Neutral Citation Number: [2019] EWHC 3300 (Comm)

Case No: CL-2012-000028

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building
7 Rolls Building, Fetter Lane
London EC4A 1NL

Date: 04/12/2019

Before :

MR. JUSTICE TEARE

- -

Between :

SUEZ FORTUNE INVESTMENTS LTD **PIRAEUS BANK AE**	**Claimants**
- and -	
TALBOT UNDERWRITING LTD AND OTHERS	**Defendants**

"BRILLANTE VIRTUOSO"

- -

- -

Peter Macdonald Eggers QC and Tim Jenns (instructed by **Clyde & Co LLP**) for the **Second Claimant**
Jonathan Gaisman QC, Richard Waller QC and Keir Howie (instructed by **Kennedys Law LLP**) for the **Defendants**

Hearing dates: 21 November 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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THE HONOURABLE MR JUSTICE TEARE

Mr. Justice Teare :

1. On 7 October 2019, following a trial spanning 52 days between February and July 2019, I gave judgment in this action. The Bank (the Second Claimant) had claimed against Underwriters (the Defendants) an indemnity pursuant to a war risks insurance policy for the constructive total loss of the vessel BRILLANTE VIRTUOSO by piracy. In that judgment, [2019] EWHC 2599 (Comm), I dismissed the claim of the Bank on the grounds that the vessel BRILLANTE VIRTUOSO had been lost by reason of the wilful misconduct of her Owner and not by reason of an insured peril. There has been no application for permission to appeal from that judgment. In the light of that judgment the Bank agreed to pay the Underwriters' costs of the action on the standard basis and to make a payment of £8.7 million by way of an interim payment on account of costs. The Underwriters reserved their right to seek costs on an indemnity basis and a further payment on account of costs. The Bank has accepted that costs should be assessed on the indemnity basis up until May 2016 when the Owner's claim for an indemnity under the policy was struck out. The Bank made that concession because the Bank had funded the Owner's claim. The Bank objected to the costs thereafter being assessed on the indemnity basis. It is agreed that if costs should be assessed on the indemnity basis there should be a further payment on account of costs in the sum of approximately £3.8 million.

2. The court's power to order costs on the indemnity basis stems from CPR Part 44.3 which provides that costs may be assessed on the standard basis or on the indemnity basis. Whereas costs on the standard basis must be proportionate and any doubt as to whether the costs were reasonably and proportionately incurred must be resolved in favour of the paying party, costs on the indemnity basis are not subject to the requirement of proportionality and any doubt as to whether costs were reasonably incurred must be resolved in favour of the receiving party. In deciding what order to make about costs the court will have regard to all the circumstances of the case including the conduct of the parties; see CPR Part 44.2(4) and (5) which provide as follows:

> "(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including-
>
> (a) the conduct of all the parties…….
>
> (5) The conduct of the parties includes-
>
> (a) conduct before, as well as during, the proceedings ……..
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue:
>
> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue……"

3. In *Excelsior Commercial and Industrial Holdings v Salisbury Hammer Aspden and Johnson (a firm)* [2002] EWCA Civ 879 the court's power to order costs on the indemnity basis was considered. Lord Woolf MR emphasised that the court had "a wide and generous discretion in making orders as to costs" (paragraph 12) but that there must

be "some conduct or (I add) some circumstance which takes the case out of the norm" (paragraph 19). Lord Woolf said that "an indemnity order may be justified not only because of the conduct of the parties, but also because of other particular circumstances of the litigation" (see paragraph 31). Finally he said that "there is an infinite variety of situations which can come before the courts" and that it would be "dangerous for the court to try and add to the requirements of the CPR which are not spelt out in the relevant parts of the CPR" (see paragraph 32).

4. Although the requirement that there be some conduct or some circumstance which takes the case out of the norm is not stated in the CPR, that requirement is a necessary consequence of the scheme of the CPR. Costs on the standard basis are the norm and so, in order to justify costs on the indemnity basis there must be something which takes the case out of the norm.

5. Very recently, on 3 October 2019, *Excelsior* was described by Sir Bernard Rix as "the leading modern authority" and that litigants were discouraged from citation of authority on what is "a well-travelled road"; see *Ford v Bennett* [2019] Costs LR 1473 at paragraphs 26-29.

