, 2011". As such, even on the Judge's interpretation, John's potential liability under clause 5 would still continue to hang over him for a wholly uncertain period after 1 September 2015 until Angeliki arranged for and completed a transaction of the type for which she had elected.

74. The only hint that the Judge gave in this regard was in [72], when he suggested that, in accordance with the view that he had earlier expressed – namely that the overall shape and design of the TTA was one of two opposing options exercisable on 1 September 2015 - that if Angeliki's rights to seek an indemnity extended beyond 1 September 2015, then "by reciprocity or symmetry of treatment", John's rights under clauses 1 and 3 "should be extended in the same way and to the same extent". But the Judge provided no clue as to how, or on what legal basis, the words of clause 1 that refer expressly to fulfilment of the conditions of clause 3 "upon maturity of the 4 years tenor" of the Brandon Loan, could be interpreted or re-written to accommodate any such extension.

75. I also do not agree with the Judge's view that the essential basis of the TTA was one involving "reciprocity or symmetry of treatment" between John and Angeliki. That view simply does not take into account the full factual matrix. The TTA was not a free-standing agreement under which John and Angeliki started as equal parties and simply exchanged options to determine who would own the Taurus Two after four years. The true factual matrix was that John and his companies were in considerable personal and financial debt to HSH, and Angeliki stepped in to rescue him, causing her company to take on a vessel of very doubtful commercial viability at a premium price, effectively agreeing that her company would hold the vessel for (at least) four years even if it continued to be loss-making, and assuming a very significant potential personal liability under a guarantee to HSH.

76. That this was the correct factual matrix against which to interpret the TTA, rather than the very limited one suggested by John, is entirely consistent with the fact that the TTA does not contain any of the language of options at all. It also starts with an extended series of recitals detailing how John's acute financial difficulties with HSH had arisen, how Angeliki had intervened with HSH and "sorted out" (per recital E) those difficulties, and how Angeliki and Captain Nicos had each made substantial personal financial contributions to the bail out. Moreover, as I have indicated above, the importance that the parties attached to the full background to the bailout is also apparent from the extensive conditions that John needed to meet – including procuring the repayment of his father - if he were to be entitled to require his sister to procure the sale of the Taurus Two to him or at his direction at the end of the term of the Brandon Loan.

77. Viewed against that full factual matrix, the absence of any temporal restriction on John's liability to make good any losses suffered by Angeliki when she came to sell the Taurus Two or refinance the Brandon Loan is entirely understandable. By contrast, John's original contention that any obligation to indemnify his sister would not arise unless she had actually completed a sale or refinancing by 1 September 2015 was both commercially impracticable and inconsistent with the wording of the TTA. And the Judge's solution under which Angeliki would be entitled to an indemnity provided that she had elected to sell or refinance on or about 1 September 2015, albeit that she did not need to complete the selected process until an uncertain date thereafter, was an exercise in judicial remaking for the parties a bargain that they did not make for themselves. In my judgment that was not a legitimate exercise.

The Arguments on Appeal on the Durability Argument

78. I have summarised the Judge's conclusions on the durability argument in paragraphs 35-37 above. On appeal, Angeliki contended that the Judge was wrong to find as a matter of interpretation that it was a precondition to John's liability under clause 5 that she remained the sole beneficial owner of Brandon. She gave two main, related reasons. The first is that the TTA did not contain any such express precondition. The second is that no such precondition could be implied as a matter of obvious inference or necessity.

79. In regard to the second point, Angeliki contended that the Judge based his conclusion on an erroneous view that the TTA adopted a contractual shorthand or fiction that Brandon's losses were her losses, which presupposed that she was the sole owner of Brandon. Angeliki contended that the Judge overlooked the facts that (as the parties well understood) any shortfall on the amount outstanding under the Brandon Loan to HSH on a sale of the Taurus Two would fall upon her as a guarantor of the loan, and that any accumulated losses would be suffered by her wholly owned company, MEM, which, as vessel manager, incurred all operational and management expenses on behalf of Brandon.

80. John essentially supported the Judge's conclusion on interpretation for the reasons that he gave. In support of his contention that the TTA was premised upon Angeliki remaining the sole beneficial owner of Brandon, John relied upon the terms of Recital G, which identified Brandon as being "beneficially controlled by" Angeliki, and he endorsed a point relied upon by the Judge in [77(ii)], that there would have been no need for the sale or refinancing mechanism in clause 1 if John and Angeliki had been the joint beneficial owners of Brandon.

