Neutral Citation Number: [2019] EWHC 2860 (Comm)

Case No: CL-2018-000588

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 04/11/2019

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

NAVALMAR UK LIMITED	**Claimant**
- and -	
(1) ERGO VERSICHERUNG AG	
(2) CHUBB EUROPEAN SE	**Defendants**

"BSLE SUNRISE"

- -
- -

Ms Ruth Hosking (instructed by **Stephenson Harwood LLP**) for the **Claimant**
Mr Benjamin Coffer (instructed by **Clyde & Co LLP**) for the **Defendants**

Hearing date: 17 October 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC:

Introduction

1. This is the trial of a preliminary issue as to whether, on a true construction of General Average Guarantees ("GA guarantees") issued by the defendants and in the events that for the purposes of this trial it is to be assumed have happened, the defendants are entitled to raise a defence under Rule D of the York-Antwerp Rules 1974 ("YAR") as a defence to their liability under the GA guarantees.

2. The trial took place on 17 October 2019, no evidence was adduced by either party and the question for determination proceeded on the basis of a statement of agreed facts and assumptions annexed to a consent order made by Butcher J on 25 February 2019.

The Facts

3. The claimant is the owner of Motor Vessel BSLE Sunrise ("vessel"). On 28 September 2012, the vessel was operating under a time charter on a laden voyage from Jebal Ali in Dubai to Antwerp in Belgium. The cargo included of about 774.733 MT of offshore pipes shipped under three Bills of Lading ("BL") on the standard Congenbill form, which provided for general average ("GA") to be adjusted in accordance with YAR.

4. On 28 September 2012 the vessel ran aground off Valencia. The owners incurred expenditure in attempting to re-float the vessel then carrying out temporary repairs before resuming the voyage. The vessel arrived at Antwerp on 26 November 2012, where all the cargo was discharged.

5. Meanwhile, on 5 October 2012, the claimant ("owner") had declared GA. On 8 October Iteco Oilfield Supply France ("Iteco France") issued an Average Bond in the Lloyds Average Form in respect of two of the BLs, known in these proceedings as BL Nos. 2 and 3. On 5 October 2012, the second defendant (then known as Ace European Group Limited) had issued an Average Guarantee in the wording approved by the Association of Average Adjusters and the Institute of London Underwriters. Notwithstanding its date, I infer that the second defendant's Average Guarantee was issued by way of security for Iteco France's liabilities under its Average Bond since it refers expressly to it being issued in consideration of the release without the collection of a deposit of the goods specified within the GA guarantee, which were those set out in Iteco France's Average Bond.

6. On 11 October 2012, Iteco Oilfield Supply GmbH ("Iteco GmbH") issued an Average Bond in the Lloyds Average form in respect of the other BL, known in these proceedings as BL No. 1. On 15 October 2012, the first defendant issued an Average Guarantee in materially similar terms to that issued by the second defendant save that it referred to the goods and BL referred to in Iteco GmbH's Average Bond.

7. The Average Guarantees referred to above are referred to collectively below as "*GA guarantees*". The Average Bonds referred to above are referred to collectively below as the "*GA bonds*".

8. Each of the GA bonds was in materially identical wording. Each was addressed to the owner and in so far as is relevant provided that:

> "In consideration of the delivery to us or our order, on payment of the freight due, of the goods noted above we agree to pay the proper proportion of any … general average … which may hereafter be ascertained to be properly and legally due from the goods or the shippers or owners thereof …"

Each of the GA guarantees was likewise addressed to the owner and in so far as is relevant provided:

> "In consideration of the delivery in due course of the goods specified below to the consignees thereof without collection of a deposit, we the undersigned insurers, hereby undertake to pay to the ship owners … on behalf of the various parties to the adventure as their interest may appear any contributions to General Average … which may hereafter be ascertained to be properly due in respect of the said goods.
>
> We further agree:
>
> (a) to make prompt payment(s) on account of such contributions as may be reasonably and properly due in respect of the said goods as soon as the same may be certified by the … Average Adjusters …".