6. Notwithstanding that discouragement the court was presented with 16 pages of submissions on the law relating to indemnity costs and with no less than 31 authorities. There appeared to be a dispute as to the manner in which the court's discretion should be exercised. The oral submissions of counsel for the Underwriters suggested that the dispute concerned a number of matters but, in reality, the dispute concerned one question, namely, whether, when conduct is relied upon to justify an order for indemnity costs, the conduct had to be unreasonable to a high degree.

7. There is a long line of authority that where it is said that a party's conduct was unreasonable it must be unreasonable to a high degree to justify an order for indemnity costs. That requirement was first stated in *Kiam v MGN Ltd. (No.2)* [2002] 1 WLR 2810 by Simon Brown LJ and has been repeatedly stated since; see *Euroption Strategic Fund Ltd. v Skandinaviska Enskilda Banken AB* [2012] EWHC 749 (Comm) at paragraph 14 per Gloster J., *Elvanite Full Circle Ltd. v AMEC Earth Environmental (UK) Ltd.* [2013] 4 Costs LR 612 at paragraph 16(a) per Coulson J., *ICI v Merit Merrell* [2017] 5 Costs LR 631 at paragraph 12 per Fraser J. and *Hislop v Perde* [2019] 1 WLR 201 at paragraphs 35-36 per Coulson LJ.

8. It was suggested that the requirement that conduct must be unreasonable to a high degree was not stated in the CPR and that this gloss on the CPR was therefore wrong in principle. However, the requirement is, I think, a necessary corollary of the scheme of the CPR. Having regard to the importance ascribed to the principle of proportionality in the CPR, where unreasonable conduct is relied upon as justifying costs on the indemnity basis, and hence removing the need for the costs to be proportionate, the conduct must be unreasonable to a high degree. Otherwise due regard would not be had to the importance of proportionality in the scheme of the CPR. This was explained by Morgan J. in *Digicel (St. Lucia) Ltd. and others v Cable and Wireless plc and others* [2010] 5 Costs LR 709 at paragraph 19:

> "Finally, I have found it useful, when asking myself whether the conduct of the paying party was at a sufficiently high level of unreasonableness or inappropriateness to make it appropriate to

> order indemnity costs, to remind myself of why precisely I am asking that question. The purpose behind the question is whether the relevant conduct makes it just as between the parties to remove from the paying party the two-fold benefit of an order on the standard basis, as compared with an order on the indemnity basis, that is to say, to enable the receiving party to recover its costs, reasonably incurred and reasonable in amount, with the benefit of the doubt being given to the receiving party and without the receiving party having to address (and persuade the court upon) the subject of proportionality. In this regard, I need to give proper weight to the significance which the CPR attach to this question of proportionality. The policy considerations behind the requirement of proportionality and the weight to be attached to the requirement are emphasised in *Lownds v Home Office* [2012] 1 WLR 2450, in particular, at [8]-[10]. The matters which will be relevant to any dispute about proportionality include those set out at CPR rule 44.5(3), which I have set out above, and also the similar provisions in rule 1.1(2)(c)."

9. Counsel for the Bank referred to the summary of the relevant principles by Coulson LJ in *Hislop v Perde* [2019] 1 WLR 201 at paras. 35-36 which is in these terms:

> "(a) Indemnity costs are appropriate only where the conduct of a paying party is unreasonable "to a high degree". "Unreasonable" in this context does not mean merely wrong or misguided in hindsight.
>
> (b) The court must therefore decide whether there is something in the conduct of the action, or the circumstances of the case in general, which takes it out of the norm in a way which justifies an order for indemnity costs."

10. The issue in *Hislop v Perde* did not in fact concern indemnity costs pursuant to CPR Part 44 but the fixed costs regime in CPR Part 45 for low value road traffic accident cases and employers' liability/public liability claims where there was a late acceptance of a claimant's Part 36 offer. It does not appear that there was any debate as to the circumstances in which it was appropriate to order indemnity costs pursuant to CPR Part 44. Although the summary could be taken as supporting the proposition that indemnity costs are *only* appropriate where there is unreasonable conduct to a high degree, such a proposition would not only be contrary to CPR Part 44 which enjoins the court to have regard to "all the circumstances" of the case but would also be contrary to *Excelsior*, the effect of which is stated in paragraph (b) of Coulson LJ's summary. Coulson LJ's summary of the principles should, as it seems to me, be read as saying that where conduct is relied upon as justifying an order for indemnity costs it must be unreasonable to a high degree. I did not understand counsel for the Bank to disagree with that approach.

