Neutral Citation Number: [2021] EWHC 40 (Comm)

Case No: CL-2019-000793

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/01/2021

Before:

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

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Between:

(1) FERAND BUSINESS CORPORATION **(2) ANGELIKI FRANGOU** **(3) MARITIME ENTERPRISES MANAGEMENT S.A.**	**Claimants**
- and -	
(1) MARITIME INVESTMENTS HOLDINGS LIMITED	**First Defendant/ Additional Claimant**
(2) KOLEN INTERNATIONAL S.A.	**Second Defendant/ Additional Defendant**

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Mr David Allen QC and **Mr Jason Robinson** (instructed by **Wikborg Rein LLP**) for the **Claimants**
Ms Caroline Pounds (instructed by **Tatham & Co**) for the **First Defendant /Additional Claimant**
Mr Richard Sarll (instructed by **Waterson Hicks**) for the **Second Defendant/Additional Defendant**
Hearing dates: 5-8 October 2020

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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. In essence this is a dispute between a brother and sister concerning their respective business and personal financial affairs, in which the claimants seek various declarations which she maintains will end the ongoing and multifaceted disputes between them that have existed for a number of years. It is clear that their relationship is now very strained and perhaps permanently fractured. Their disputes have been fought out with undisguised and uncompromising hostility in these proceedings, throughout this trial and in Greece.

Background and Primary Facts

2. I now turn to the background to this dispute. The second claimant ("AF") and Captain John Frangos ("JF") are sister and brother. Both AF and JF are experienced ship owners and managers. AF and JF carry on business together although each have other business interests. Their joint business activity is carried on in part through the first defendant ("MIHL"). JF was at all material times MIHL's Chief Executive Officer. MIHL's business was at all material times to hire out ships owned by associated or subsidiary companies.

3. AF and JF each owns his or her interest in MIHL via corporate vehicles that they respectively control. The first claimant ("FBC") is AF's vehicle through which she owns her interest in MIHL and the second defendant ("Kolen") is the vehicle through which JF owns his interest. At all times material to these proceedings, MIHL had a third shareholder called Oscaleta Limited ("Oscaleta") although currently it owns only 5% of MIHL's share capital.

4. The instrument by which AF, JF and Oscaleta agreed to manage MIHL was a stockholder agreement dated 8 September 2014 ("SHA"). The SHA is governed by English law and is subject to the exclusive jurisdiction of the English courts – see clause 13.13. The parties to that agreement are and are only Oscaleta, FBC, Kolen and MIHL.

5. As I have said, both AF and JF have business interests other than their respective interests in MIHL. AF is the Chairman and Chief Executive Officer of Navios Group,

which consists of three companies listed on the New York Stock Exchange and a further company listed on the NASDAQ. It owns or operates as disponent owner in excess of 200 ships. She is also the ultimate owner of the third claimant ("MEM").

6. Turning to JF, as well as being the ultimate owner of Kolen, and the Chief Executive Officer of MIHL, he was at all times material to these proceedings the ultimate owner and operator of an entity called First Lines Company S.A ("FL"). Its business is that of technical and commercial ship management. It acted as ship manager for ships hired out by MIHL until 2017. There is a dispute between MIHL and FL as to whether MIHL owes FL unpaid management fees. That dispute is the subject of a London arbitration.

7. AF maintains and I accept that JF has suffered significant financial difficulty in recent years. AF says and JF did not challenge her evidence that this was the result primarily of long running ruinous litigation in Greece that was concerned with or arose out of his divorce. It is not necessary that I mention any of the other parties involved. It is necessary only to record that as a result of that litigation JF had to pay a third party US$58.5m and it left him unable to raise finance to carry on his business career, which he was able to resume only in or about 2007. AF provided financial support for JF from at least 2012 until the break down in relations between them in 2019 to which I refer in detail below.

8. The financial support that AF provided to JF has been substantial. In or about 2007, JF acquired a vessel (using a corporate vehicle) called "Taurus Two". It was acquired using finance provided by HSH Nordbank AG. The indebtedness was secured by a mortgage over the vessel. In August 2011, the vessel was arrested following a loan default. AF maintains that at the request of her father, she used her relationship with the bank to assist by negotiating a loan by HSH Nordbank AG to a company controlled by her, secured by her personal guarantee, to finance the acquisition of the vessel by her company. AF maintains that she assisted her brother in relation to other vessels owned by companies controlled by him where lending defaults had occurred.

9. It was against that background that AF maintains that MIHL was formed at the end of 2012. AF maintains that she was a reluctant investor and was persuaded to invest as a means of assisting her brother with his business career. The initial purpose of the exercise was to acquire the corporate ownership of three vessels - the Christine B (IMBA Maritime S.A.), the Nikolas III (Iris Enterprises Company S.A.) and the Titan (Titan Maritime Enterprises S.A). A plan to raise funding for further ship

purchases by an IPO failed for want of investor interest but a hedge fund agreed to invest US$25m in return for a 50% shareholding. The hedge fund invested through its subsidiary Oscaleta. Following this exercise, Oscaleta held 50% of the shares in MIHL and AF and JF each held 25%. The relationship of the three shareholders was governed by the SHA as I have explained already. Thereafter, MIHL acquired two further ships, each of which was owned by a subsidiary, being the Hope I and the Pacific Cebu. As provided for by clause 5.5 of the SHA, FL was appointed technical and commercial manager of MIHL's ships and thus JF was in practice the manager of each of the ships.

10. In 2016, MIHL was short of cash and three rights issues took place. Oscaleta did not participate in any of them but AF (by FBC) and JF (By Kolen) did with the result that their respective shareholdings rose to 47.5% and Oscaleta's was diluted to 5% - see Amendments 1 to 3 of the SHA. In light of the reduction in Oscaleta's shareholding, it was agreed by clause 2 of Amendment No. 1 that clause 4.2 of the SHA be varied so that no shareholder whose shareholding fell beneath 12.5% would be entitled to designate a director of MIHL. In consequence, the two directors nominated by Oscaleta resigned, so that by 13 October 2016, AF and JF were the only directors of MIHL.

11. There is a dispute as to what happened thereafter concerning membership of the Board. AF claims that she and her brother agreed that Mr. Sheldon Goldman be appointed as a director of MIHL on 25 November 2016. AF maintains that this agreement is contained in or evidenced by the minutes of a meeting of the board on that date. JF contended at one stage that his signature on this document had been forged. Both parties engaged handwriting experts. The experts are agreed:

> "… that the …signature … in the name [JF] on the original board minutes dated 25 November 2016 and 21 June 2017 were written by [JF]. The possibility that the signatures are simulations of his signature by another person(s) is considered to be, at least, unlikely."

I accept AF's case on this issue because the agreed expert evidence places the issue beyond realistic argument. I also accept her case that the document memorialises Mr Goldman's appointment as a director. The impact of this finding is something I return to later in this judgment.

12. The next major area of dispute concerns the sale of the Christine B. MIHL had acquired the company that owned this vessel with the aid of a loan from

Commerzbank secured by a marine mortgage over the Christine B. AF's evidence was that by late 2016, Commerzbank had decided to withdraw from the ship finance market and was willing to discount by 10% the amount of the loan outstanding in return for prompt repayment. JF does not dispute this. This reduced the amount outstanding from US$11.6m to UD$10.3m.

13. An alternative lender known to AF (ABN Amro) was willing to provide a new loan of US$9m. MIHL did not have the funding to make up the difference but in any event, again according to AF, ABN Amro did not want to do business with JF or to fund a ship in the MIHL structure. She maintains that the Commerzbank loan secured against the Christine B was for a sum that exceed the then value of the ship. Assuming that to be so, a sale of the ship was plainly of benefit to MIHL. AF's evidence is that it was agreed between her and her brother (in their capacities as directors of MIHL) that MIHL would cause IMBA Maritime S.A to sell the ship to an entity called Plous Shiptrade Company SA ("Plous") at a price equivalent to the sum needed to discharge the Commerzbank loan with AF funding the balance of US$1.4m needed to discharge the loan to Commerzbank and Plous taking over responsibility for the ship's accumulated and unpaid trade debt. The sale was completed on or about 16 December 2016. Plous agreed to assume liability for the ship's accumulated and unpaid trade debt totalling a further US$1m. That this was what in fact happened is not in dispute between the parties to these proceedings. Plous was at all times material to these proceedings wholly owned by Maritime Enterprises Holdings SA, which in turn was wholly owned by AF.

14. It is common ground that this transaction could not have proceeded without JF consenting to it both because of the transfer of title to Plous but also because the management of the ship was transferred on sale from FL to the third claimant ("MEM"). Its sale to Plous made commercial sense from MIHL's point of view since it relieved that company of the Commerzbank loan (including that part of it that was in excess of the vessel's value at the date of its disposal) and the accumulated unpaid trade debt. JF did not make any financial contribution to the acquisition of the vessel by Plous. I accept AF's evidence that ABN Amro did not want to do business with JF or to fund a ship in the MIHL structure because that is consistent with the transfer of management and with a sale rather than simply a re-finance by MIHL with ABN Amro in substitution for Commerzbank.

15. The value of vessels such as the Christine B is substantially a function of the state of the charter market at the time of a sale. AF's evidence and there is nothing to contradict it is that the Dry Bulk charter market was at an all-time low at the date when the Christine B was sold by MIHL to Plous. Her evidence is that the market picked up steadily during 2017. None of this appears to be in dispute although JF maintains that this improvement was foreseeable as something that was likely to occur at the date of the sale of Christine B to Plous. His case is that it was agreed between him and AF at the time of the sale of the vessel to Plous, that Plous was to sell the vessel on to the Navios Group of which AF was CEO at a price of US$13.75m. He maintained at an earlier stage in these proceedings that the effect of the agreement was that the profit made by Plous would be shared equally between him and his sister. Such an agreement if made would have constituted a breach by AF and JF of their fiduciary duties to MIHL for reasons that are obvious. At a later stage (when is unclear) JF's case became that the effect of the agreement was that the profits would be paid to MIHL. There is no memorandum anywhere to that effect nor is it alleged by JF that any such memorandum was created. AF's case is that the sale to Plous was a purchase by Plous from MIHL of a vessel that was worth less than the sum secured against it and was of obvious benefit to MIHL because it was financially distressed and the effect of the sale was to relieve MIHL of all the debt associated with the vessel and benefitted it by the difference between the sum of the amount of the Commerzbank debt less the value of the vessel and the accumulated unpaid trade debt.

16. What is not in dispute is that the Christine B was sold by Plous to a company within the Navios Group the following year. AF's case is that the Navios Group identified the Christine B as a vessel that it might wish to purchase in or around mid-2017. However, since AF was the Chairman and CEO of Navios Group, it followed that she could not properly be involved in the purchase of the Christine B by Navios since that vessel was now owned by Plous, which as I have explained was wholly owned and controlled by her.

17. AF maintains that a committee of independent Navios directors was established with independent third-party advice to consider the purchase. AF maintains that the Christine B was a "*... high quality vessel ... that had enjoyed trouble free operations for several years ...*". AF's evidence is that this process culminated in the sale of the Christine B by Plous to Navios on 11 August 2017 at a price of US$13.75m, resulting in a gross profit of US$4.335m for Plous.

18. AF's case is that from the moment when he became aware of the sale, JF demanded a half share of the profit. His case as I have said is that it had been agreed between AF and JF at the time the vessel had been sold to Plous that Plous would sell the vessel on into the Navios group at the price that in the end Plous sold it for and either the profit would be shared between them (his pleaded case) or the whole of the profit would be paid by Plous to MIHL (the case that Kolen wanted to advance by way of amendment and which JF advanced in his oral evidence at trial). I return to that issue later in this judgment.