81. In response to Angeliki's argument regarding her personal liability to HSH as guarantor and MEM having suffered the accumulated losses, John pointed out that both Angeliki and MEM would have rights of subrogation and indemnity in relation to such matters against Brandon. He asserted that his liability to pay 100% of those losses to Angeliki under clause 5 would only make sense on the footing that any such right of subrogation or indemnity was essentially worthless to Angeliki because it was against a company that she wholly owned, and that it made no sense for him to have to pay 100% of the losses under clause 5 if he owned 50% of Brandon.

82. In the alternative to his arguments on the meaning of the TTA, John contended by his Respondent's Notice that the Judge had been wrong to reject his arguments that by the time of the sale of the Taurus Two in 2020, the TTA had been impliedly rescinded by

a separate agreement between him and Angeliki. John contended that such agreement to rescind the TTA was evidenced in the MEH Letter (which he contended Angeliki procured MEH to write at his behest), that their entire business and financial relations should be conducted on a combined basis across a fleet comprising six vessels and on the terms referred to in the letter. He contended that, contrary to the Judge's conclusion, this was inconsistent with any intention that the TTA, which only related to the Taurus Two, would have any continued effect.

83. In the second alternative, John contended that the 2018 Reconciliation, which was signed by both parties, showed Brandon's indebtedness to MEM in respect of the trading losses of the Taurus Two at the end of 2018 being allocated equally to him and Angeliki. He said that this was fundamentally inconsistent with the continued existence of clause 5 of the TTA which envisaged that he would be liable to Angeliki for 100% of those losses, and hence evidence of the implied rescission of the TTA.

84. In reply, Angeliki supported the Judge's conclusions on the implied rescission arguments. She submitted that the MEH Letter was simply a document from the corporate trustee of the shares in the various vessel-owning companies dealing with the distribution of profits of those companies between John and her as joint venturers. Angeliki also contended that the Judge was right to view the 2018 Reconciliation as merely a cash-flow reconciliation that said nothing about the continued existence of the TTA. Neither document was evidence of any agreement between herself and John to discharge the TTA.

Analysis of the Durability Argument

85. I am content to assume, for the purposes of this analysis, that John and Angeliki entered into the TTA on the basis that Angeliki was, at the time, the sole beneficial owner of Brandon. I do not, however, consider that the TTA should be interpreted to mean that John's liability under clause 5 was conditional upon Angeliki retaining that sole beneficial interest in Brandon. That would have meant that Angeliki was agreeing to accept a significant restriction upon her commercial freedom to organise her own property and affairs for at least four years if she wished to preserve the benefit of clause 5. Neither the language of Recital G nor any other express provision of the TTA could conceivably be interpreted as imposing any such precondition.

86. The Judge appears to have derived such precondition as a matter of necessary implication from the terms of clauses 1 and 3 of the TTA. He asked, at [77(ii)], "Why would Brandon need to sell the vessel to another company if it was itself in the joint ultimate ownership of [John] and [Angeliki]?", suggesting that in such a situation, the obvious mechanism would be for the remainder of the beneficial interest in Brandon to be transferred to John. But this is a complete *non sequitur*.

87. The first point to make is that at the time of the TTA, Brandon was not in the joint ownership of John and Angeliki, and there is no suggestion that it was foreseen at that time that it would become jointly owned by them. As such, the fact that the TTA did not provide for an alternative way to achieve a particular economic effect for John in a future situation which had not arisen and was not foreseen, is no guide to the proper interpretation of the agreement.

88. Secondly, clause 1 of the TTA required Angeliki to consent to a sale by Brandon of the Taurus Two to John or his associates, or to a third party at his direction, if the conditions set out in clause 3 were satisfied. These conditions included that the sale price of the vessel would be sufficient to enable Brandon to discharge all the external liabilities that it had incurred to HSH, and to repay the capital injections from Captain Nicos that had funded Brandon's purchase of the vessel in 2011. The two clauses therefore provided a mechanism under which all external parties who had funded the bail out in 2011 could be repaid. The mechanism also allowed for the possibility that John might not be able to afford to acquire the Taurus Two himself, but could arrange a purchase by a third party who was able to provide the necessary funds. The Judge's comments in [77(ii)] provide no explanation of why a transfer of Angeliki's remaining beneficial interest in Brandon to John would achieve those results.