11. In the light of the wide nature of the discretion to order costs on the indemnity basis I accept the submission made by counsel for the Underwriters that there may be an "aggregation of factors" which justify an order for costs on the indemnity basis, one of which may be unreasonable conduct though not to a high degree. What matters is

whether, looking at all the circumstances of the case as a whole, the case is out of the norm in such a way as to make it just to order costs on the indemnity basis. That is the approach in *Excelsior*; see also *ABCI v Banque Franco-Tunisienne* [2003] EWCA Civ 205 at paragraph 70 per Mance LJ.

12. The wide nature of the discretion has been expressed by Christopher Clarke J. in *Balmoral v Borealis* [2006] EWHC 2531 at paragraph 1 in these terms:

> The discretion is a wide one to be determined in the light of all the circumstances of the case. To award costs against an unsuccessful party on an indemnity scale is a departure from the norm. There must, therefore, be something – whether it be the conduct of the claimant or the circumstances of the case – which takes the case outside the norm. It is not necessary that the claimant should be guilty of dishonesty or moral blame. Unreasonableness in the conduct of the proceedings and the raising of particular allegations, or in the manner of raising them may suffice. So may the pursuit of a speculative claim involving a high risk of failure or the making of allegations of dishonesty that turn out to be misconceived, or the conduct of an extensive publicity campaign designed to drive the other party to settlement. The marking of a grossly exaggerated claim may also be a ground for indemnity costs.

13. In the present case the Underwriters say that costs on the indemnity basis are appropriate for no less than 11 reasons. Counsel stressed that he did not base his submission upon unreasonable conduct by the Bank (though, if he had to, he would). Although the word "unreasonable" does not appear in paragraph 36 of counsel's written submissions which summarises those 11 reasons, most of the reasons appeared to be criticisms of the Bank's conduct and I had therefore thought that counsel was saying that the Bank had acted unreasonably. But I was told in counsel's reply that they were not saying that. Rather, the Underwriters' claim for indemnity costs was based upon the character of the claim, looked at objectively, its weakness, the manner in which the Bank had pursued its claim (see CPR Part 44.2(5)(c)) and its effect on the Underwriters' response to it. The court was urged to consider whether, in the light of such matters, it was appropriate that in assessing the costs payable by the Bank the Bank should retain the twin benefits of costs on the standard basis or whether the Underwriters should have their costs assessed on the more generous basis of indemnity costs without, in particular, the need to establish that their costs, although reasonably incurred, were also proportionate in amount.

14. In response counsel for the Bank said that its claim was independent of the Owner's claim, that it was objectively arguable, that it would not have been apparent at the start of the trial that it was weak, that the Underwriters' case had to be tested and won at trial and that the outcome of the trial was not a foregone conclusion.

15. I shall not comment upon all 11 of the matters relied upon by the Underwriters but only those which struck me as being the most significant of them.

<u>The character of the Bank's claim</u>

16. Counsel submitted that the Bank's purpose was to seek recovery for the Owner's fraudulent destruction of his vessel. The Bank's purpose was to seek an indemnity in respect of the loss of the vessel by a fire which was said to have been caused by pirates. It has now been determined that the loss of the vessel was caused by the Owner's own misconduct and not by the insured peril of piracy. That that was so had been denied by the Bank through to the end of the trial. Of course, the Bank did not know that the Owner had procured the fire and was not party to the Owner's plan. I am not sure that it is correct, in those circumstances, to say that the Bank's purpose was to seek recovery for the Owner's fraudulent destruction of his vessel. But what can be said is that the Bank's purpose was to seek recovery in respect of what has now been determined to be the Owner's fraudulent destruction of his vessel.