19. It is now necessary to mention albeit more briefly the arrangements concerning the remaining MIHL vessels. The common theme was that each was the subject of a mortgage that was in default and/or which required restructuring and whilst the lenders were prepared to restructure the lending, they were only prepared to do so (AF maintains) on the basis that ownership and management was moved to companies controlled by AF. In order to comply with these requirements management was transferred from FL to MEM and on 22 September 2017 the Titan was sold by Titan Maritime Enterprises S.A. to Leyde Shipmanagement S.A, an entity controlled by AF and Nikolas III was sold by Iris Enterprises Company S.A. to Smertos Shiptrade S.A., also controlled by AF. In the result, by the end of 2017, management of all the MIHL ships had been transferred from FL to MEM and ownership of all but two had been transferred to entities controlled by AF.

20. AF maintains that while all this was going on, JF was suffering a series of financial reverses that meant he was in need of funds to finance both his commercial and personal requirements. As AF puts it in paragraph 44 of her first statement, "*... Apart from the MIHL fleet, John had other vessels that he owned and operated. He was constantly in need of funds to meet obligations, both business and personal. I had provided John with significant financial support since 2012 but what happened from 2017 to 2019 was on a different scale because of the volume of problems that John was encountering ...".* Her case as set out in her statement is:

> "46. Whenever John wanted money and funds were not immediately available, he would call repeatedly and demand that monies be provided in order to avoid an urgent crisis that he was facing. John's approach was to press and harass to the point where you would concede because it was easier to do so than to continue to resist. He would make repeated telephone calls to Alex Meraklis, myself, and my office (speaking with Georgia, my PA), demanding that monies be made available. I would not want to take his calls, so he would end up calling 10

times or more before I might speak with him or give instructions to Alex Meraklis.

47. Not only was I having to deal with John's demands but Alex Meraklis and I were being approached directly by suppliers. The situation was most embarrassing. Our father had built up strong commercial relationships over a 40 year period in the business. Those relationships had been passed across to John and myself. This included Ocean Maritime & Trading (Mr Yamamoto) (a Japanese spare parts supplier that our father had worked with since the 1970s), Aspida Travel Agency (whose owners were also was from Kardamyla), and GS Travel Agency (who had done business with our father for many years and was owed more than US$300,000 by John's companies). These companies and many others approached me to resolve their payment issues with John. I felt duty bound to assist because of their relationship with my father, who had told me on many occasions over the years that suppliers should not be left unpaid.

48. I was also approached by the UK P&I Club and the London P&I Club, both of whom were owed substantial amounts by John's companies. I am a director of the UK P&I Club. I have had vessels entered with the London Club since 1990. I arranged for payment plans to be agreed, but they were not honoured and the UK Club was threatening to arrest ships. A new payment plan was agreed with the UK Club and I gave my personal promise to the Club that the payments would be made. This was for premium owed on vessels that were not part of the MIHL fleet. It was John's obligation and not MIHL's.

49. John was also failing to pay his office staff, many of whom had previously worked for our father and were well known to me. Employees who had worked for the Frangos family for many years had not been paid for periods of up to 12- 18 months, I could not take on all of this burden but I sought to assist. For example, I provided Eur 44,000 in December 2016 to pay the Christmas "bonus" of the First Lines staff so that people received some money for Christmas.

50. The number and scale of problems was daunting. As soon as one problem was resolved, a new one would emerge. Throughout this process John never properly engaged with the issues. His approach was to pass the problems across to Alex Meraklis and myself to sort out.

51. At the same time John was demanding money to cover his personal and family expenses. I was being asked to pay credit card bills, travel costs, insurances, tuition fees, property taxes, maintenance on his Ferrari, and other similar expenses.

52. I had numerous and heated arguments with John about what he was doing. I found it impossible to speak with him about money because John would repeatedly lie and not acknowledge

> what was truly taking place. John was not willing to accept that obligations to banks or trade debtors might have to be paid ahead of any payments to himself."

21. I now return to the sale of the Christine B by Plous. As I have said already, JF demanded a share of the profits from July 2017 when he learned of the sale. AF maintains that JF was entitled to nothing both because the sale by MIHL to Plous was a freestanding transaction that was not subject to any agreement to the effect that JF asserts and because in any event, even if that was wrong, JF owed her sums that in the aggregate exceeded what would have been JF's share had there been such an agreement. As she put it in paragraph 54 of her first statement:

> "John became aware of the sale of the vessel to Navios at some stage during July. His immediate focus was the profit that Plous would make from a sale. He quantified this at US$ 5 million and demanded that amount should be paid to him. He argued that the Christine B was his vessel and that he was entitled to receive the full profit made. I strongly disagreed with John. He had not contributed a single dollar towards the purchase of the vessel by Plous in December 2016 or the subsequent costs incurred. I had provided all of the funding required over and above the US$9 million advanced by ABN Amro. I had funded payment of the owner equity, the outstanding trade debt, and other costs incurred after Maritime took over the management. All up this had cost more than US$2.5 million. John's quantification of the "profit" was nonsense. As so often happened, John focussed only upon the income and ignored all of the costs that were incurred. At the same time, John had not accounted for insurance recoveries and other amounts received by First Lines that should have been shared. When the full cost of purchasing CHRISTINE B was properly calculated, and a proper accounting made of the monies that John had received and of the additional payments that I had funded, I knew that John was not entitled to any money at all."

22. At this stage in my summary of the background, it is necessary to introduce Mr Alex Meraklis ("AM") and Mr. Evangelos Tsatiris ("ET"). AM is nominally the finance director of MEM and the company secretary of MIHL. In practice however he is AF's principal accounting and financial advisor. Mr. Tsatiris performs a similar role for JF.

23. AF maintains that notwithstanding her views as set out above and the levels of support that she says she provided to JF over the years, she instructed AM to meet ET in an attempt to arrive at an agreed position that nothing was due even if (which as I have said she denied and denies) the profit from the sale of the Christine B was to be shared equally between AF and JF. She maintains that once account was taken of the true cost of purchasing the Christine B, including the trade debt and other expenses

that had been funded by either MEM as successor manager or AF, along with (i) various amounts that JF or his companies had received and was required to share but had not been accounted for, and (ii) the numerous payments made on behalf of MIHL that MEM or AF says she had funded, no money was payable to JF who in fact owed AF US$298,669.95. AF's case is that the outcome of these discussions was that it was agreed between AM and ET on behalf of their respective principals in August 2017 and recorded in what is known in these proceedings as the "*Christine B Schedule*":

Distribution of sales proceeds M/V Christine B		IF 50%	AF 50%
Sale price of the vessel	13,750,000.00		
Less 1% commission on sale	(137,500.00)		
Less due for debt service	(8,563,791.00)		
Net Sales proceeds	**5,048,709.00**	2,524,354.50	2,524,354.50
Paid equity for the purchase of vessels by AF	1,408,549.88	(704,274.94)	704,274.94
Payments for M/V Christine b by AF	176,347.66	(88,173.83)	88,173.83
Payment of intr to Commerzbank (AF)	143,224.00	(71,612.00)	71,612.00
Add hire M/V Christine B kept by First Lines	147,979.00	(73,989.50)	73,989.50
Contribution by AF 05/09/2014 less intercompany	118,620.00	(59,310.00)	59,310.00
Trade accounts payable Christine 10/8/17	755,348.00	(377,674.00)	377,674.00
Other trade liabilities 10/8/17	66,368.00	(33,184.00)	33,184.00
Direct payments by AF(100%) to JF	774,598.00	(774,598.00)	774,598.00
Intercompany account due to FL	960,006.00	480,003.00	(480,003.00)
claims collected by IRIKA vessels	1,146,867.45	(573,433.73)	573,433.73
Additional pmts for other vessels by AF	805,486.90	(402,743.45)	402,743.45
Due for loan installments MIHL vessels	288,068.00	(144,034.00)	144,034.00
TOTAL		**(298,669.95)**	**5,347,378.95**

AF maintains that JF did not dispute that he had agreed the Christine B schedule at any stage prior to the onset of the dispute that culminated in the commencement of these proceedings.

24. Given that JF now maintains that the effect of the alleged agreement he says was made between him and his sister at the time they agreed on behalf of MIHL that the vessel would be sold to Plous was that all Plous's profits from the sale of the Christine B would be paid to MIHL, it is extraordinary that this schedule should have been prepared on behalf of AF since it purports to be prepared on the notional basis that the proceeds would be shared between AF and JF and takes account of sums that could not be the subject of a set off as between Plous or AF on the one hand and MIHL but if at all only between AF and JF.

25. The preparation of the schedule is consistent with only either the alleged agreement between JF and AF being that Plous's profits would be shared between them or an after the event request or demand by JF that they be split.

26. JF now accepts that an agreement between him and his sister to split the proceeds of a planned onward sale of the vessel to the Navios Group at a price of US$13.75m at the

time when the vessel was sold to Plous would have been unlawful and a breach by both him and AF of the duties they owed to MIHL as its directors, although his pleaded case was that the agreement was that the proceeds would be split between him and his sister.

27. That an agreement to the effect pleaded by JF is not now relied on by him and that it is now accepted by him that any such agreement would be unlawful (as obviously it would be, given the existence of a minority shareholder in MIHL at the time) persuades me that it is highly improbable that any such agreement was reached. I have had the benefit of seeing and hearing AF give evidence before me during this trial. I am satisfied and find that AF is an astute, experienced and well-advised business person who fully understands her obligations as a company director and the implications for her business career if she breached the fiduciary duties she owed to any company of which she was a director. I find her to be sufficiently astute to know that such an agreement (particularly if reached at the time they agreed on behalf of MIHL to sell the vessel to Plous) would involve a breach of duty by both her and her brother owed to MIHL and in probability of her duties to the Navios Group as well, since on JF's case the alleged agreement committed AF to causing the Navios Group to purchase the vessel at a price agreed between her and JF of US$13.75m.

28. Returning to the preparation of the Christine B Schedule, I conclude that its preparation was inconsistent with JF's case that there was an agreement at the time of the sale of the vessel to Plous that the profit to be made by Plous would be paid to MIHL for all the reasons set out above.

29. The only alternatives left are either that there was an agreement to the effect JF pleaded (which now JF denies and which I have concluded AF would not have agreed to) or with what has been AF's consistent case as to what happened namely an after the event demand by JF that he be given a share of Plous's profits from the sale by it to the Navios Group once he learned of the sale. I set out my final conclusions concerning this issue later in this judgment.

30. AF's case is that thereafter JF continued to demand further financial support that she reluctantly agreed to provide but to which he had no entitlement since his only entitlement was to his share of any profits generated by MIHL. This led to the preparation in 2017 of a schedule of "*Amounts Received from Maritime*". This is said to record amongst other things the whole of the sums received by JF in the period

between August and November 2017, which it is said totaled US$537,000. AF maintains that continuing support at this level was unsustainable because:

> "John's only entitlement was to receive a share of profits if and when distributed by MIHL or the owning companies. All of the monies that John was drawing from the business were advances against future distributions of profits. I was concerned to limit how much John could draw because of the increasing frequency and amount of his demands, and the upheaval that he was creating every time that he wanted money."