9. The owner appointed GA adjusters. On 24 April 2013, the GA adjusters issued a certificate recommending a payment on account and thereafter a GA adjustment, which was subsequently varied, calculating the first defendant's share of the GA loss and expenditure to be US$525,365 and the second defendant's share to be $548,030. Although the statement of agreed facts does not say so in terms, it necessarily follows that Iteco GmbH's share under its Average Bond is the same as that of the first defendant under its Average Guarantee and Iteco France's share under its Average Bond is the same as that of the second defendant under its Average Guarantee.

The Issue for Determination

10. The relevant cargo interests and the defendants maintain that the casualty event occurred because the owner failed to exercise due diligence before and/or at the commencement of the voyage to ensure that the vessel was seaworthy and/or properly to equip and/or supply the vessel in breach of Art. III.1 of the Hague/Hague-Visby Rules ("HVR"), which were incorporated by reference to each of the contracts of carriage contained in or evidenced by the BLs. It is common ground between the parties that if the casualty event occurred because of a breach by the owner of Art. III.1 of the HVR then no GA is due from the relevant cargo interests by operation of Rule D of the YAR. The issue that I have to determine is whether the same defence is available to the defendants in relation to their liability under the GA guarantees.

Applicable Principles

11. It is common ground that the general principles applicable to the construction of contracts governed by English law apply to the construction of the GA guarantees unwritten by the defendants. In summary:

    i) The court construes the relevant words of a contract in its documentary, factual and commercial context, assessed in the light of (a) the natural and ordinary meaning of the provision being construed, (b) any other relevant provisions of the contract being construed, (c) the overall purpose of the provision being construed and the contract in which it is contained, (d) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (e) commercial common sense, but (f) disregarding subjective evidence of any party's intentions – see Arnold v. Britton [2015] UKSC 36 [2015] AC 1619 *per* Lord Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph;

    ii) A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract or order was made - see Arnold v. Britton (ibid.) *per* Lord Neuberger PSC at paragraph 20;

    iii) In arriving at the true meaning and effect of a contract, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract or consent order and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see Arnold v. Britton (ibid.) *per* Lord Neuberger PSC at paragraph 17;

    iv) Where the parties have used unambiguous language, the court must apply it – see Rainy Sky SA v. Kookmin Bank [2011] UKSC 50 [2011] 1 WLR 2900 *per* Lord Clarke JSC at paragraph 23;

    v) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used – see Arnold v. Britton (ibid.) *per* Lord Neuberger PSC at paragraph 18;

    vi) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other – see Rainy Sky SA v. Kookmin Bank (ibid.) *per* Lord Clarke JSC at paragraph 2 - but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made – see Arnold v. Britton (ibid.) *per* Lord Neuberger PSC at paragraph 19;

    vii) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see Wood v. Capita Insurance Services

Limited [2017] UKSC 24 *per* Lord Hodge JSC at paragraph 11. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent– see Wood v. Capita Insurance Services Limited (ibid.) *per* Lord Hodge JSC at paragraph 13; and

viii) A court should not reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain - see Arnold v. Britton (ibid.) *per* Lord Neuberger PSC at paragraph 20 and Wood v. Capita Insurance Services Limited (ibid.) *per* Lord Hodge JSC at paragraph 11.

Discussion

Factual and Commercial Context

12. It is necessary to understand the fundamental principles that apply in this area of commercial activity before turning to the true construction of the GA guarantees. These principles, which have been settled for many years, were or ought reasonably to have been within the knowledge of all the parties to this claim by reason of them being either experienced commercial ship owners or cargo insurers. These principles are summarised in detail in Chapter 37 of the 4th edition of the York Antwerp Rules at paragraphs 37.01-37.09. They are also set out in clear terms not merely in the various legal text books to which I have been referred but in the shipping industry guides included in the authorities bundle produced for this trial. What follows is a summary of those relevant to the issue I have to determine.

13. General average has its origin in the earliest days of maritime trade. In essence it applies where one of the parties to a maritime adventure (typically, the ship owner, charterer and cargo interests) suffers a loss in order to preserve the property of the others. Where that occurs the others each contribute to the cost of making good the loss suffered by the disadvantaged participant in the adventure. Most commonly in modern times general average arises when, as here, a ship owner incurs salvage and repair costs in order to save or repair a ship and thus save its cargo.