17. An owner who brings a claim for an indemnity under a policy of marine insurance, which claim fails because the owner scuttled his ship, will obviously be ordered to pay costs on the indemnity basis because his fraudulent conduct was unreasonable conduct to the highest degree possible and was clearly out of the norm. Where the mortgagee of the ship pursues his own claim under the policy (whether as assignee and loss payee or as co-assured) he is in a different position from the owner because he has not acted fraudulently or pursued a claim dishonestly. The question raised by the Underwriters' submission in the present case is whether the mortgagee, notwithstanding that he is in a different position from the owner, should also have to pay costs on the indemnity basis. Counsel submitted that the mortgagee should be so ordered because the character of the claim, namely, a claim based upon (as it has now been found) a fraudulent and dishonest scheme is beyond the norm and such that an order for indemnity costs is appropriate. That was said to be particularly so in the present case where the fraudulent scheme was particularly bold and involved, not only the owner, master and chief engineer, but also a local salvor in Aden and disaffected members of the Yemeni Coast Guard.

18. I accept that the character of the claim brought (or rather continued to be brought) by the Bank in May 2016 was out of the norm in that, as was alleged by the Underwriters but denied by the Bank and as the court has now found, the fire which caused the constructive total loss of the vessel was the product of a fraudulent conspiracy orchestrated by the Owner. In reaching that conclusion I have in mind that underwriters from time to time have to face such claims, as is apparent from the pages of the Lloyd's Law Reports from the 1920s onwards. Underwriters in other areas of business, such as household and motor insurance underwriters, also have to face fraudulent claims; see *Parker v NFU* [2012] EWHC 2156 (Comm) and *UK Insurance v Gentry* [2018] EWHC 37 (QB). Nevertheless such claims are not the norm. The norm consists of claims honestly made but where there are disputes about the extent of cover, the effect of a breach of a warranty and the like. The Bank's claim was honestly brought but it was in fact based upon a fraudulent conspiracy (and, it seems, one which was unprecedented in nature and scale). From the point of view of the Underwriters the claim of the Bank was as much out of the norm as the Owner's claim had been.

19. Counsel for the Bank stressed that its claim was independent of the Owner's claim. It was, in the sense that the Bank's claim could be pursued even if the Owner did not pursue his claim. But it was nevertheless based upon what the Underwriters alleged to be, and has now been found to be, a conspiracy to defraud the Underwriters. The character of the claim is therefore out of the norm. Even if the Owner had never brought

a claim the Bank's claim, in circumstances where the Underwriters alleged that the fire had been deliberately caused by the Owner, would have been out of the norm.

20. However, whether or not the character of the claim is one sufficiently out of the norm to make it appropriate to justify an order that the Bank pays costs on the indemnity basis depends upon the other circumstances of the case.

The improbabilities in the Bank's case

21. Counsel submitted that the Bank's case failed to confront the inherent improbabilities in its case. In my judgment in the main action I noted the improbabilities inherent in the Bank's case; see paragraphs 415-426. One of these (the fact that the master had the crew's passports ready) may not have been appreciated until trial. But it seems likely that many of these improbabilities were, on an objective basis, apparent in May 2016. Certainly, I was told that by May 2016 the Bank had seen the US Navy materials (paragraph 217 of the judgment), had listened to the VDR audio record (paragraphs 29-31 of the judgment) and had prepared the 2015 crew statements in the light of the VDR.

22. Counsel for the Bank stressed that there were available in May 2016 many witness statements from the crew which supported the accounts given by the master and chief engineer and that many matters were the subject of advice from experts (whose reports were yet to be exchanged). Counsel for the Bank submitted that the Bank was entitled to believe that the claim was genuine and could be established at trial. Perhaps the Bank did. But the Bank's subjective belief is not relevant. On an objective basis some of the improbabilities in the claim must have been apparent in May 2016. It is sufficient to mention three of the most significant. First, there was the master's action in letting the armed men board (paragraph 416 of the judgment). Second, there were the actions of the supposed pirates who, whilst apparently intent on hijacking the vessel for ransom, brought with them an IEID (paragraph 417 of the judgment) which was later activated in order to cause the fire. Third, there was the action of the master who, having been instructed to proceed to Somalia, in fact steered the vessel away from Somalia without that being noticed by the supposed pirates (paragraphs 418-419 of the judgment). On an objective basis these matters must have indicated to the Bank that their claim faced considerable difficulty and that there was some support for the allegations being made by the Underwriters. That is because it is well established that in cases of this character the reliability of the evidence of the master will depend upon an assessment of the probabilities; see paragraphs 65-67 of the judgment. There were therefore real risks to the Bank in continuing with the claim.