AF says that her attempts to bring this expenditure under control culminated in a meeting in early December 2017 attended by ET on behalf of JF and AM in which AF says it was agreed that JF could draw down up to US$140,000 per month:

> "… provided the business was able to meet this expense. These monies were being drawn against John's share of future profit distributions made by the vessels. If the vessels were not making sufficient profit to afford this expense, the payments could not continue."

JF's case is that it was agreed he was entitled to US$140,000/month unconditionally.

31. At the same meeting AF maintains that it was agreed that formal records would be kept of all financial arrangements between her and her brother. She says her understanding was that the Christine B schedule would be included within these records. This further emphasises the impact of the preparation of this schedule on the alleged arrangements concerning the sale of the Christine B to which I referred above. These records consisted of (a) annual reconciliations of what was owed by each sibling to the other, (b) a separate record of payments made by or on behalf of AF to or for JF and (c) annual reconciliations that it was intended would be agreed between AM and ET on behalf of their respective principals. AF's case is that the first such schedule entitled "AMOUNTS RECEIVED FROM MARITIME records payments made between 25/08/2017 and 20/11/2017 and that preparation of such schedules continued on a rolling basis until July 2019, shortly before the present dispute arose. It is these three sets of records that AF calls the "*private ledgers*". The most recent of the reconciliations was signed in January 2019. It purported to show an accumulated deficit due from JF to AF of in excess of US$4m.

32. During 2019, on AF's case, JF's financial needs and control did not improve. It is not necessary for me to set out the detail in this judgment. It is sufficient to say that increasingly JF was unable to manage his affairs without his sister's continuing

support. AF says that she asked Mr Goldman (on AF's case JF and AF's fellow director of MIHL) to liaise with Ashley Katz, a restructuring specialist partner at the London office of the US law firm Fried Frank. This led to correspondence which seems to have been the trigger for the dispute that has led to these proceedings. In so far as is material, Mr Katz's initial letter stated:

> "We act on behalf of Angeliki Frangou.
>
> At your request and on your behalf, our client took on certain of your financial obligations. Furthermore, our client acts in various capacities, including as guarantor for certain financial obligations of which you and members of your immediate family are beneficiaries. In respect to these guarantees and otherwise, you have failed to maintain satisfactory and sufficient financial support and wherewithal.
>
> We understand that:
>
> 1. you are experiencing financial difficulties; and
>
> 2. you have been dissipating your assets, including but not limited to (a) liquidating certain valuable assets for cash, and (b) transferring certain real estate assets (worth in excess of US$15 million) to your immediate family members.
>
> These actions:
>
> 1. have been and continue to prejudice our client in her capacities aforementioned; and
>
> 2. constitute, among other things, an act of structuring your affairs with the effect of putting your assets beyond the reach of our client.
>
> In light of the above, our client requires you to confirm your attendance at a meeting in London at our offices on either Thursday, October 10 or Friday, October 11 at 10:00 am, with a view to understanding your proposals in connection with reducing and extinguishing your financial obligations to our client.
>
> All of our client's rights are strictly reserved and in particular our client reserves the right to take such steps as she may be advised, including but not limited to self-help remedies which may be available.
>
> Please direct all future communications, including any requests for information, to me and Sheldon Goldman (copied) as we work towards understanding your approach to resolving these matters."

If and to the extent that there could be any doubt in the mind of JF that AF's patience was exhausted, he would have been left in no doubt as to the position by the letter from Mr Goldman that followed a few days later. JF had sent an email saying in effect he was not prepared to meet Mr Goldman but was prepared to meet Mr Katz in Athens together with AF's other advisors. This resulted in a response from Mr Goldman in uncompromising terms. He offered another meeting with him and Mr Katz in London and added this warning to JF:

> "Please note that you will not receive any further cash payments until this meeting is convened and a satisfactory proposal is made relating to the method and manner in which you intend to extinguish your financial obligations to my client.
>
> Please note that if you do not attend the meeting, you do so at your own risk; my client strictly reserves the right to take such necessary and appropriate steps as she may be advised to protect her interests."

33. JF responded to this by instructing Mr. Michalis Dimitrakopoulos, a leading criminal lawyer in Greece, to represent him. What followed was what Mr. Allen describes in his written opening as "… *increasingly antagonistic correspondence* …". This culminated in the service on AF in the name of Kolen of a series of five "*Extra Judicial Notices"*. These are apparently Greek law instruments which, as their name suggests, are not court proceedings. Mr. Sarll submitted that they were no more or less than the equivalent of a letter of claim. There is no expert evidence that explains the role of these communications in the Greek legal system or in relation to claims that become the subject of civil claims before the Greek courts. There is nothing that suggests these documents are of any more significance than Mr. Sarll suggests. There is certainly no evidence that they constitute claims initiated before a Greek court. To treat them as formal claims before a Greek court would be inconsistent with their title.

34. The Extra Judicial Notices ("EJNs") are referred to in these proceedings and in this judgment respectively as EJN1, which is the notice served on 21 October 2019, EJN2, which is the notice served on 22 October 2019, EJN3, which is the notice served on 23 October 2019, EJN4, which is the notice served on 9 December 2019 and EJN5, which is the notice served on 30 December 2019.

35. Following service of these EJNs further acrimonious but ultimately unproductive correspondence followed. These proceedings have been commenced in an attempt to demonstrate that JF's allegations contained in the EJNs are false and wrong and,

possibly, to discourage him from advancing the same allegations elsewhere. I refer to the EJNs in more detail below.

Framework Principles Applicable to the Grant of Declarations

36. This claim is concerned exclusively with the making of declarations. As I have explained, the immediate cause of the commencement of these proceedings was the service of the EJNs ostensibly on behalf of the first defendant and on behalf of FL by a Greek lawyer acting on the instructions of JF. Although the EJNs are not in themselves proceedings, it is implicit that the EJNs are the precursor to the commencement of proceedings in Greece. Since the service of the EJNs at least one claim has been commenced by JF against AF in Greece to which I refer in more detail below.

37. That being so, a potential issue arises as to whether these proceedings should be regarded as an attempt to obtain orders from an English Court for deployment in anticipated or extant Greek proceedings for the purpose of circumventing the commencement of proceedings in Greece or influencing the outcome of such proceedings. Inevitably, this point has to be considered before turning to the substantive issues that arise. I start by setting out some general conclusions as to whether this should be treated as a discretionary bar to the grant of any of the declarations sought. If and to the extent that I conclude these principles do not have that effect, it will be necessary to return to them again later in this judgment in relation to EJN4, since the extant proceedings in Greece to which I have alluded earlier impact specifically on the dispute between the parties the subject of that EJN so that a different outcome may be appropriate in relation to the declarations sought specifically by reference to EJN4.

38. Generally, English Courts will refuse to grant declarations that are intended to influence or are likely to have the effect of influencing the outcome of proceedings before the courts of other sovereign states. In such circumstances as a matter of discretion declarations will be refused unless there is some identified special reason why the court should grant the declaration sought – see by way of example Howden North America Inc v. ACE European Group Limited [20-12] EWCA Civ 1624; [2013] Lloyds Rep I.R. 512 per Aikens LJ at paragraph 37, where he said " ... *I would regard the idea that the English court should give its unsolicited judgment as 'advice' to a Federal Judge in the US District Court for the Western District of Pennsylvania on elementary principles of English law, in the expectation or even hope that such a*

judgment would be 'at the very least … of considerable assistance' as both presumptuous and condescending. To use the phrase of Leggatt LJ in Barclays Bank plc v Homan, it smacks of 'unacceptable hubris …' and, most recently, The Bank of New York Mellon v. Essar Steel India Limited [2018] EWHC 3177 (Ch) *per* Marcus Smith J at paragraph 22(2)(c) and 22(3).

39. Mr Allen asserted that this point is without substance in these proceedings because there had been no challenge to the jurisdiction of this court in relation to any part of the claim in these proceedings. Whilst that is true as far as it goes, it is not material because it means only that the court has jurisdiction over the claims that have been made. That is the start not the end of the point I am now considering. That there has been no jurisdictional challenge does not mean that the court should not or could not refuse the declarations sought or some of them as a matter of discretion and leave it to the parties to resolve their disputes in the courts of the states in which they all reside or of which they are all nationals (here, Greece).

40. This point is one that I have been troubled by but in the end have concluded that it is not one that of itself should prevent me from considering the grant of the declarations sought on their individual merits, although as I have said this issue is one I will have to return to when considering the declarations sought in relation to EJN4. My reasons for reaching this conclusion are as follows.

41. Firstly, had this point been one that was of general significance in the circumstances of this case I would have expected Mr Sarll to deploy it on behalf of the second defendant but he did not except perhaps in relation to EJN4. In any event, secondly, like all discretionary issues, it is fact sensitive. Here, other than in relation to the EJN4 issue, no proceedings have been commenced in Greece, contrary to the position in both the authorities referred to above and may never be commenced. Thirdly, whether a court will grant declarations that might incidentally impact on foreign proceedings will depend in practice on whether the proper parties are before the court (as they may not be if the purpose of seeking declarations is to influence foreign proceedings), on whether the declaration sought will serve any practical utility other than to influence the outcome of foreign proceedings and on whether there is a real and present dispute between the parties before the court that the declarations sought will or are intended to resolve. These are factors that are material to the exercise of discretion in any event. In those circumstances – that is where no foreign proceedings have been commenced other than in relation to part of the EJN4 issues, the impact of

these proceedings on any proceedings that might be started in Greece has not been relied on by Mr Sarll (other than perhaps in relation to EJN4) and the other factors I have mentioned will have to be considered as part of the discretion exercise in any event, all lead me to conclude that the potential impact of any declarations that I might grant on yet to be commenced foreign proceedings is something that I should leave out of account other than to the extent referred to below.

42. More generally and in summary the applicable principles that a Court should apply when considering whether to grant declarations are:

i) The court has jurisdiction to grant declaratory relief, whether or not any other remedy is claimed – see CPR 40.20;

ii) Although claims for declarations are generally sought and granted together with other forms of relief – see Civil Procedure, Vol. 1, paragraph 40.20.2 – the absence of any claim for any other remedy will generally not deter a court from granting declarations that it is otherwise appropriate to grant;

iii) The power to grant declaratory relief is discretionary – see Rolls Royce plc v. Unite the Union [2009] EWCA Civ 387; [2010] 1 WLR 318 *per* Aikens LJ at paragraph 120(1). It follows that "… *The court should not … grant any declarations merely because the rights, facts or principles have been established and one party asks for a declaration. The court has to consider whether, in all the circumstances, it is appropriate to make such an order*." - see Finance Service Authority v. Rourke [2001] EWHC 704; [2002] CP Rep 14 *per* Neuberger J as he then was at page 10;

iv) When considering the exercise of the discretion, in broad terms, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are other special reasons why or why not the court should grant the declaration – see Finance Service Authority v. Rourke (ibid.) *per* Neuberger J at page 11;

v) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them before a Declaration will be granted concerning the existence or extent of that legal right. However, the claimant does not need to have a present cause of action

against the defendant – see Rolls Royce plc v. Unite the Union (ibid) *per* Aikens LJ at paragraph 12(2);

vi) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question - see Rolls Royce plc v. Unite the Union (ibid) *per* Aikens LJ at paragraph 12(3);

vii) The fact that the claimant is not a party to the relevant contract in respect of which such a declaration is sought is not fatal to an application for a declaration, provided that the claimant is directly affected by the issue – see AXA SA v. Genworth Financial International Holdings Inc [2018] EWHC 2898 (Comm) and Rolls Royce plc v. Unite the Union (ibid) *per* Aikens LJ at paragraph 12(4);

viii) The court must be satisfied that all sides of the argument will be fully and properly put and ensure that all those affected are either before it or will have their arguments put before the court. - see Rolls Royce plc v. Unite the Union (ibid) *per* Aikens LJ at paragraph 12(6);

ix) Assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised. In answering that question it must consider the other options of resolving this issue see Rolls Royce plc v. Unite the Union (ibid) *per* Aikens LJ at paragraph 12(7); and

x) If otherwise it is appropriate to do so as a matter of discretion, there is no reason why a court should not grant a negative declaration – see Messier-Dowty Ltd v Sabena SA [2000] 1 WLR 2040 *per* Lord Woolf MR at paragraphs 41-42.