89. The third point is that in focussing his attention on how the parties might have given effect to clauses 1 and 3, the Judge appears to have been attempting to construe clause 5 by reference to a situation in which, by definition, clause 5 would not apply. By its express terms, clause 5 only operates where clause 3 has not been satisfied and the Taurus Two remains in the ownership of Brandon after 1 September 2015. I do not see the logic in that approach.

90. In reality, the most that could be said is that clauses 1 and 3 were premised upon Angeliki retaining the necessary control or influence over Brandon so as to ensure (i) that Brandon retained the Taurus Two for four years and (ii) that Brandon would sell the vessel in accordance with the terms of clause 1 if the conditions in clause 3 were satisfied. Those clauses said nothing about how such control or influence had to be maintained, and there is considerable force in the point that the logical effect of John's argument is that Angeliki would lose all rights to an indemnity under clause 5 if she disposed of even an insignificant part of her beneficial interest in Brandon to a third party, whatever the terms of that disposal were. There is no good reason, still less a necessary one, for reading any such restriction into the TTA.

91. The Judge's other main reason for reaching his conclusion on the durability argument was that the requirement that John compensate Angeliki under clause 5 for 100% of any shortfall on a sale of the Taurus Two or refinancing of the Brandon Loan by Brandon, together with accumulated losses from operation and management of the vessel, would have only made sense to the contracting parties on the basis that Angeliki was assimilated to Brandon as its sole beneficial owner. Again, I consider that the Judge was wrong on this.

92. The contracting parties would have appreciated that in the situation envisaged by the second sentence of clause 5, Angeliki would have to pay the full amount of the shortfall on the Brandon Loan directly to HSH under her personal guarantee, and she would also suffer further loss, $ for $ in respect of the accumulated losses, by reason of being the 100% owner of MEM. None of her losses in these respects would depend in any way upon her continuing ownership of Brandon. Specifically, there would be no basis for the contracting parties to assume that if Angeliki disposed of part of her beneficial interest in Brandon, HSH would also release her from her personal guarantee for the whole of the Brandon Loan. There is also no indication that the parties thought that Angeliki might dispose of any part of her interest in MEM, and she retains that interest.

93. That conclusion is not undermined by John's further argument to the effect that Angeliki and MEM could mitigate their losses by relying upon rights of subrogation or indemnity against Brandon. John's argument was that if Brandon was owned 50/50 by him and Angeliki, then Angeliki could in effect recover 50% of her losses from John via a claim against Brandon, and so it would make no sense for her to be able still to recover 100% from him under clause 5.

94. John's argument assumes too much. It assumes that in the event of a sale or refinancing of the Taurus Two which did not enable repayment of HSH in full, Brandon would have sufficient extra funds to be able to pay any subrogation or indemnity claims made against it by Angeliki or MEM. But that would not be so. Brandon was a single-vessel company. Clause 2 of the TTA required any earnings from the operations of the Taurus Two during the period of the Brandon Loan to be applied towards the running costs, management fees and any repayments of capital and interest on the Brandon Loan. Accordingly, if there was a shortfall between the amount outstanding on the Brandon Loan and the sale price achieved for the vessel or from a refinancing of the Brandon Loan, Brandon would have no further funds with which to meet that shortfall. Nor would there be any remaining funds to pay any accumulated losses from the operation and management of the vessel, which losses would have been incurred by MEM as manager of the vessel. There would, moreover, be no legal obligation, or any certainty, that the shareholders or ultimate beneficial owners would inject new capital to remedy Brandon's deficiency.

95. I therefore conclude that the Judge's analysis of the durability agreement as a matter of interpretation of the TTA was wrong. I now turn to his analysis on implied rescission.

96. The Judge dealt with the law on implied rescission in [97] as follows,

> "Implied rescission could only occur where the same contracting parties had engaged in further contractual relations on a basis so inconsistent with the subsistence of their original contract that they are to be taken as having discharged it by implied consent. Such implied consent is conceptually akin to a distinct implied contract by which the parties agree that the relevant prior contract is discharged in full: see Cobalt Data Centre 2 LLP v. Revenue & Customs Commissioners [2022] EWCA Civ 1422; *Chitty on Contracts* (34th ed. 2021) at 25-030 - 25-031."