23. I have noted the Bank's response to these matters at paragraphs 46-48 of its counsel's submissions. It is said that the master's evidence was supported by the evidence of members of the crew, that neither the Underwriters nor the Bank could "know" that there had been a fraud, that material developments in the case late in the action redefined the focus of the enquiry, that the oral evidence of the master and Dr. Mitcheson was unheralded, that the Underwriters' case had to be tested and won at trial, that given the factual complexity of the case the merits of the case were far from obvious and that there were numerous factors which militated against a finding of wilful misconduct. These points are valid to an extent but they do not detract from the circumstance that in May 2016 there were improbabilities about the master's evidence which made the continuation of the claim by the Bank perilous. I have well in mind that the fact that a claim may appear vulnerable or weak in hindsight is not sufficient to

justify indemnity costs. But the three matters which I have mentioned were not improbable only in hindsight after all of the evidence in the case had been considered. They struck me as improbable in the very early days of the trial when I first learnt about them and considered them.

The reasons for the Owner's claim being struck out

24. In May 2016 the Owner's claim was struck out in the circumstances described in the judgment at paragraphs 72, 445 and 446. Again, on an objective basis the findings made by Flaux J. must have indicated to the Bank that the Owner, Mr. Iliopoulos, was capable of planned and deliberate dishonesty in connection with this very case, a fact which supported (though did not prove) the Underwriters' case. Those findings must have served, on an objective basis, to increase the risks to the Bank in continuing with the claim. To say, as counsel for the Bank do at paragraph 49 of their submissions, that the findings were merely "one of numerous factors the Court would have to take into account" is true, but seriously underplays the significance of what the findings indicated about the character of Mr. Iliopoulos.

25. Pausing there, it can therefore be seen that this was a case which was not only out of the norm by reason of its character but was also one in which, when the Bank continued with its claim in May 2016, there must have been a real risk of failure, first, on account of the improbabilities in the evidence and, second, on account of what was known of the character of the Owner. Counsel for the Underwriters submitted that the findings made by Flaux J. were "a unique and unprecedented feature of the present case". That is not to say that the Bank must have regarded the case as one bound to fail. Clearly, the Bank did not so regard it and must have had reason to consider that the difficulties could be overcome and that the risk of failure would not in fact occur. But on an objective basis the claim would have been viewed as one fraught with difficulty and danger.

Developments in the case thereafter

26. By September 2017 photographs had been supplied by Mr. Theodorou (an employee of the local salvage company and a "whistleblower") which showed that the fire had been out, or almost out, by 1030 on 6 July and yet had resurged by 1530. This was at a time when the local salvor from Aden was on site. Yet the salvage statement of Mr. Vergos made no reference to the resurgence. This was remarkable; see paragraphs 367 and 428-436 of the judgment. On an objective basis this must have increased the risks of the Bank's case failing and the Underwriters' case succeeding. It suggested that Mr. Vergos may have been involved in the resurgence of the fire. Counsel for the Bank submitted that the evidence as to the cause of the resurgence was complex and that the Bank's case had been supported by Dr. Mitcheson's written evidence. These observations are true but the fact of the resurgence, coupled with the absence of any evidence as to that resurgence in Mr. Vergos' statement, must, on an objective basis, have made the Bank's case yet more vulnerable to failure.

27. Mr. Theodorou had told Mr. Veale (an investigator) that there had been deliberate damage in the engine room to fuel the fire (see paragraph 438 of the judgment). As a result the photographs were studied again by Dr. Craggs (the Underwriters' fire expert) and evidence of damage to the drain cock of the diesel oil tank in the purifier room was found (see paragraphs 155 and 368-9 of the judgment). Dr. Craggs produced his report

on this matter in October 2018. Since it was common ground between the fire experts that the additional fuel used to cause the resurgence was most likely to be diesel oil this was an important discovery. Counsel for the Underwriters called this "the smoking gun". Whilst there was much debate at trial as to when this damage was caused, whether it was deliberate and whether the resurgence of the fire was deliberate or natural (see paragraphs 370-399 of the judgment) the discovery of this damage, on any objective basis, must have very substantially increased the vulnerability of the Bank's case, particularly in circumstances where the Bank was not calling Mr. Vergos to give evidence.