EJN1

43. EJN1 was served by Kolen as shareholder in MIHL on AF and MEM and is dated 21 October 2019. The EJN text is lengthy but is summarised in the re-amended Particulars of Claim at paragraphs 27 in these terms:

> "The First Notice alleges inter alia that: (1) certain financial statements and reports have not been provided with respect to the "MV HOPE I"; (2) US$360,000 in management fees and US$144,000 in respect of consultancy fees have been paid in respect the "MV HOPE I" without the Second Defendant's agreement, and arbitrarily; (3) for the repair (dry-docking) costs

> incurred with respect to the "MV HOPE I" and "MV PACIFIC CEBU", provision of certified copies of invoices and proof of payment; (4) the Third Claimant has failed to provide information as to how it manages the "MV HOPE I" and "MV PACIFIC CEBU" in exchange for remuneration pursuant to the MEM Agreements; and (5) no information has been given with respect to the financial situation and intended winding up of Cordelia."

Paragraph 28 of the re-amended Particulars of Claim summarises (accurately) the demands of AF and/or MEM contained in EJN1 as being to:

> "28.1. Render detailed accounts for the management of "MV HOPE I" and "MV PACIFIC CEBU" for the period from 10 March 2017 to date.
>
> 28.2. Agree to an extraordinary management financial audit in respect of the management of "M/V HOPE I" and "MV PACIFIC CEBU", covering the period from 10 March 2017.
>
> 28.3. Explain to the Second Defendant why US$144,000 was incurred with respect to consultancy fees for the "MV HOPE I", and to disclose certified copies of invoices evidencing that cost.
>
> 28.4. Provide certified copies of invoices and proof of payment with respect to:
>
> (1) repair (dry-docking) costs for the "MV HOPE I" totalling US$1,269,494 for the 2018 financial year;
>
> (2) repair (dry-docking) costs for the "MV PACIFIC CEBU" for the 2017 financial year; and
>
> (3) purchase costs of all spares placed on the "MV HOPE I" and "MV PACIFIC CEBU" from 10 March 2017 to date.
>
> 28.5 Explain in writing how the "MV HOPE I" and "MV PACIFIC CEBU" are managed, and how many people are responsible for her management, along with their individual responsibilities.
>
> 28.6. Explain in writing the financial condition of Cordelia[1] and how that financial condition has come about, including certified copies of financial reports and accounts.
>
> 28.7. Explain in writing "any other information not known to us, which could be considered definitive or particularly important for the estimation of the true state of management of the above ships by you".
>
> 28.8. Refrain from taking any action, without the consent of the Second Defendant, that could lead to the sale of the "M/V

[1] MIHL's subsidiary company that owned the Hope I

> HOPE I" and/or "MV PACIFIC CEBU", including the winding up of Cordelia and/or Rigel[2]."

44. The declarations sought in these proceedings in relation to EJN1 are set out in paragraphs 47 - 48 and 49.9 of the re-amended Particulars of Claim (where what is set out is sought in relation to each of EJN1, 3 and 4), and paragraphs 49.1 – 49.3, 49.8 and 49.10 of the re-amended Particulars of Claim, where what is set out are the declaration sought specifically by reference to the allegations made in EJN1.

The Clause 13.13 Point

45. This issue is one that arises in relation to EJN1, 3 and 4. It is convenient that I reach conclusions in respect of it at this stage so that I don't have to return to it again.

46. In substance the point is that each of EJN1, 3 and 4 purports to assert rights to information or payment that can only arise if it arises at all under the SHA. However clause 13.13 of the SHA provides:

> "13.13. Jurisdiction; Court Proceedings; Waiver of Jury Trial. Any Litigation against any party to this Agreement arising out of or in any way relating to this Agreement (including any non-contractual obligations arising out of or in connection with this Agreement) shall be brought in the courts of England and each of the Parties hereby submits to the exclusive jurisdiction of such courts for the purpose of any such Litigation; provided, that a final judgment in any such Litigation shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by Law. **Each party irrevocably and unconditionally agrees not to assert (a) any objection which it may ever have to the laying of venue of any such Litigation in England, (b) any claim that any such Litigation brought in any such court has been brought in an inconvenient forum and (c) any claim that such court does not have jurisdiction with respect to such Litigation**. To the extent that service of process by mail is permitted by applicable Law, each Party irrevocably consents to the service of process in any such Litigation in such courts by the mailing of such process by registered or certified mail, postage prepaid, at its address for notices provided for herein. **Each Party irrevocably and unconditionally waives any right to a trial by jury and agrees that any of them may file a copy of this paragraph with any court as written evidence of the knowing, voluntary and bargained-for agreement among the parties irrevocably to waive its right to trial by jury in any Litigation**."

[2] MIHL's subsidiary company that owned the Pacific Cebu

47. The claimants allege that service of EJN1,3 and 4 constitutes a breach of clause 13.13 of the Stockholder Agreement, as the claims were the subject of extra-judicial process in Greece and not a claim brought before the English Courts. I accept that this is a submission that if otherwise correct is potentially available in relation to EJN1,3 and 4 because Kolen is the or one of the parties in whose name those notices have been issued and is a point that is available to any of the parties to the SPA to which EJN1, 3 or 4 is addressed. I consider whether it is open to any party to whom these notices have been addressed who is not a party to the SHA later in this section of the judgment.

48. For clause 13.13 to apply, the service of the EJNs would have to constitute "*Litigation*" within the meaning of that clause. That concept is widely defined by Article 1 of the SHA to mean "*... any claim, action, suit, audit, inquiry, proceeding or governmental investigation.*" In consequence, clause 13.13 applies to "… *any claim, action, suit, audit, inquiry, proceeding or governmental investigation … against any party to this Agreement arising out of or in any way relating to this Agreement (including any non-contractual obligations arising out of or in connection with this Agreement) ...*".

49. The words "*...arising out of or in any way relating to ...*" are of very wide scope (see by analogy the case law in relation to the scope of such language in arbitration agreements) and here there is no real doubt and in any event I find that EJN1 and 3 each concern issues arising from or relating to the SHA. EJN1 is concerned with complaints made by Kolen in its capacity as a shareholder in MIHL and relates to accounting in respect of vessels owned by MIHL. The material that is sought by EJN1 is material that Kolen can be entitled to (if at all) only in its capacity as a shareholder in MIHL. ERJN3 was issued by Kolen in its capacity as a shareholder in MIHL, is concerned with the operation of the MIHL fleet and seeks information that it is entitled to if at all only by reason of it being a shareholder in MIHL. Finally EJN4 was issued by Kolen but is exclusively concerned with the issue already considered at some length earlier in this judgment as to whether Plous or AF has accounted correctly to MIHL in respect of the sale of the Christine B pursuant to the alleged agreement that JF alleges was made at a time when that vessel was ultimately owned by MIHL. It is probable that the phrase "*...arising out of or in any way relating to ...*" is wide enough to include such an issue.

50. There are two generic issues that remain however. The first is whether the EJNs are each a "…*claim, action, suit, audit, inquiry, proceeding or governmental investigation …"* and secondly whether clause 13.13 can have any application to anyone who is not a party to the SHA.

51. It is plain that the EJNs contain claims in the sense that each contains a demand made in the name of the party on whose behalf the notice is said to have been issued. However the word "*claim"* in the context in which it is used in clause 13.13 means something more narrow than that and plainly means a formal process. This is apparent from the words and expressions that follow it in the definition. There is no evidence that suggests that compliance with the notices is anything other than a matter of choice for the recipient. As I said earlier, this point tends to be emphasised by their description as being "*Extra Judicial"* which as a matter of language suggests that it is something issued without invoking the jurisdiction of (in this case) the courts of Greece. The only reference within the documents to the Greek Courts seems to be limited to issues of service. There is no evidence of Greek law or practice adduced by either party. There is thus no evidence that the issue of such a notice compels the recipient to do anything as a matter of Greek law.

52. The definition and clause 13.13 have to be read together with the result that the apparently wide scope of the definitional language has to be read as qualified in two ways – first what would otherwise come within the scope of the definition of Litigation is qualified by limiting it to any formal process coming within that definition that is started in a court of competent jurisdiction but is capable of being " … *brought in the courts of England* …" and by limiting the scope of the clause as a matter of construction to prohibiting the initiation of any claim or other proceedings otherwise coming within the scope of the definition of Litigation before any state court with jurisdiction that otherwise could be brought in the courts of England. Understood in that way, in my judgment the clause operates like any other exclusive jurisdiction provision and would preclude the second defendant from bringing proceedings against any other party to the SHA in any court of competent jurisdiction other than the Courts of England and Wales.

53. In my judgment that provision so understood has not yet been breached by Kolen because no such proceedings have been commenced, other than in relation to EJN4. As Mr Sarll put it in his oral closing submissions "… *because … no process was ever engaged through the sending of this letter, there cannot be a breach*. … *these are*

mere letters, the same way that one might write a letter before action and there is no process that they engage. … If you get a letter from a lawyer, you could throw it in the bin if you wanted to unless, of course, actually there is process involved and then there might be sanction of some sort."

54. The other issue that arises concerns the parties to whom the notices have been addressed. The parties to the SHA are MIHL, FBC and Kolen. Oscaleta is also a party but that is not material to any issue in this case because it is not a party to these proceedings and the EJNs have not been addressed to it. Clause 13.13 expressly applies for the benefit only of "… *any party to this Agreement* …". It cannot therefore be enforced against Kolen by either AF (to whom EJN1,3 and 4 are each addressed), by MEM (to whom EJN1 and 3 are addressed) or by AM (to whom EJN3 is addressed). AM is not a party to these proceedings. It has not been argued that FBC could or is seeking to enforce clause 13.13 on behalf of AF, MEM or AM, nor was it argued on behalf of the claimants that it was open to either AF or MEM to enforce clause 13.13 against Kolen by operation of the Contracts (Rights of Third Parties) Act 1999 and it does not appear to be arguable that they would be entitled to, given the language of clause 13.13 and applying ss.1(1)(b), 1(2) and 1(3) of the Act.

55. I turn now to the declarations sought by reference to the clause 13.13 point. The Declaration sought by paragraph 49.9 of the re-amended Particulars of Claim is not one that can or should in the exercise of discretion be granted because the service of EJN 1, 3 and 4 is not a breach of clause 13.13 for the reasons set out above. Even if that is wrong it is not a declaration that could be made in favour of the claimants to whom the EJN1, 3 or 4 are addressed because none of them are parties to the SHA. EJN1 is addressed to AF and MEM, neither of whom are parties to the SHA; EJN3 is addressed to AF, MEM and AM, none of whom are parties to the SHA and EJN4 is addressed to AF, who is not a party to the SHA as I have said. In those circumstances, there is no real and present dispute between the parties before the court as to the existence or effect of clause 13.13 and in any event, the most effective way of resolving any issue concerning the scope and effect of clause 13.13 is on an application for an anti-suit injunction as and when any proceedings are commenced otherwise than before the Courts of England and Wales by a party to the SHA against any other party or parties to it or against any other party who is not a party to these proceedings and claims to be entitled to take advantage of the provision.