97. There was some debate between the parties on appeal as to whether the Judge was right to state the legal test for implied rescission in terms that require "further contractual relations" (i.e. a subsequent agreement) between the original parties. It was submitted on behalf of Angeliki that a binding agreement was required, whereas it was contended on behalf of John that all that was required was evidence of a subsequent common intention to rescind.

98. I do not think it is necessary to resolve that issue. Whatever the precise requirements of the law in that respect, I consider that it is clear that rescission will only be implied if the subsequent agreement/common intention of the parties (i) relates to the same subject matter as the earlier contract and (ii) is so fundamentally inconsistent with the earlier contract that the only inference that can be drawn is that the parties no longer intended the earlier contract to be performed: see Morris v Baron [1918] AC 1 at 25-26

and 31; Beningtons v North Western Cachar Tea Company [1923] AC 48 at 62; Cobalt Data Centre 2 LLP v. Revenue & Customs Commissioners [2022] EWCA Civ 1422 at [73]-[90] and [136]; and *Chitty on Contracts* (34th ed. 2021) at 25-030 - 25-031.

99. In the instant case the Judge held that neither the MEH Letter nor the 2018 Reconciliation was "necessarily or fundamentally inconsistent with the survival of the TTA". I consider that this was a correct precis of the test, and for the reasons that follow, I agree with the Judge's conclusions.

The MEH Letter

100. As indicated above, the MEH Letter was a letter written in 2017 by MEH to Prosperity and Sangamo. It referred to six ships, including the Taurus Two, that had been acquired by six named companies and that were each being managed by MEM. The letter stated that MEH "hereby irrevocably and unconditionally confirm and undertake" that the shares in the companies owning the six shares were held and would continue to be held by MEH in equal parts for Prosperity and Sangamo.

101. Importantly for present purposes, the letter also contained an undertaking (c) by MEH,

> "That we shall keep both of you fully posted regarding any matters related to the above and in particular we shall not fail to take into account insofar as the assessment and/or distribution of profits or losses is concerned, any proven unequal cash contributions in the form of equity or loans by any of you or your affiliates or advances by [MEM] in relation to any of the ships which might be disposed at a future stage…"

102. John contends that the MEH Letter evidenced an agreement that the shares in the six ship-owning companies, and profits and losses from operation and sale of the six ships, would be dealt with on a collective basis and on the basis of equality between him and Angeliki. He contends that this was fundamentally inconsistent with the continued performance of clause 5. I do not agree.

103. The first point to make is that the MEH Letter was an undertaking by MEH which related solely to the manner in which MEH would fulfil its role as corporate trustee of the shares in the six ship-owning companies. As well as holding the shares, the role of trustee would extend to receiving dividends from those companies and deciding how to distribute those dividends to Prosperity and Sangamo. In contrast to clause 5 of the TTA, MEH's undertaking did not, for example, address the possibility that the Brandon Loan might be refinanced, it did not indicate who would have the right to arrange that, or contain any condition as to the terms upon which that might occur, and nor did it deal with any consequences thereof as between John and Angeliki.

104. The most that might be said is that the MEH Letter contained a generalised undertaking by MEH to take certain matters into account, when deciding how to distribute to Prosperity and Sangamo any distributions that MEH might receive from the ship-owning companies. But the letter did not specify precisely how those identified matters would be taken into account, nor did it purport to be an exhaustive list of matters that it might take into account.

105. If and insofar as clause 5 might be triggered and impose a liability upon John following a sale of the Taurus Two arranged by Angeliki, there would, for the reasons that I have explained, necessarily be a shortfall on the amount outstanding under the Brandon Loan and accumulated losses from operation and management of the vessel. As such, there would be no profits payable to MEH to be distributed between Prosperity and Sangamo. In such a situation, if John had not paid his liability under clause 5, I see no reason why Angeliki could not ask MEH to take into account, when determining how to distribute any profits from sale of one of the other ships, the unequal contributions that she had made to the acquisition of the Taurus Two and the accumulated losses suffered by MEM in relation to the operation and management of the vessel. But if and to the extent that John had paid those sums to Angeliki pursuant to clause 5, plainly he could contend that MEH should not take such losses into account when dealing with other distributions.