14. Under contracts that incorporate the YAR (as did those relevant to these proceedings), the ship owner is responsible for adjusting and collecting general average contributions from the cargo interests. In order to secure payment from the cargo interests the ship owner has the benefit of a possessory lien that entitles the owner to refuse delivery of cargo until the cargo interest concerned either pays the average contribution to which is properly due to the owner or provides reasonable security for its liability to contribute – see the summary of the relevant practice set out in Castle Insurance Limited v. Hong Kong Islands Shipping Company Limited [1984] 1 AC 226 per Lord Diplock at 234C-D.

15. Where cargo is uninsured, the ship owner will require the cargo interest concerned to provide security in the form of a cash deposit before releasing the cargo. Alternatively, security can be provided in the form of an agreement by the cargo interests concerned to pay the GA contribution as and when it becomes properly and/or legally due.

Although there are other wordings used in the shipping industry, that which is most widely used is the Lloyds form of GA bond used by the cargo interests in this case. The bond of itself does not provide the security that would be provided by a cash deposit for obvious reasons. That being so, the ship owner will usually insist on the provision not merely of the bond but also a cash deposit or a third party guarantee, which is usually, but does not necessarily have to be, provided by the cargo insurer – see Castle Insurance Limited v. Hong Kong Islands Shipping Company Limited (ibid.) per Lord Diplock at 234G-H. Again the form of guarantee that is very frequently used is the form used in this case.

16. Where the YAR applies and cash deposits have been collected, the cash deposits so collected are required to be paid into an account in the joint names of a representative of the ship owner and a representative of the depositors in a bank approved by both – see YAR, Rule 22. Such deposits are "*... without prejudice to the ultimate liability of the parties*".

17. As Popplewell J observed in The Lehmann Timber [2012] EWHC 844 (Comm) [2012] 2 All ER (Comm) 577 at para. 30:

> "The GA Guarantee was intended to operate in conjunction with a general average bond. The wording of the guarantee is expressed to be in consideration of delivery "without collection of a deposit" but it says nothing of delivery without a bond being in place from consignees. The factual matrix against which the GA Guarantee falls to be construed is that it was sought in conjunction with a bond in accordance with the almost invariable practice of the last 200 years or more. In those circumstances it is at the very lowest arguable that the insurers could successfully contend that the GA Guarantee was not intended to respond in the absence of a bond with which it was expected to go hand in hand."

The key point relevant for present purposes is that in general GA guarantees are intended to operate in conjunction with or to go hand in hand with, not in effective substitution for, the GA bonds. In this case, there is no evidence, nor anything set out in the agreed statement of facts and assumptions, that suggests the GA guarantees were sought or provided otherwise than as security for the GA bonds, which would otherwise have been provided in the form of cash deposits. Indeed, it is difficult to see what commercial interest the insurers would have had in providing a guarantee that conferred a greater benefit on the ship owner than the owner would have had under the GA bonds secured by a cash deposit. None is suggested. Since the owner is entitled to no more than reasonable security, it is difficult to see on what proper basis the owner could have sought security that would have conferred a greater benefit than would have been conferred by an appropriate cash deposit provided and to be held in accordance with the YAR.

18. As I have explained already, the owner appointed a GA adjuster in this case and the adjuster arrived at the sum that was properly the subject of GA in the circumstances of this case. YAR, Rule D keeps all questions of alleged fault out of the adjustment and preserves unimpaired the legal position, which is resolved at the stage of enforcement

– see The Cape Bonny [2017] EWHC 3036 (Comm) [2018] 1 Lloyds rep. 356 *per* Teare J at 358 at paras 4-5. If at that stage a court or arbitrator concludes that the GA expenditure is due to actionable fault on the part of the owner then the cargo interests are not liable to make general average contribution – see The Cape Bonny (ibid.) at para. 155. As Lord Diplock summarised the position in Castle Insurance Limited v. Hong Kong Islands Shipping Company Limited (ibid.) at 237:

> "…an average statement under the [YAR] prepared by average adjusters appointed by ship owners is not binding on cargo owners either as respects any net general average contribution or any net general average claim. Cargo owners can not only dispute entire liability upon such grounds as that the vessel is unseaworthy at the beginning of the voyage owing to the failure of the ship owner to exercise due diligence, or that sacrifices or expenses claimed were not made or incurred to preserve from a common peril the property involved in the adventure and therefore did not amount to general average acts, but they can also dispute the quantum of any contribution or claim attributed to their consignment by the average statement. If there were to be any such dispute it would fall to be determined by a court of justice of competent jurisdiction or … by arbitration.
>
> So, as a matter of law, in the absence of any agreement to the contrary, the publication of the average statement settles nothing: it has no other legal effect than as an expression of opinion by a professional man as to what are the appropriate sums payable to one another by the various parties interested in the ship and the cargo."