56. In those circumstances, the claims for declarations as set out in paragraphs 47, 48 and 49.9 are refused.

The Declarations sought by Paragraphs 49.1 – 49.3, 49.8 and 49.10 of the re-Amended particulars of Claim

57. The declarations sought by reference specifically to EJN1 are sought by all the claimants and are in these terms:

> "49.1. The Second Defendant has received, via its accountant Mr. Evangelos Tsatiris, audited financial statements for Cordelia and Rigel for 2017 and 2018, and unaudited consolidated financial statements for the First Defendant for the interim period to 30 September 2019, and have accordingly received the detailed financial accounts as required by the Stockholder Agreement;
>
> 49.2. The Second Defendant has received, via its accountant Mr. Evangelos Tsatiris, audited financial statements for Cordelia and Rigel for 2017 and 2018, and unaudited consolidated financial statements for the First Defendant for the interim period to 30 September 2019, verifying the repair (dry-docking) costs, and purchase cost of all spares placed on, the "MV HOPE I" and "MV PACIFIC CEBU". The Second Defendant has accordingly received the detailed financial accounts required by the Stockholder Agreement;
>
> 49.3. The First and/or Second Defendants are aware of and have approved the management fees charged by the Third Claimant in the amount ofUS$30,000 per vessel per month;
>
> …
>
> 49.8 Each and every allegation made in the First Notice, Second Notice, Third Notice and/or Fourth Notice is in every respect wrong and/or unfounded and the Defendants or any one or more of them are not entitled to make the demands set out therein
>
> …
>
> 49.10. The Second Defendant is not entitled to demand that the Second and/or Third Claimant provide them with the documents and/or information demanded in the Notices or any one or more of them."

The declaration sought in paragraphs 49.8 and 49.10 of the re-amended Particulars of Claim are really no more than very generalised ways of restating the subject matter of the declarations sought in all the earlier sub-paragraphs of paragraph 49. In my judgment this is not appropriate. If the claimants are entitled to the declarations

sought in the earlier paragraphs, then there is no need and it is inappropriate that the court should exercise its discretion to restate in more generalised language the effect of what has gone before. It is entirely unnecessary and is likely to generate rather than eliminate controversy. That is all the more so in relation to paragraph 49.8, which is expressed in inappropriately tendentious language and thus would require reformulation in any event. If the claimants should succeed only in part then granting the generalised summary declarations would be obviously inappropriate without significant re-drafting. In those circumstances, I intend to say no more about paragraphs 49.8 and 49.10 either in relation to EJN1 or any of the other EJNs.

58. As to the balance of the declaration sought, in my judgment it is necessary throughout to have clearly in mind Neuberger J's warning in Finance Service Authority v. Rourke (ibid.) set out in paragraph 43(iii) above and set out in the same paragraph.

The Paragraph 49.1 Declaration

59. Paragraph (a) of the demands set out in EJN1 calls on AF and MEM to provide to Kolen (i) "*... detailed accounts for the management of ...Hope 1 and ... Pacific Cebu from 10 March 2017 to date"*. The reference to "*date"* can only be to the date of EJN1 – that is 21 October 2019. The claimants' case is that Kolen has received all the documents that it is entitled to for the period referred to. JF's evidence contained in paragraph 35 of his first witness statement is that:

> "…on Friday, October 4th 2019, Mr. Meraklis delivered to me in person copies of the audited reports for the years 2018/2017 dated September 20, 2019 for m/v Hope I and copies of the audited reports for years 2018/2017 dated July 5th, 2019 for m/v Pacific Cebu."

This point continued to be accepted throughout the trial – see Mr Sarll's closing submissions at T4/53/32-34 and T4/54/13-15. Although JF does not make any reference to them in his statement, the claimants' case is that in addition he was supplied with unaudited accounts for the 9 month period ending on 30 September 2019. Although the claimants allege that the audited financial statements for MIHL were also provided, again the statements for the 9 month period down to 30 September 2019 were unaudited. In fact by the end of the trial it was accepted by Mr Sarll that he had received audited accounts for MIHL albeit only on 29 December 2018. Although Mr Sarll complained that this was after the commencement of these proceedings – see T4/54/16-17 – that is not to the point not least because there is no timing breach whether of the SHA or otherwise alleged in the Defence and it would

not be appropriate to refuse a declaration that Kolen has received something to which it is entitled simply because what it was entitled to was supplied late. That is an issue that is relevant either to a damages claim (but none has been brought) or to costs. On this basis, Mr Allen submits that I should grant the first declaration sought because the facts as I have set them out are not contested and could not be contested by Kolen.

60. Article 8 of the SHA governs what information was to be maintained by MIHL and what access each shareholder was permitted to have to that information. This provision included:

> "(c) The Company shall and shall procure that each Subsidiary shall allow each Stockholder (provided it or a Group Transferee continues to hold Stock) and its respective Agents reasonable access on reasonable notice to examine and, at the relevant Stockholder's cost, copy the books and records of the Company and each Subsidiary and the Stockholders (provided it or a Group Transferee continues to hold Stock) shall be entitled to discuss the Group's affairs with its directors and senior management.
>
> (d) The Company shall supply each Stockholder (provided it or a Group Transferee continues to hold Stock) with the financial information necessary to keep it properly informed about the business and affairs of the Group, including, without limitation:
>
> > (i) draft individual accounts of each Group Company and consolidated accounts of the Group in respect of each financial year within thirty (30) days of the end of the period to which they relate, and the audited individual accounts of each Group Company and the audited consolidated accounts of the Group in respect of each financial year promptly following their approval by the Board;"

In the course of his cross examination of AF and AM, Mr Sarll suggested that Kolen had not been provided with all the information that it was entitled to under these provisions and otherwise that it had been deprived of access to information and records of MIHL that it was entitled to access by operation of Article 8 of the SHA. Mr Allen objected to cross examination that was not strictly confined to the issues as set out in the pleadings. Specifically by reference to the point concerning compliance with Article 8, Mr Allen submitted that:

> "no positive case at all that the Stockholder Agreement was not satisfied, or that there was a breach of it, or that particular accounts should have been delivered but were not. Absolutely nothing. So my learned friend is not entitled to say in closing, in our submission, that there was any breach of the Stockholder Agreement or that particular accounts should have been sent

> but were not sent because there is no positive case for it. Had there been we could have dealt with it.
>
> …
>
> The point about it is this, my Lord, and it is quite a simple point. If it was to be alleged that there was any breach of that particular agreement, that would have to be addressed in the context of whether or not that construction was right or not, and also the underlying facts, but it might be, for example, that accounts could not be sent by reason of the conduct of the second defendant himself, or there could be waiver or estoppel; there could be all sorts of arguments."

- see T4/8/21-9/6. In making this submission, Mr Allen relies on what Lawton LJ said in Rolled Steel Products Limited v. British Steel [1986] Ch 246 at 309 namely:

> "A plaintiff is entitled to know what defences he has to meet and a defendant what claims are being made against him. If the parties do not know, unnecessary evidence may be got together and led or, even worse, necessary evidence may not be led. Pleadings regulate what questions may be asked of witnesses in cross-examination"

On that basis he submits that the claimants are entitled to the declarations sought in paragraph 49.1 of the re-amended particulars of Claim.

61. When considering some aspects of what Lawton LJ says in that case it needs to be borne in mind that the principles that apply to the conduct of civil litigation have changed significantly since 1986. However the principles relating to the importance of pleadings as the means by which the issues to be determined at trial are identified and defined remain as important now as they did then. At the start of the trial Mr Sarll applied for permission to make wholesale amendments to his client's Defence. That application failed for reasons that I gave at the time but which included that the application was a very late application. In light of that result, Mr Sarll and his client are in principle limited to the issues that arose on the pleadings as they are. That said, there are limits to how far this principle can be taken in a claim where the only remedies being sought are declarations. As I have said repeatedly, whether a declaration is granted in the terms sought is a matter of discretion, and as Neuberger J held in Finance Service Authority v. Rourke (ibid.), "*The court should not … grant any declarations merely because the rights, facts or principles have been established and one party asks for a declaration. The court has to consider whether, in all the circumstances, it is appropriate to make such an order*." If the evidence suggested an entitlement to particular types of information for example and there was a doubt as to

whether such or all such information had been provided, it may be appropriate to decline to grant a declaration that suggested otherwise on appropriateness grounds notwithstanding the state of the pleadings. However, whether that is the correct response is acutely fact sensitive.

62. In relation to EJN1, Kolen pleads only that MEM:

> "… ceased to provide financial information to the Second Defendant and/or Mr Frangos, in spite of requests that they do so, in circumstances which caused the Second Defendant and/or Mr Frangos to apprehend embezzlement of funds in Greece. The Second and Third Claimants are Greek domiciled, as are the Second Defendant and Mr Frangos and the appropriate forum in which to deal with allegations of embezzlement, is before the Greek courts."

see paragraph 13 of Kolen's Defence. There is no allegation of "… *embezzlement of funds* …" made in EJN1. The allegation has not been particularised in the pleadings in this action and if and to the extent that such a claim is to be advanced against either AF or MEM, I accept that any such claim is likely to be brought in the Courts of Greece not the Courts of England since aside from the exclusive jurisdiction provisions contained in the SHA, none of the parties have any relevant connection to England or her Courts. This is so because as I have said neither AF or MEM are parties to the SHA, which applies only to the parties to that agreement and thus the exclusive jurisdiction provision within the SHA would be of no application to such a claim. Equally JF is not entitled to demand information under the terms of the SHA. He is not a party to that agreement. The only people entitled to demand information are the Stockholders as defined in the SHA – which materially are only either FBC or Kolen. Thus the only allegation contained in the defence that is material to the issues before this court is an allegation by Kolen that it has not been provided with the financial information to which it is entitled.

63. In the end the only objection in relation to the first declaration sought was that (a) the accounts for the 9 months ending 30 September 2019 were not audited and (b) no accounts had been provided for any period thereafter. As to the first of these points, it is mistaken because clause 8.1(d)(i) of the SHA does not require the production of audited accounts unless the conditions set out in the clause (which require the provision of audited accounts only following their approval by the Board) have been met. There is no evidence that they have been and it is not alleged in the pleadings by Kolen that those conditions have been met. The key point is however, that the

declaration as drafted does not suggest that audited accounts have been provided for the last 9 month period referred to in paragraph 49.1 of the re-amended Particulars of Claim.

64. The second point has more substance only because the accounts that have been provided for 2019 are for the 9 month period ending on 30 September 2019 whereas EJN1 is concerned with the period down to 21 October 2019. However, provisionally, I consider that can be addressed by qualifying the words "… *and have accordingly received the detailed financial accounts as required by the Stockholder Agreement*" by adding the words "… down to 30 September 2019". However I will hear counsel further on this drafting point following hand down of this judgment.

The Paragraph 49.2 Declaration

65. This declaration is concerned primarily with the dry-docking costs incurred in respect of the Hope I and Pacific Cebu and the purchase cost of all spares placed on board those vessels. This is addressed in EJN1 at paragraph (d) where Kolen requested "*certified copies"* of the "*relative official statements"* showing actual payment of these costs. These expenses relate to the years ending 31 December 2017 and 2018 - see paragraph 29.1 of the amended Particulars of Claim. Assuming this factual assertion to be correct, these expenses thus relate to years in respect of which Kolen has been provided with audited accounts.