The 2018 Reconciliation

106. John contended that the 2018 Reconciliation, which was a spreadsheet signed by both him and Angeliki, was a binding contractual record of their respective liabilities for the trading losses of the six ships referred to in the MEH Letter. John contended that the losses shown in the spreadsheet in respect of the Taurus Two were the same as the "losses from the operation and management of the vessel" referred to in clause 5 of the TTA. On that basis he contended that the intention that the TTA would no longer be performed was apparent from the fact that those amounts in relation to the Taurus Two were divided equally between him and Angeliki, rather than being allocated 100% to him.

107. Angeliki contended that MEM, as manager, was in effect used as a shared bank account for the operations of the six ships. She submitted that having heard evidence, the Judge accepted, at [37] and [101], that the 2018 Reconciliation was a statement as at 31 December 2018, of the cash position as between MEM and the six ship-owning companies. It is said that this is a factual finding with which this court should not interfere unless it is plainly wrong.

108. Angeliki further contended that, as a cash reconciliation, the 2018 Reconciliation had no connection whatever with any shortfall in respect of Brandon's debt to HSH that might arise on a subsequent sale of the Taurus Two or the refinancing of the Brandon Loan, still less did it say anything about how that should be treated as between her and John. She also submitted that as a statement of MEM's cash position at the end of 2018, the 2018 Reconciliation said nothing about how the parties intended that any accumulated losses from operation and management of the Taurus Two since 2011 should be dealt with as between her and John upon a subsequent sale of the vessel or refinancing of the Brandon Loan referred to in clause 5. As such, Angeliki contended that the Judge was right to conclude that it was not a necessary inference from the 2018 Reconciliation that the parties had intended to extinguish all of their remaining rights and obligations under clause 5 of the TTA.

109. The first part of the 2018 Reconciliation appears on its face to be a statement of the cash expended and income received by MEM in the operation and management of each of the six ships during 2018, with an opening balance from 2017. In addition to showing the net total for each vessel, the spreadsheet also shows the various total amounts due to or from MEM in respect of each of the ships being set off against the

amounts shown for the other ships to produce a net aggregate sum of US$5,294,322 "to be paid to [MEM]". The document also shows that this requirement was split equally with US$2,647,161 being shown to be "due by" Angeliki. The amount "due by" John was increased to US$7,149,769 by the addition of "old dues" of US4,218,132 from him and several other sundry items, including US$98,090 in respect of 2017 fees.

110. I consider that there is no obvious reason to doubt the Judge's view of the nature of the 2018 Reconciliation, and that Angeliki is also right to submit that as a statement of the cash expended and collected during 2018 and showing MEM's net position as regards the management of each of the ships, the 2018 Reconciliation says nothing about how the parties to the TTA intended that any capital shortfall to HSH arising on sale of the Taurus Two or refinancing of the Bandon Loan would be dealt with as between John and Angeliki at that future point in time.

111. I also do not consider that the 2018 Reconciliation shows how the parties agreed or intended that any accumulated operational and management losses of Brandon would be dealt with when the Taurus Two was sold or the Brandon Loan refinanced. The 2018 Reconciliation is a document dealing with MEM's cash position as regards the management of each of the ships. It show surplus monies received from the operation of some of the ships being offset against deficiencies in the operations of other ships so as to produce a net cash requirement due from each of Angeliki and John as at a particular point in time at the end of 2018.

112. I therefore think that the Judge was right that the 2018 Reconciliation did not amount to or evidence an agreement that was necessarily inconsistent in any fundamental way with clause 5 of the TTA, so as to lead to the conclusion that John and Angeliki had agreed or intended to abandon the TTA.

Quantum

113. The consequence of my analysis above is that John was liable to Angeliki under clause 5 following sale of the Taurus Two in 2020. The net proceeds of sale of the vessel were US$4,606,000. This left a shortfall of US$644,000 together with a contractual release fee of US$1,250,000 owing to HSH, which Angeliki paid. The Judge held at [80] that both sums, totalling US$1,894,000, fell within the concept of a "shortfall" in clause 5 of the TTA. There is no appeal against that part of the decision.

114. The accumulated losses incurred by Brandon from the operation and management of the Taurus Two at the time of sale of the vessel, calculated by reference to Brandon's audited financial statements to 30 September 2022, amount to US$9,770,290.

115. Pursuant to his Respondent's Notice, however, John contended that this amount ought to be reduced. He relied upon three matters.