"*Average adjustments are prepared on an assumption of liability and never seek to determine that liability*" - see The Corinthian Glory [1977] 2 Lloyds Rep 280 per Donaldson J as he then was at 287. This is so whether the liability of the cargo interest concerned is secured by the ship owner's possessory lien or by a cash deposit or a bond provided by a cargo owner (at any rate when provided in the terms of the GA bonds provided in this case) secured by a cash deposit.

19. The assumption on which the trial of this preliminary issue proceeds is that set out in paragraph 12 of Annex 1 to the consent order made on 25 February 2019 namely that a "*... rule D defence is available to the [cargo interests] ...*" It follows that the effect of the owner's case is that it is entitled to make a full and unqualified recovery under the GA guarantee notwithstanding that the cargo interests have a defence available under the GA bonds and notwithstanding that the GA guarantees were provided in order to secure the obligations under the GA bonds in accordance with usual industry practice. Whilst it is possible for the parties to achieve this result by the express terms of their agreement (as the owner contends is the case here), if the owner's contention in this case is correct then it is entirely unclear why the GA bonds were sought or provided. They would be entirely unnecessary. Further, as I noted at paragraph 17 above, it is difficult to see what commercial interest the cargo insurer would have in conferring on the owner a greater benefit than the owner would have had against the cargo interests

either by virtue of its possessory lien or the GA bonds. These factors are part of the relevant factual and commercial matrix.

The Language used by the Parties

20. It is common ground as I have said that the cargo interests have a Rule D defence available to them. The basis of this concession is the language of the GA bonds and in particular the provision that limits the liability of the relevant cargo interests to the proper proportion of any "… *general average ... which may hereafter be ascertained to be properly and legally due* …". The owner contends that this is a different and more restricted obligation than that imposed by the GA guarantees. It submits that this is so because the GA guarantees create a primary obligation as between the insurers concerned and the owner and because the obligation under the guarantee is to " … *pay any contributions to General Average ... which may hereafter be ascertained to be properly due* …". I reject that submission for the following reasons.

21. Firstly, whilst I accept that the GA guarantees create a primary obligation as between the insurer concerned and the owner, that does not lead to the conclusion that the obligation is one that is greater, wider or more onerous than that which exists between the owner and the cargo interest concerned under the GA bonds, as opposed to being a primary obligation to pay that which becomes properly due as between the owner and the cargo interests. In my judgment, which of those constructions is correct depends on the language used in the GA guarantees, viewed in the factual and commercial context I have set out above.

22. Secondly, I do not accept that it is appropriate to construe the GA guarantees without regard to the existence or terms of the GA bonds or the circumstances that led to the provision of the GA guarantees. Although it was submitted by counsel for the owner that there is no express link between the GA guarantees and the GA bonds, I consider that to be wrong as a matter of construction. There is no evidence, or anything in the relevant factual matrix, that suggests the guarantees would have been issued but for the need to provide security for the obligations arising from or acknowledged by the GA bonds in accordance with the long standing practice noted earlier in this judgment. The language used by the parties, particularly when read in the relevant factual and commercial context, shows that the GA guarantees were intended to operate in conjunction with the GA bonds in the way described by Popplewell J in <u>The Lehmann Timber</u> (ibid.). The GA guarantees state that each has been issued in " … *consideration of the delivery in due course of the goods specified below to the consignees thereof <u>without collection of a deposit</u>* …" [Emphasis supplied]. I have explained the role of a deposit in the absence of a GA guarantee earlier in this judgment and that provides the context in which this phrase must be construed. This language, when read in the context I have set out, makes plain that the guarantee was supplied in lieu of the cash deposit that would otherwise have been needed to secure the release of the cargo and with it having been intended to be available in the same way and on the same terms as a deposit. As I have explained any GA deposit provided in a case to which the YAR applies must be dealt with as provided for by the YAR – that is held without prejudice to the ultimate liability of the parties – see paragraph 16 above.