66. The claimants' case concerning this issue is pleaded at paragraph 29 of the amended Particulars of Claim (which remained unaltered in the re-amended Particulars of Claim) in these terms:

> "29.1. Grant Thornton has prepared audited financial statements for Cordelia and Rigel for 2017 and 2018. Copies of those financial statements were provided to the Second Defendant's accountant, Mr. Evangelos Tsatiris in or about September 2019. The audited financial statements for 2017 and 2018 verify:
>
> (1) The repair (dry-docking) costs for the "MV PACIFIC CEBU" totalled US$950,780 for the 2017 financial year.
>
> (2) The repair (dry-docking) costs for the "MV HOPE I" totalled US$1,269,494 for the 2018 financial year, comprised of US$870,222.36 for such costs incurred during 2018, and US$399,271.53 for the unamortized portion of such costs incurred in 2015.

> (3) The purchase cost of all spares placed on the "MV HOPE I" and "MV PACIFIC CEBU" from 10 March 2017 to 31 December 2018.
>
> 29.2. Grant Thornton is due imminently to finalise unaudited financial statements for the Vessels for the interim period to 30 September 2019. A copy of such unaudited financial statements will be provided to the Second Defendant when they are available. The unaudited financial statements for the interim period to 30 September 2019 will include details of the purchase cost of all spares placed on the "MV HOPE I" and "MV PACIFIC CEBU" from 1 January 2019 to 30 September 2019.
>
> 29.3. Grant Thornton is due imminently to finalise audited consolidated financial statements for the First Defendant for 2017 and 2018. The audited financial statements for 2017 and 2018 are expected to include in the audit opinion reference to the unaudited periods in 2017 when the "Vessels" and the "Other Vessels" were under the management of First Lines. Copies of such consolidated financial statements shall be provided to the Second Defendant when they are available."

67. Paragraph 29 of the amended Particulars of Claim is addressed in Kolen's amended Defence at paragraph 14, where it is pleaded:

> "Paragraph 29 is noted. However the Grant Thornton audits do not, amongst other matters, check whether invoices have been paid or, if so, for what amount. The Second Defendant and/or Mr. Frangos have on numerous occasions requested documents and proof of payment of the enumerated alleged costs, but to date, these requests have been ignored and none have been received."

The use of the expression "*Paragraph 29 is noted*" has to be treated as an admission of the paragraph. That is so because the CPR requires a defendant to plead to each allegation whether it is admitted, not admitted or denied. To "note" something is not either to deny or not admit it. It is implicitly at least therefore an admission and must be treated as such. This is how the claimants have treated it – see paragraph 8 of their Reply. No attempt has been made by Kolen to challenge this approach. In those circumstances, Kolen must be treated as having admitted what had been alleged in paragraph 29 of the amended Particulars of Claim.

68. AM asserts in paragraph 94 of his statement that Kolen had called for "… *documentary proof of the costs incurred …"*. On this basis Mr Allen submits that the claimants are entitled to the declaration sought because Kolen … *has been provided with evidence for all these costs …*" being " … " … *463 pages of invoices and*

proofs of payment for drydocking costs, repairs and purchase of spares with respect to PACIFIC CEBU …" and " *… 477 pages of the same for HOPE I …*" and because " *… There is no pleaded suggestion by D2 that any of this information is incomplete or defective in any way …*" The difficulty about this material is that EJN1 was not concerned with proof that costs had been incurred but with payment of the costs. That being so, the volumes of evidence showing that the costs had been incurred is beside the point other than to the extent that it can be inferred that because the costs had been incurred they must also have been paid. As to this point, AM states in paragraph 95 of his statement that:

> "… not all of these expenses have been paid at this time. The reason for this has been a shortage of funds. Nevertheless the payments remain due and the intention is to pay all outstanding obligations as and when funds become available. This is an ongoing process."

69. The audited financial statements for MIHL for the year ending 31 December 2017 record the dry-docking/special survey costs for Pacific Cebu totaled $950,780 in 2017 and that those costs were "*capitalized"*. That cost receives the same treatment in MIHL's accounts for 2018 and those of the vessel owning subsidiary Rigel. The Hope I costs are recorded as to US$870,222 in the audited financial statements for her owning company Cordelia as well as MIHL's accounts for the year ending 31 December 2018 and as to the balance (being costs incurred in 2015) as part of Cordelia's 2018 accounts. The spares are likewise set out in the accounts of the vessel owning subsidiaries and the underlying vouchers and receipts evidencing the sums recorded in the accounts have been disclosed and are in evidence.

70. In light of this, Mr Allen submits that this material contains all the evidence of payment that can or should be required contained as it is in transparent audited accounts prepared and audited by Grant Thornton. As he put in his oral closing submissions, "*… these expenses have been exhaustively evidenced"*. He concluded this part of his submissions by saying:

> "If the second defendant wanted to advance a positive case there was anything wrong in our case or the documents, it could have done but did not do. It should have done in January or whenever it did its defence. There is no positive case yet again that the Stockholder Agreement has not been complied with in any way whatsoever and so it is not open to my learned friend to say either in questions in cross-examination or in closing that there was a breach of it"

71. Mr Sarll submitted that this was all entirely wrong. First he submits that "… *article 8 of the Stockholder Agreement entitled Kolen to audited financial reports, and the unaudited consolidated financial statements, the management accounts, for the interim period to 30 September 2019 are no substitute*." In my judgment that is not a submission that is available to Kolen on the pleadings because no such allegation has been pleaded. Indeed, on Kolen's own pleading the period 1 January to 30 September 2019 is entirely immaterial because it has admitted that these costs were incurred in 2017 and 2018 as alleged by the claimants in paragraph 29 of the amended Particulars of Claim. In his closing submissions Mr Sarll did not really grapple with this part of the case at all – see T4/56/13-57/2.

72. On the pleadings, the only point that could be made is that the sums in issue had not been paid. However that point was not deployed by Mr Sarll in the course of his closing submissions. It is in any event not arguable because of the treatment given to the items in the audited accounts that are available. The absence of yet further audited accounts that I infer would have provided exactly the same treatment of the same items would not assist.

73. In those circumstances, I consider that in principle I could declare that Kolen has received audited financial statements for Cordelia and Rigel for 2017 and 2018, and unaudited consolidated financial statements for the MIHL for the interim period to 30 September 2019, verifying the repair (dry-docking) costs, and purchase cost of all spares placed on, the Hope I and the Pacific Cebu. However, in principle I do not consider that any declaration should go further than that on the evidence that is relied on and should not include the final sentence to the effect that Kolen has accordingly received the detailed financial accounts required by the Stockholder Agreement. That sentence is not justified because the declaration sought is concerned ostensibly with the treatment of dry docking and spares costs. It is inappropriate to include within it general words that could be interpreted as applying to issues other than drydocking and spares costs for the two vessels in question.

The Paragraph 49.3 Declaration

74. The declaration sought is to the effect that MIHL and/or Kolen are aware of and have approved the management fees charged by the Third Claimant in the amount of US$30,000 per vessel per month. It is said that this declaration is material to a dispute between the parties to the effect that the management fees and consultancy

fees in respect of the Hope I were never agreed and requests an explanation as to why consultancy fees were incurred and disclosure of invoices.

75. The difficulty about this formulation (which comes from paragraph 70 of Mr. Allen's opening submissions) is that it does not actually reflect the true nature of the dispute between the parties as set out in EJN1. As Mr. Sarll said in the course of his submissions:

> "So the next declaration is, "The first and/or second defendants are aware of and have approved the management fees charged by the claimant in the amount of $30,000 per vessel per month." This is accepted. The complaint made in the notice was actually different; namely that this rate had been exceeded, had been overcharging."

– see T4/57/3-6. It is not merely accepted but is plainly evidenced by the documentary materials referred to by Mr Allen in paragraph 71 of his opening submissions and was conceded by JF in the course of his cross examination – see T3/26/1-17. There was a dispute by reference to this point in relation to the very generalised proposed declaration referred to at paragraph 49.8 but as I have already indicated I do not intend to grant a declaration in those terms.

76. The only issue that remains therefore is whether I should grant the declaration sought at paragraph 49.3 of the re-amended Particulars of Claim given that as Mr Sarll indicated it is not objected to simply because what it refers to is not in dispute between the parties and because the real issue (charging in excess of the admitted figure) is not addressed by the declaration sought. This is more difficult. Generally, there must be a real and present dispute between the parties as to the existence or extent of a legal right between them before court will grant a declaration concerning that legal right. However, that has to be balanced by other factors including the balance of justice between the parties, whether the declaration would serve a useful purpose and whether there are other special reasons why the court should or should not grant the declaration – see the summary of applicable principles in paragraph 43 above.

77. On balance I consider it is appropriate to grant this declaration. My reasons for that conclusion are as follows. First, the claimants pleaded their case concerning this issue in clear terms in paragraph 30 of their amended and re-amended Particulars of Claim. Whatever else might be said of paragraph 15 of Kolen's amended Defence, it does not contain the admission or concession made by Mr Sarll referred to above.

78. In those circumstances, while there is currently no issue between the parties concerning what had been agreed concerning the payment of fees, that was not the position when the Defence was filed. It is possible that there may be other litigation between some or all of these parties. It is possible that at least some and possibly all of the parties may be differently represented in such litigation than they are today. In those circumstances, justice to the claimants requires that there be a declaration to the effect sought in order to preclude any misunderstandings as to the position later. There is no injustice to Kolen in adopting this course because of the concession that it has now made, because that concession was not made in its Defence and the only injustice that might arise would occur if I had granted the declaration sought at paragraph 49.8 of the re-amended Particulars of Claim, which as I have said I do not intend to grant in any event. The declaration will serve a useful purpose by eliminating the possibility that Kolen might attempt to withdraw its concession in subsequent proceedings either here or elsewhere and I conclude that would be a special reason for granting this particular declaration even in the face of the concession now made.

79. There is a short issue I should mention concerning consultancy fees. The claimants' case is pleaded in paragraph 31 of their amended and re-amended Particulars of Claim. Kolen's pleaded response to this was in paragraph 16 of its Defence and was "*Paragraph 31 is noted"*. As I have said that is an implicit admission since it is neither a non-admission or a denial. Although there was some discussion about the issue there is no specific declaration sought in relation to it. Thus while this issue is the subject of the first sub-paragraph (b) and the second sub-paragraph (c) within EJN1, no declaratory relief has been claimed in respect of the issue. In those circumstances, as I see it provisionally I need say no more about this issue although if counsel take a different view I will hear brief further argument on this point following the hand down of this judgment.

80. In summary therefore in principle the claimants have made out their case on the evidence to be entitled to declarations as sought in paragraphs 49.1 (provisionally, subject to the qualification referred to above), 49.2 (omitting the final sentence) and 49.3.

81. The remaining question is whether as a matter of discretion, I should grant the declarations sought. I have already addressed this issue in relation to paragraph 49.3. Mr Sarll did not specifically submit that any of these declarations should be refused

on discretionary grounds because he focussed instead on what he considered to be the evidential issues that arose in relation to each declaration sought. The real issue that arises is whether the fact that AF and MEM should benefit from declarations made by reference to obligations imposed by the SHA when neither are parties to it. As I have noted, this is not a bar to the grant of what is otherwise appropriate declaratory relief. As will be apparent from what I have set out above, in reality all these parties are closely inter related and it is probable that if there is any further litigation it will involve at least some of those who are not parties to the SHA.