28. Mr. Lillie (the Bank's marine engineering expert) put forward, in response to the discovery of the damaged drain cock in the purifier room, an "innocent" explanation of that damage, the BLEVE theory; see paragraphs 140 and 373 of the judgment. This was a flawed theory on at least two counts. First, it assumed that a particular pipe was a fire main carrying water when it was not. Second, it involved an improbable trajectory of a motor stator from the fuel oil conditioning unit being propelled by the BLEVE across the purifier room, avoiding other structures, striking a bulkhead and falling down onto and so damaging the drain cock. Mr. Lillie's report putting forward this theory must have caused the Underwriters to incur considerable expense in responding to it. Whilst the Bank was entitled to investigate whether there was an innocent explanation for the damage to the drain cock greater care ought to have been exercised by Mr. Lillie before putting it forward.

29. Counsel for the Bank submitted that the Bank was justified in calling Mr. Lillie because he is an acknowledged expert engineer who had inspected the vessel and who had been found by Flaux J. at the trial on quantum to be an impressive and measured witness. I do not doubt that the Bank was justified in calling Mr. Lillie for those reasons but the Bank must bear responsibility for the failings of the witness it calls; see *Balmoral v Borealis* at paragraph 20 per Christopher Clarke J. In any event, the improbable trajectory of the motor stator across the purifier room ending with a successful strike on the drain cock must, on an objective basis, have been apparent to the Bank itself.

30. There was another development in the views of Dr. Mitcheson, the Bank's fire expert. He had accepted in his early report and in the experts' joint report that the resurgence of the fire had been in the purifier room. After the Five Oceans photographs had been produced Dr. Mitcheson departed from that agreement in his later reports and said that the resurgence had not been in the purifier room. This change of opinion enabled the Bank to suggest that the damaged drain cock in the purifier room was an irrelevance. But a departure from an agreed joint memorandum is an unsure foundation for an important opinion.

31. Thus, when the trial began on 18 February 2019 the prospects of a successful outcome for the Bank's claim must, on an objective basis, have appeared bleak.

32. The Bank may have considered that the difficulties in way of a successful outcome could be overcome. But objectively there were very real difficulties by the time the trial commenced in February 2019. Counsel for the Underwriters used colourful language to describe the Bank's position at the commencement of the trial; "even an optimistic litigant inclined towards a speculative gamble should by this stage have realised that the game was up". I am not inclined to adopt that language. The Bank's case was supported by factual and expert evidence and so it is difficult to describe it as

speculative. But to those familiar with the weaknesses in the Bank's case at the commencement of trial there would have been no surprise had the Bank chosen no longer to contest the Underwriters' allegation of wilful misconduct by the Owner. The evidence of fact to be given by the master (and the chief engineer) had not been consistent and was improbable. The expert evidence to be given by the fire expert as to the location of the resurgence had gone back on an agreed position in the joint report that the resurgence occurred in the purifier room and the expert evidence to be given by the expert marine engineer had advanced an improbable theory to explain the damage to the drain cock in the purifier room. There was no evidence from Mr. Vergos to explain the resurgence of the fire and the Owner, Mr. Iliopoulos, had been found by this court to be capable of deliberate and planned dishonesty in connection with this very case. The litigation still had to be "won" by the Underwriters by persuading the Court that on the basis of the whole of the evidence the loss had been caused by the wilful default of the Owner. But on an objective basis there were very real weaknesses in the Bank's case.

The trial

33. Having decided to continue with its denial of the Underwriters' case as to the wilful misconduct of the Owner the Bank argued every point (save for the BLEVE theory which was dropped on Day 35). Counsel for the Underwriters submitted that the insistence by the Bank that there was nothing suspicious about the loss of the BRILLANTE VIRTUOSO meant that "every single point (and its significance) had to be argued at trial……thus considerably increasing the costs of the dispute". In circumstances where the Bank's closing submissions ran to over 640 pages and the Underwriters' closing submissions ran to over 780 pages that submission appears to be correct.