23. Thirdly, there would be no practical purpose in the owner seeking the issue of the GA bonds from the cargo interests if the intended effect of the GA guarantees was to create

an obligation on the part of their insurers to pay the owner without regard to the ultimate liability of the cargo interests to the owner. There was no benefit so far as the insurers were concerned since they would have a subrogated claim available to them against the ship owner whether or not the cargo interests provided the GA bonds and, on the owner's case, it would be unsecured whether or not the GA bonds had been issued by the cargo interests. The position of the cargo insurers would only be secured to the same extent as that of the cargo interests they insured if they became liable only once any Rule D defence had been determined by a court or arbitrator. The cargo interests were secured in the sense that they would become liable only once a Rule D defence had been dismissed, whether their liability was secured by the possessory lien or a cash deposit. The insurers had no commercial interest in undertaking a more onerous obligation than was undertaken by the cargo interests under the GA bonds and the owner had no entitlement to demand security in excess of reasonable security. It is difficult to see how reasonable security could be security that provided greater protection for the owner than the owner would have had by reason of either its possessory lien or a cash deposit.

24. Fourthly, the GA Guarantees expressly limit the obligation that arises to paying " … *on behalf of the various parties to the adventure as their interest may appear any contributions to General Average which may hereafter be ascertained to be properly due* ..." Three points arise.

i) First, I accept the submission on behalf of the defendants that the meaning of the word "*due*" when applied to a monetary obligation is that it is legally owing or payable. As Sheen J held in The Jute Express [1991] 2 Lloyds Rep 55, when construing a GA bond issued by the cargo interests concerned in that case, the words "… *and which is payable by the owners of the goods thereof* ..." meant "*... and which is legally due ...*" from those owners. "Due" is synonymous with "payable" and payable means legally payable. There is no good reason for distinguishing between a GA bond and a GA guarantee when considering this construction issue given the commercial and factual context referred to earlier and noting again Popplewell J's observation that the " … *factual matrix against which the GA Guarantee falls to be construed is that it was sought in conjunction with a bond in accordance with the almost invariable practice of the last 200 years or more*."

ii) Secondly, no sum becomes legally due or payable " … *on behalf of the various parties to the adventure as their interest may appear* ..." by way of contribution to general average unless and until it has been decided whether the Rule D defence that it is common ground is assumed to be available to the cargo interests concerned succeeds or fails. The payment that is to be made is to be made on behalf of the cargo interests concerned. That suggests clearly that what the insurer was agreeing to pay was what the parties to the adventure would otherwise have had to pay themselves. No GA obligation arises where the cargo interests establish a Rule D defence; there is no proper basis on which the ship owner could demand security from cargo interests on terms that exclude such a defence and no commercial or other reason why an insurer of the cargo interest concerned would agree to provide such security. As between cargo interests and owner, the reasons for that are those explained by Sheen J in the Jute Express (ibid.) at 61 RHC, final paragraph (there being an obvious typographical error

where the phrase "cargo-owners" should read "ship owners"). That reasoning applies *a fortiori* to insurers underwriting a GA Guarantee who could recover from the ship owner only by an unsecured subrogated claim.

iii) Finally and in my judgment decisively, the language of the GA guarantee provides that what is payable is the sum that is ascertained to be properly due in respect of the said goods. As I have said already, in my judgment "*due*" means owing or payable and GA does not become owing or payable unless and until the merits of a Rule D defence have been resolved by a court. The inclusion of the word "*properly*" serves to put the point beyond doubt. There are a number of authorities which support this view – see the Cape Bonny (ibid.) where the defendants had provided a GA guarantee by which they had promised to pay any contribution to GA "*... which may hereafter be ascertained to be properly due ...*", the guarantors relied on a Rule D defence and Teare J held that there was no obligation to make a GA contribution because the expenditure was due to actionable fault by the owners and the claim against the defendants was dismissed. To similar effect is the Kamsar Voyager [2002] 2 Lloyds Rep 57. That case was concerned with a claim against insurers under a GA guarantee. The terms of the guarantee are not set out expressly but the judge says at page 59 (LHC) that the insurers resisted the claim on the basis that sum claimed was not properly due because the GA expenditure has been caused by actionable fault. I infer that to be liable under the GA guarantee in that case the guarantee expressly stated that the sums claimed had to be properly due. No other reasonably arguable basis for the judge's formulation has been suggested.