82. In those circumstances, in the exercise of my discretion, I consider that the declarations sought in paragraphs 49.1 to 49.3 are ones I should grant subject to the provisional qualifications and qualifications already referred to.

EJN2

83. EJN2 was issued by First Lines against AF, MEM and AM. Its effect is summarised accurately at paragraph 34 of the re-amended Particulars of Claim as alleging that MEM owes it the sum of US$1,182,218.06, plus interest, by way of management fees said to have become due to First Lines during its time as manager of MIHL's ships as provided for by clause 5.5 of the SHA. EJN2 demands payment within 5 days of service from MEM.

84. Although EJN2 is addressed to AF and AM (as well as MEM), no claim is made against either of them by EJN2. As EJN states:

> "WE CALL on the first of you within five (5) days of service of these presents to pay to us the total amount of US Dollars 1,182,218.06 with interest lawfully and at the legal default interest rate from the next day of the finalization and clearance of the above amount due, namely the 31.12.2017, otherwise and fully ancillary thereto, from the service of the present to you, to be taken as formal notice for the payment of the above amount due, and in any case until its full repayment."

The "*first of you"* is MEM. I therefore reject the submission made by the claimants at paragraph 79 of Mr Allen's written opening that "*... EJN2 alleges that C2 ... owes $1,182,218.06 to First Lines with respect to outstanding management fees ..".* Had any such allegation been made, I would have agreed with Mr. Allen that such an allegation would have been "*plainly wrong"* as he says in paragraph 79 of his written opening. However, as I have said no such allegation has been made.

85. Although management of MIHL's ships by First lines is provided for by the SHA, it was carried into effect by two other agreements – a ship management Agreement ("SMA") made on 8 September 2014 between First Lines and MIHL, which was subject to a London arbitration agreement contained in clause 16 and an Administrative Services Agreement ("ASA") between the same parties made on the same date that was also subject to a London arbitration agreement contained in clause 17 of that agreement. It follows from this that (a) any claim concerning the fees due at any rate as a matter of contract is an issue that arises only as between MIHL and First Lines and (b) any dispute between them concerning fees must be referred to arbitration in London. The claimants allege and it appears not to be disputed that First Lines' claim for management fees is currently the subject of an ongoing arbitration in London, brought by MIHL.

86. I now turn to the declarations sought by reference to EJN2. Aside from the general declaration sought in paragraph 49.8 that I have addressed already, the declaration sought specifically by reference to EJN2 are those set out in paragraphs 49.4 and 49.11 of the re-amended Particulars of Claim. They respectively provide:

> "49.4 Neither the First Defendant, nor the Second and/or Third Claimants as agents and/or subsidiaries of the First Defendant, owe First Lines the sum of US$1,182,218.06, or any other sum, with respect to its management of the First Defendant's fleet of vessels during its time as manager pursuant to the terms of the SMA and/or ASA; …
>
> 49.11 The First and/or Second Defendants, or any one or more of them, are not entitled to receive any monies from the Second Claimant and/or the Third Claimant, as demanded under any one or more of the Notices or at all."

87. In my judgment the claimants are not entitled to either of these declarations. I reach that conclusion for the following reasons.

88. The claimants no longer pursue the application for these declarations on behalf of MIHL (the first defendant) – see paragraph 54.1 of Mr Allen's closing submissions. This was an inevitable concession since referring back to The Bank of New York Mellon v. Essar Steel India Limited (ibid.) the claim for a declaration as to the liabilities between MIHL and FL raises the issue in a very direct way as to whether it is appropriate for the court to grant declarations that may then be deployed to influence other tribunals. It is obvious that a declaration that FL was not entitled to recover money from MIHL would be an attempt to defeat the resolution of the dispute

between MIHL and FL by the method they agreed and have embarked upon on the pending arbitration proceedings. As Marcus Smith J said in Essar Steel (ibid.), the possibility of a declaration having such an effect "… *would amount to an improper interference in a … process being conducted by a party … not before me, who has been unable to make submissions*." It was also entirely inappropriate since FL is not a party to these proceedings.

89. It follows from the concession just referred to that this part of the claim is pursued only on behalf of AF and MEM.

90. Turning first to the declaration sought in paragraph 49.4, no claim has been made by FL in EJN2 against anyone other than MEM (the third claimant) (and so not against AF (the second claimant)). AF is not a party to either the ASA or the SMA and FL is not a party to the SHA. There is therefore no issue as between FL and AF to which the declaration sought in paragraph 49.4 of the re-amended Particulars of Claim could play any useful role. It follows that it would be wrong to exercise my discretion by granting a declaration in the terms sought and pursued.

91. In relation to this part of the claim as it related to MEM, I repeat that FL is not a party to these proceedings. This raises a number of potential difficulties. First, it is questionable whether any declaration made in these proceedings could be technically binding on FL, secondly Mr Sarll is not instructed on behalf of FL not least because FL is not a party to these proceedings and thus any concessions he makes are or may not be binding on FL, and thirdly it raises the question whether its case will be fully and properly put, given that there are extant arbitrations proceedings in London which engage the same issues.

92. Mr Allen in the course of both his written and oral submissions has repeatedly complained that facts and matters relied on by Kolen have not been pleaded. However, in paragraph 19 of Kolen's Defence it has pleaded that:

> "As to paragraphs 34 to 36 the Second Extrajudicial Notice has been issued by First Lines which is not a party to these proceedings and the claims of First Lines fall to be determined in arbitration pursuant to the Management Agreement between First Lines and the First Defendant."

In my judgment that is more than adequate to raise the issues to which I have so far referred. Indeed, to the extent that it applies to the pleaded claim on behalf of MIHL, it is the basis of the concession made by Mr Allen referred to above. Mr Allen

maintains in his written opening that paragraph 19 "*amounts to challenging the Court's jurisdiction"*. It is nothing of the sort. Together with paragraph 19A (to which I refer in detail below) this paragraph is making fair and square the points relevant to why the declaration sought should be refused on discretionary grounds on the case as it was then being advanced by the claimants – that FL is not a party to these proceedings, FL's claims against MIHL fall to be determined by arbitration in accordance with the arbitration agreements between them and seeking a declaration in these proceedings as to the indebtedness of MIHL to FL is an impermissible attempt not merely to circumvent that agreed method of resolving such a dispute but to affect an extant arbitration.

93. The claimants have spent much time and energy in these proceedings attempting to demonstrate that FL is not entitled to any part of the sum it claims from MIHL. This part of the case is pleaded in paragraph 35 of the re-amended Particulars of Claim. In summary, the claimants allege that the total sum owed is US$960,006 not US$1,182,218.06 and that sum has been discharged not by payments by MIHL to FL but by a combination of payments or credits by AF to JF of US$480,003 referred to in the Schedule set out earlier in this judgment as "*... Intercompany account due to FL ..."* and/or payments by MIHL to JF of US$699,700 and/or to FL totalling US$330,2017, the sums due have been discharged.

94. This is not the correct or appropriate forum to resolve this dispute, as I have explained earlier and as is apparently now conceded. The correct forum for this issue to be resolved is either in the arbitration currently on foot in London (where all issues concerning third party set offs and cross claims can be resolved if truly relevant) and (in relation to parties who are not parties to the arbitration agreements) in proceedings in Greece. As Kolen correctly pleads in paragraph 19A of its Defence:

> "19A Further. as regards sub-paragraph 35.3 of the Amended Particulars of Claim:
>
> (i) The Second Extrajudicial Notice. to which this sub-paragraph relates, was issued by First Lines who is not a party to these proceedings.
>
> (ii) As stated in paragraph 19 above. First Lines' claim against the First Defendant to be paid US$1,182.218.06 in management fees and other monies due arises pursuant to the Ship Management Agreement dated 8th September 2014 under which disputes were to be referred to LMAA arbitration in London.

(iii) Further. neither Mr Frangos (who is also not a party to these proceedings) nor the Second Claimant. Ms Frangou. are parties to the Stockholder Agreement pursuant to which the Claimants seek declaratory relief from this Court.

(iv) Accordingly, if (which. without prejudice to the contentions in this paragraph 19A. is denied) there was an agreement between Mr Frangos and Ms Frangou on or about January 2018 to discharge the First Defendant's liability to First Lines in the manner contended for by the Claimants:

(a) This would not be an agreement arising out of the Stockholder Agreement but would instead be a private agreement between Mr Frangos and Ms Frangou (it is noted that there is no allegation by the Claimants that the alleged January 2018 agreement between Mr Frangos and Ms Frangou included an agreement to refer disputes under it to the jurisdiction of this Court).

(b) Whether, and, if so, the extent to which, the alleged January 2018 agreement between Mr Frangos and Ms Frangou in fact discharged the liability owed by the First Defendant to First Lines is a matter which could only be decided by a LMAA arbitral tribunal in accordance with the provisions of the arbitration agreement in the Ship Management Agreement.

(c) As detailed further in sub-paragraph 21 (ii) below the dispute between Mr Frangos and Ms Frangou regarding the allocation of profits from the re-sale of the "Christine B" by Plous Shiptrade Co. to Coasters Ventures Limited (a subsidiary of Navios Maritime Partners LP) is currently proceeding before the Greek Courts pursuant to proceedings commenced by Mr Frangos on 20th February 2020.

(v) In the premises, sub-paragraph 35.3 should be struck out and/or the Court should decline to give the declaratory relief sought by the Claimants in respect of the Second Extrajudicial Notice. The Claimants have failed to assert any facts in this sub-paragraph which establish any sustainable cause of action for declaratory relief under the Stockholder Agreement against either the First or the Second Defendant. Conversely:

(a) Neither the First Defendant, nor the Second Defendant issued the Second Extrajudicial Notice.

(b) In effect therefore. the Claimants are asking the Court to grant declaratory relief against a party who is not before it. Self-evidently. the Court cannot do this.

(c) In any event, the Second Extrajudicial Notice does not assert rights to payment and information pursuant to the Stockholder Agreement on which the Claimants found their claim to be entitled to declaratory relief from this Court.

> (d) The facts and matters relied upon by the Claimants in this sub-paragraph in their attempt to impeach First Lines' right to payment also do not relate to the Stockholder Agreement. but are said arise out of an alleged separate agreement said by the Claimants to have been concluded between parties: (i) who were not parties to the Stockholder Agreement. and (ii) one of whom. Mr Frangos. is not before the Court.
>
> (vi) Moreover. the dispute between Ms Frangou and Mr Frangos as to what was agreed between them relating to the distribution of the profits from the sale of the "Christine B" from Pious to Coasters is currently pending before the Greek Courts in proceedings to which neither the First nor the Second Defendant is a party and the declaratory relief sought by the Claimants against the Defendants in these proceedings regarding this dispute is, properly analysed, an attempt by the Second Claimant to influence the outcome of the Greek proceedings to which this Court should not accede."

95. It would be an entirely impermissible exercise of discretion to attempt to resolve in these proceedings issues that can or should be resolved elsewhere. If it is contended that as a result of agreements between AF and JF the sums otherwise due from MIHL to FL have been discharged then that issue should be resolved in the arbitration in which MIHL's alleged indebtedness to FL is to be resolved. If and to the extent this part of the case is not covered by the concession referred to earlier, the declaration pursued is nevertheless an attempt to sidestep the arbitration and to avoid the need to litigate the issues between the parties other than those who are party to the arbitration by litigation in Greece.