34. The Bank's readiness to argue every point, however weak, can be illustrated by two aspects of the evidence, one factual and the other relating to the expert evidence. There was what I regarded as a hopeless attempt to support the master's evidence as to why he had permitted the armed men to board (see paragraph 218 of the judgment). There was also a surprising attempt to support the written evidence of Dr. Mitcheson as to the location in which the fire had resurged. When cross-examined he had accepted that the resurgence was likely to have been in the purifier room (as he had done in the joint report). He accepted that it was possible that he had unconsciously allowed himself to argue the Bank's case in a way that was not fully objective; see paragraphs 147-152 of the judgment. But the Bank continued to argue the point at length; see paragraphs 302-309 of the judgment.

Discussion and Conclusion

35. The character of the Bank's claim, being one which sought an indemnity under a policy of insurance where the Underwriters had pleaded (and were to prove) that the loss had been caused by the wilful misconduct of the Owner, was out of the norm. Such a claim typically gives rise to considerable cost. I explained in my judgment at paragraph 23 why that is often the case. One reason is the need for the claimant to establish a plausible explanation for the loss consistent with "innocence" and with the evidence in the case; see also the quotations from *The Ikarian Reefer* in paragraph 62. The need in the present case for the Bank to establish a plausible explanation for the loss gave rise to considerable expenditure on expert evidence not only with regard to the location and

cause of the resurgence of the fire but also with regard to the plausibility of the armed men being disaffected members of the Yemeni coast guard who wished to share the profits from hijacking the vessel with Somali pirates; see paragraphs 115-133 and 340-350 of the judgment. The latter evidence involved much wide-ranging speculation and conjecture because there has never been a reported case of Yemeni-Somali piracy.

36. The question is whether there is something in the circumstances of the case, or in the manner in which it was conducted by the Bank, that was so much out of the norm that justifies an order for costs on the indemnity basis. In answering that question it is necessary to bear in mind the importance of proportionality in the CPR and to consider whether it is appropriate to excuse the Underwriters from the need to show that their costs were proportionate.

37. I was referred to several judicial comments on the relevance of the merits of a case. Thus in *Three Rivers* Tomlinson J said at paragraph 25(5):

> "Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails."

38. Similarly, in *Borealis* Christopher Clarke J. said at paragraph 1 that

> "…the pursuit of a speculative claim involving a high risk of failure"

may suffice to justify an order for indemnity costs.

39. In *Elvanite Full Circle Ltd. v AMEC Earth and Environmental (UK) Ltd* [2013] 4 Costs LR 612 at paragraph 16 per Coulson J. and in *ICI v Merit Merrell Technology Ltd* [2017] EWHC 2299 at paragraph 10 per Fraser J. at paragraph 10) it was said that

> "the pursuit of a weak claim, will not usually on its own, justify an order for indemnity costs provided that the claim was at least arguable and not hopeless from the outset"

40. In *Hosking v Apax Partners LLP* [2019] 1 WLR 3347 at paragraph 42-43 EWHC 2732 Hildyard J. said at paragraph 42

> "The merits of the case are relevant in determining incidence of costs: but, outside an entirely hopeless case, they have much less, if any, relevance, in determining the basis of assessment."

41. I am not persuaded that there is a rule or law or any principle to the effect that the merits of a case are only relevant in certain circumstances. CPR 44.2(4) does not permit of any such rule or principle. All depends upon the circumstances of the case and whether the case, or the circumstances of the case, are beyond the norm to such an extent that an order for indemnity costs is justified. There does however seem to me to be good sense and justice in the observation by Tomlinson J. that where a claim is weak a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails.

42. The Bank, in my judgment, decided to continue the claim in May 2016 at time when, for the reasons I have given, there was a real risk of failure. The developments thereafter in 2017 and 2018 served only to increase that risk to such an extent that the Bank, through its experts, was compelled to abandon that which had been common ground between the experts and to advance theories which had to be abandoned late in the trial. That occurred not in relation to minor matters but in relation to crucial matters which must have consumed considerable sums in costs, namely, the location in which the resurgence occurred, the purifier room, and the significance of the damaged drain cock in the purifier room. The Bank was entitled to pursue its claim and to argue every point but it did so in circumstances where its claim was weak and there was a high risk of failure. Such were those weaknesses that there were times during the trial that I thought that there must have been some reason of which I was unaware that justified the Bank (or the mortgagee interest underwriters, see paragraph 19 of my judgment) in pursuing this claim against the war risk underwriters. But no such reason has materialised.