25. The owner relied on the Maersk Neuchâtel [2014] EWHC1643 (Comm); [2014] 2 Lloyds Rep 377 as suggesting the contrary conclusion to that set out above. I am not able to agree that this is the effect of that authority for the following reasons.

26. Firstly, the contractual obligation being construed in that case was contained in a Letter of Undertaking issued by a charterer and was to pay what was due " *... under an Adjustment...*". As the judge observed at para. 18(1) of his judgment, the issue in that case was whether Maersk had contracted out of the right to challenge an adjustment. Secondly, the factual and commercial context was different from the entirely conventional one that applies in this case. Thirdly, the language used in the Letter of Undertaking was different from that in the GA guarantees in this case. The GA guarantees in this case refer to the sum being "*properly*" due whereas that was not the case in the Letter of Undertaking as was noted by Hamblin J at paragraph 31 (7) of his judgment. Finally, the obligation being considered in that case was an unequivocal undertaking to pay the sum ascertained to be due under an Adjustment. In this case, but not in the Letter of Undertaking being considered in the Maersk Neuchâtel (ibid.), the defendants' undertaking was to pay " *... on behalf of the various parties to the adventure as their interest may appear ...*" the GA "*... which may hereafter be ascertained to be properly due in respect of the said goods*". This is functionally no different from the phrase that resonated with Sheen J in The Jute Express (ibid.) – that is the sum "*... which is payable in respect of the goods by the owners thereof ...*".. It is wholly different to the wording used in the Letter of Undertaking. It was an undertaking to pay the sum found due on the adjustment and it was this that wording that displaced the normal practice I have described above.

27. In those circumstances, the judge's conclusion in the Maersk Neuchâtel (ibid.) that the charterer had contracted out of the right to challenge an adjustment was unsurprising but that conclusion does not assist in resolving the issues that arise in this case. For these reasons I consider that the reasoning of Sheen J ought to be followed in relation to the instruments I am considering, particularly given the factual and commercial context set out above.

28. In my judgment, the law is correctly stated in para. 30.61 of Lowndes & Rudolf: Law of General Average and The York-Antwerp Rules 15th Edition:

> "It was held in *the Jute Express* that the words in the standard average bond referring to general average "which is payable" mean "and which is legally due", thus preserving the right to challenge any alleged liability for contribution. Nonetheless to put the matter beyond doubt in other jurisdictions, the words "properly due" are used on the average guarantee and in some cases the phrase "legally and properly due may also be used. Where by contrast a bond or letter of undertaking **should omit such formulae** the contract may be understood as akin to an on-demand guarantee, payment being due upon here certification. Hence in *The Maersk Neuchatel* a letter of undertaking given by a charterer …to "pay the proportion of any General Average … which may hereafter be ascertained to be due … under an Adjustment" was construed as requiring the charterer to pay the sum ascertained to be due in the adjustment. …

Conclusion

29. For those reasons I conclude that the Preliminary Issue I have to decide should be resolved in favour of the defendants. Nothing is payable under the GA guarantees issued by them if the loss was caused by the owner's actionable default or until that issue has been resolved. In my judgment that conclusion necessarily follows in light of the language used when construed in the factual and commercial context to which I have referred. To decide otherwise would be to alter the settled practice of the shipping industry that has been established for many years and the business of which has been conducted by reference to standard forms that have a well established and well understood meaning and effect as is plain from the many authorities, legal and trade texts I have been referred to. Not merely does the language used when considered in its correct factual and commercial context lead to the conclusion I have reached but the settled practice I have referred to (itself part of the relevant factual matrix) is such that only very clear wording could justify a departure of the sort contended for by the owner in this case. The wording used in this case does not satisfy that requirement. If and to the extent the wording used is ambiguous the factual and commercial context and commercial sense requires that it be construed in the manner contended for by the defendants.