116. The first is that his liability for trading losses should be capped at the amount outstanding on 1 September 2015. The Judge rejected that contention at [81(iii)], holding that if (contrary to the Judge's view) John's liability continued in respect of a sale or refinancing arranged by Angeliki materially later than 1 September 2015, then there was no reason to cap the relevant trading losses to an earlier date. That was plainly correct. The chronological frame of reference of the second sentence of clause 5 is plainly the time of the sale or refinancing, and the accumulated losses referred to are

those "from September 1, 2011" to that time. If the sale or refinancing can occur some time after 1 September 2015, then the accumulated losses for which John is liable must also run to that date.

117. The second matter was that the amount of the accumulated losses should be reduced to 50% to reflect John and Angeliki's co-ownership of Brandon from (at least) 21 September 2017. The Judge indicated, at [81(i)] that he would have been minded to accept this argument. However, it is clear that he did so because he thought that this argument "feeds more properly into the durability analysis".

118. For the reasons that I have given, I have come to the conclusion that the Judge's decision on the durability argument was wrong, because he mistakenly thought that clause 5 was only designed to compensate Angeliki for losses that she would suffer by reason of her ownership interest in Brandon, rather than by reason of her status as a guarantor of the Brandon Loan and sole beneficial owner of MEM. For the same reasons, I would reject John's arguments in relation to the quantum of the claim for accumulated losses. The accumulated losses that clause 5 was designed to address were the accumulated losses from the "operation and management of the vessel". These were monies that were expended by MEM as manager of the vessel, and were never reimbursed. MEM was solely owned by Angeliki, and this liability did not depend upon who owned Brandon.

119. John's third contention by way of Respondent's Notice was that the amount of the accumulated losses derived from Brandon's audited financial statements should be reduced to take account of the trading profits made by a different vessel, the Orion III. The Judge dealt with the underlying facts as regards this ship in [25] of his Judgment as follows,

> "…it appears that [Angeliki] and [John] agreed at some point in the last quarter of 2012 to acquire another vessel and use its operating profits to service the financing of [the Taurus Two]. A vessel called m/v ORION III was purchased in January 2013 by a company called Trinite Maritime Co. ["Trinite"]. This vessel was delivered on 21 June 2013. It is common ground that the shares in Trinite were or became at some point held by MEH on behalf of Prosperity (owned by [John]) and Sangamo (owned by [Angeliki]) in equal proportion. From the date of delivery, ORION III was managed by [Angeliki's] company MEM."

120. John contended at trial that the audited accounts of Brandon used by Angeliki to compute the accumulated losses for the purpose of clause 5 of the TTA did not take any account of monies that either had been paid or were due to be paid by Trinite to Brandon pursuant to this agreement. John contended that if such monies were taken into account, Angeliki's computation of accumulated losses for the purposes of clause 5 by reference to Brandon's accounts should be reduced.

121. The Judge rejected that argument. At [27] of his Judgment he recorded that it was not alleged that there had been any variation of the TTA arising out of this arrangement in relation to the Orion III. Then, at [81(ii)], he held that any income received from the Orion III would not have been generated by the Taurus Two but from a collateral

arrangement between John and Angeliki. The Judge observed that this therefore did not arise "from the operation and management of the vessel" as required by clause 5.

122. John sought to contest the Judge's decision on appeal, alleging that, as a matter of construction, and by some symmetry of treatment, clause 5 required not only Brandon's exposure to a third party such as MEM to be taken into account, but also any benefits due to Brandon from third parties such as Trinite.

123. That contention is hopeless. The Judge was plainly correct to hold that the relevant phrase in clause 5 relates to losses "from the operation and management *of the vessel*", and that "the vessel" was the Taurus Two that was the subject of the TTA. Clause 5 would therefore include the losses incurred by MEM as manager of the Taurus Two. But it could not extend to losses relating to any other ship, or any monies generated by the operations of a different ship that might, for whatever reason, be paid or be payable to Brandon as a consequence of some extraneous agreement which was not in contemplation of the parties when the TTA was entered into in 2011, but was entered into several years later.

Disposal

124. For these reasons, I would allow the appeal and substitute an order for payment by John of a total of US$11,664,290 to Angeliki together with interest and any necessary consequential orders.

Sir Launcelot Henderson:

125. I agree.

Lady Justice Asplin :

126. I also agree.