43. In circumstances where I received over 640 pages of closing submissions from counsel for the Bank the claim cannot be said to have been beyond argument. It was, however, when viewed objectively, a weak and fragile case, albeit one which still had to be "won" by the Underwriters.

44. In the circumstances of the present case I am persuaded that the character of the claim and the circumstances in which it was pursued since May 2016 were beyond the norm and justify an order that costs be paid on the indemnity basis. When I ask myself whether there is good reason why the Bank should be deprived of the twin benefits of costs on the standard basis I am persuaded that it is fair and just that it should be. The Bank chose, undeterred by the objective weakness in its case, to argue the case at length and on every point. The Underwriters had to respond at length and on every point. In the result the Bank lost on every point of substance and did so for reasons which could have been predicted at the commencement at the trial in February 2019 by an objective observer familiar with the case.

45. I have considered whether to limit the indemnity costs to those incurred from the commencement of the trial because that is when the weakness of the Bank's case (having regard to the discovery of the damaged drain cock) must have been most apparent. But it is clear that the Bank's uncompromising manner of pursuing its case long pre-dated the start of the trial. In the Reply the Bank pleaded that there were no suspicious circumstances at all. This unrealistic approach to the case continued through to the trial. At the commencement of the trial it was said that the Underwriters' case was "no more than a conspiracy theory" which, in a memorable and striking phrase, was said to "shoot for the baroque". The Bank was entitled to resist the Underwriters' claim but in circumstances where its case was weak and the Bank chose to do so at length and on every point in an uncompromising manner it cannot, it seems to me, be unjust to order that the Bank pays all of the Underwriters' costs since May 2016 on the indemnity basis.

The "non-wilful misconduct" issues

46. The Underwriters had additional defences which were not dependent upon the wilful misconduct allegation, namely, the BMP warranty issue (save for the aspects of drifting and a high state of readiness, which flowed from the master being part of the Owner's plan – see paragraphs 567-8 and 573 of the judgment), the section 41 illegality issue,

the Clause 4.3 issue and the abuse of process issue. With regard to these issues the Underwriters either did not succeed on them entirely or the court did not need to rule on them. It is accepted by the Bank that it is nevertheless appropriate in circumstances where the Underwriters succeeded on their principal defence that the Underwriters should recover their costs but the Bank submitted that such costs should only be on the standard basis. The Bank also said that that the costs of the Cargo Theft issue should be paid on the standard basis because the theft was not relied upon in support of the allegation of wilful misconduct. The Underwriters sought to dissuade the court from making issue based orders because they only lead to further costs being incurred. They also had additional reasons for saying that standard costs were inappropriate in any event.

47. I shall express my conclusions shortly:

i) The BMP defence succeeded in part because the master was party to the Owner's plan. That is a good reason for awarding the Underwriters their costs on the indemnity basis. Further, to separate out the costs of those issues on which the Bank succeeded would not be appropriate and would lead to complications and argument as to which costs should be assessed on which basis and hence to additional costs.

ii) In circumstances where the Bank won on the section 41 illegality issue I consider the costs of that issue should be paid on the standard basis.

iii) In circumstances where the court did not deal with the clause 4.3 point or the abuse of process point I consider that the costs of those issues should be paid on the standard basis.

iv) The Cargo Theft issue was not, I think, pressed by the Underwriters as being a matter which materially assisted the wilful misconduct allegation. But it was argued because the Bank considered that it was relevant to the reliability of Mr. Marquez' evidence. That was relevant to the issue of wilful misconduct. The Bank lost on the Cargo Theft issue. The costs of this issue should be paid on the indemnity basis.

Conclusion

48. The Bank is ordered to pay the Underwriters' costs on the indemnity basis from May 2016 save for the section 41 illegality issue, the clause 4.3 issue and the abuse of process issue which should be paid on the standard basis. The parties are requested to agree an appropriate order including the quantum of the further sum to be paid on account of costs.