96. As I said earlier a court asked to grant a declaration is required to ask itself whether the grant of declarations by a court in England and Wales is the most effective way of resolving the issues raised. In answering that question it must consider the other options of resolving this issue - see Rolls Royce plc v. Unite the Union (ibid) *per* Aikens LJ at paragraph 121(7). It is manifest that there are other more effective ways of resolving the issues that arise – that is by arbitration between the parties to the arbitration agreement in the arbitration that is now proceeding with any claims against anyone not party to the arbitration agreement being litigated elsewhere. This is not a jurisdiction issue as Mr Allen suggests but a strong reason why in the exercise of its discretion the court should not grant the declarations sought.

97. In relation to the declaration referred to in Paragraph 49.11, neither MIHL (the first defendant) or Kolen (the second defendant) have made any claims for money from AF or MEM by EJN2 or at all. The claim in EJN2 is a claim for money by FL from

MEM that plainly MEM cannot owe since it was not a party to either the ASA or the SMA under which FL apparently claim entitlement to be paid. This does not justify a declaration in the terms set out in paragraph 49.11 however, because there is no mention of FL anywhere within it. Mr Sarll accepted in the course of his closing submissions that EJN2 was "… *not legally right. Of course it is not legally right* …" – see T4/59/10-14. This raises the possibility that it may be appropriate to grant a much more narrowly formulated declaration focussed exclusively on MEM's alleged liability to FL in respect of the sums the subject of EJN2. In the end there are three reasons why I think I should not adopt that course.

98. First, no such claim has been made. As Mr Allen has submitted repeatedly, the parties should be confined to their pleaded cases.

99. Secondly, Mr Sarll is not instructed by FL and it would be wrong to grant a declaration that may impact on rights that FL has without FL being a party to these proceedings and advancing whatever argument might be thought available to it. Mr Allen argued that this was not relevant because Aikens LJ held in Rolls Royce v. Unite the Union (ibid.) that

> "The fact that the claimant is not a party to the relevant contract in respect of which such a declaration is sought is not fatal to an application for a declaration, provided that the claimant is directly affected by the issue"

However, that does not mean that a Court should in all cases proceed in that way, merely that it can if otherwise minded to do so in the overall exercise of its discretion. In any event this principle applies to parties who are not parties to a relevant contract and is not directly concerned with parties who are not before the court, where the relevant consideration is whether a court can be confident that all sides of the argument will be fully and properly put. I am not so satisfied.

100. Thirdly, if the issue is as straightforward as it appears to be then it can and should be summarily disposed of if and when any claim is brought by FL against MEM. As I have said earlier the EJNs are not themselves proceedings but an apparent threat to commence proceedings. The issue can and should be resolved by the court before whom any such claim is brought by reference to the legal principles that apply to any such claim. Those principles would not I think necessarily be English law principles because MEM is not a party to any of the relevant agreements.

101. Finally, before leaving this point I should record Mr Allen's submission at paragraph 55 of his closing submissions that:

> "... if this court does not grant C2 (AF) and C3 (MEM) the declaratory relief sought, there is no forum in which my clients can obtain justice. It is only in this forum, in this jurisdiction that either C2 or C3 can be vindicated with respect to the fatuous allegation in EJN2""

With respect this is hyperbole. There is no claim in the EJN in any sense other than in the sense of a demand made in a formal letter. There is no claim against AF within EJN2 of any sort, the only claim against MEM is by a party who is not a party to these proceedings and in truth MEM will on its case be vindicated in any jurisdiction where a claim is in fact made against it if ever it is.

EJN3

102. EJN3 dated 24 October 2019 is addressed to AF and MEM as well as other individuals who are not parties to this litigation. It is concerned with the management by MEM of the MV Nikolas III and MV Titan owned by MIHL through its subsidiaries Iris Enterprises Company SA (MV Nikolas III) and Titan Maritime Enterprises SA (MV Titan).

103. Management of these ships was transferred from FL to MEM on 21 and 22 May 2017 as a condition of the re-financing of those vessels as explained earlier. Both vessels were sold on 23 September 2017 and so were managed by MEM for four months between 21 May and 23 September 2017.

104. EJN3 is not clearly expressed as to who is alleged to have done what. I accept however that as alleged by the claimants it makes allegations against AF and MEM. As summarised accurately in paragraph 37 of the re-amended Particulars of Claim, EJN3 alleges as against AF and MEM that they:

> "… failed to: (1) provide to the Second Defendant any information or accounts with respect to the management of the "MV NIKOLAS III" and "MV TITAN" by the Third Claimant between 21 May 2017 and 23 September 2017 (with respect to the "MV TITAN") and between 22 May 2017 and 23 September 2017 (with respect to the "MV NIKOLAS III"); and (2) pay to the First and/or Second Defendant charter hire earned from the aforementioned vessels "

105. The notice goes on to make various demands for information and accounting as summarised in paragraph 38 of the re-amended Particulars of Claim accurately as being:

> "38.1. Render detailed information and accounts for the management of the "MV NIKOLAS III" (for the period 22 May 2017 to 23 September 2017) and the "MV TITAN" (for the period 21 May 2017 to 23 September 2017), including certified copies of invoices and proof of payment of expenses and spares relating to those vessels.
>
> 38.2. Agree in writing to an extraordinary management financial audit regarding the management of the aforementioned ships.
>
> 38.3. Explain in writing "any other information not known to us, which could be considered definitive or particularly important for the estimation of the true state of the management of the above ships on the above time".
>
> 38.4. Pay "to us all/awfully due amounts from the management of the two above ships during the above time period, with interest, lawfully and since the time that such amount became due and payable"."

The claimants' pleaded case in relation to the allegations contained in EJN3 are contained in paragraph 39 and 40 of the re-amended Particulars of Claim, which are in these terms:

> "39. As for the demand for financial accounts, Grant Thornton is due imminently to finalise audited consolidated financial statements for the First Defendant for 2017. The audited financial statements for 2017 are expected to include in the audit opinion reference to the unaudited periods in 2017 when the "Vessels" and the "Other Vessels" were under the management of First Lines. Such audited financial statements shall be provided to the Second Defendant when they are available.
>
> 40. As for the charter hire earned by the "MV NIKOLAS III" and "MV TITAN" during the aforementioned periods, such income was paid into the bank accounts of Titan Maritime Enterprise S.A. and Iris Enterprises Company S.A. respectively, held at Credit Agricole CIB. The financial statements prepared by Grant Thornton prove the same and such sums have been credited as income earned by the two vessels and the First Defendant during the relevant period. Such income was applied towards loan repayments, financing and operating costs."

106. The only pleaded defence to these paragraphs is in paragraph 20 of the amended Defence. It admits the sale of the vessels on 23 September 2017 and then pleads:

> " … It was agreed between [FBC] and [AF] and [Kolen] and [JF] that the hire during this period[3] for the two vessels would inure to the benefit of their existing Owners prior to the changes of ownership on 23 September 2017 and that the operating costs of those vessels through that time would be met by the new Owners who assumed Ownership of the vessels from 23 September 2017. In spite of this agreement the income of "Titan" and "Nikolas III" through the period 21 May 2017 and 22 May 2017 respectively up to 23 September 2017 has been retained by the Third Claimant. The hires which have thus been wrongfully retained by the Third Claimant amount to US$1,622,454." [Footnote supplied]

107. The relief sought by the claimants by reference to these allegations are the declarations set out in paragraphs 49.5, 49.6 as well as paragraphs 49.8 and 49.11. Paragraphs 49.5 and 49.6 are respectively to the following effect:

> "49.5 The charter hire earned by the "MV NIKOLAS III" and "MV TITAN" for the periods 22 May 2017 to 23 September 2017 and 21 May 2017 to 23 September 2017 respectively have been paid into the bank accounts of Iris Enterprises Company S.A. and Titan Maritime Enterprise S.A. and have in all the circumstances been properly accounted for, including as earnings of the First Defendant;
>
> 49.6. The First and/or Second Defendants are not entitled to any further sums with respect to the charter hire earned by the "MV NIKOLAS III" and "MV TITAN" for the periods 22 May 2017 to 23 September 2017 and 21 May 2017 to 23 September 2017 respectively;"

Paragraphs 49.8 and 49.11 are the "sweep up" declarations that I have referred to in passing earlier. As I have said, I do not regard the making of generalised declarations of that sort as appropriate and that the claimants should be confined to the declarations specifically sought in relation to each EJN.

108. Kolen denies that the claimants are entitled to either of the declarations referred to in Paragraphs 49.5 and 49.6 of the re-amended Particulars of Claim– see paragraph 49 of the amended Defence. Although the basis of this general denial is not pleaded, if the pleading is read as a whole it is clear that the entitlement to the declaration sought is denied by reference to what is pleaded in paragraph 20.

[3] i.e 21 May to 23 September 2017

109. The claimants rely on the financial statements for MIHL for the period ending 31 December 2017 audited by Grant Thornton and two Reports of Factual Findings dated 13 December 2018 on the position of Iris Enterprises Company and the Nikolas III and Titan Maritime Enterprises and the Titan. Although, as Mr. Allen submits, the allegations in paragraph 39 have not been denied, no doubt that was because at that stage the accounts referred to had not been provided. However, they were subsequently.

110. Mr Sarll's case was that identified by him in his closing submissions at T4/60/9-12 – that MEM has wrongfully retained the earnings of both ships during the four month period between management of the ships being transferred to MEM and the sale of the vessels. This issue is one that the claimants addressed in paragraphs 90 – 91 of and Annex 1 to their opening submissions.

111. Mr Allen complains in both his written opening and closing submissions about a supposed lack of particularity of Kolen's case on this issue. As long as the focus of this complaint is what is set out in the Defence, this is a point with at best forensic substance for three reasons. First it was open to the claimants to apply to strike out the Defence if they considered it so lacked particularity that it was embarrassing to the fair trial of the claim. No such application was made. Secondly it could have requested Further Information under CPR Part 18 if further particulars were in fact required but again they did not. Thirdly the opening outlined in great detail and by reference to an 8 page annex to the written opening why this point is not maintainable. Thus in my judgment there is no substance to the complaints made concerning lack of particularity. However, if and to the extent the complaint concerns a departure from the strict confines of what is pleaded then there is more substance to the point.

112. The specific allegation made in the Defence is that "*... the income of "Titan" and "Nikolas Ill" through the period 21 May 2017 and 22 May 2017 respectively up to 23 September 2017 has been retained by the Third Claimant ...*". The material that is set out in paragraph 90-91 of the claimants' opening submissions together with the 8 page annex demonstrates that this point lacks any substance. The contents of the annex is a distillation of the material that is contained in the statements of account issued by Credit Agricole Indosuez Bank ("CA") in relation to both Iris and Titan, copies of which have been included in the trial bundles, the internal accounts maintained by MEM in respect of the management of each vessel and the charter hire invoices for each vessel. It is not suggested that the distillation contained in Annex 1

is not accurate. It follows from this that the assertion that the income of either ship has been retained is unsustainable and, as the claimants submit:

> "The hire earned by the vessels in this period was paid into the Credit Agricole accounts of Titan Maritime Enterprises and Iris Enterprises Company. Accordingly, the hire earned by the vessels during this period did inure to the benefit of their owning companies prior to the change of ownership on 23 September 2017, and accordingly inured to the benefit of D1."

The internal accounting material maintained for each ship show the hire payments being received from charterers. The sums received are the same as the sums set out in the hire charge invoices rendered to charterers and the bank statements of account show the same sums being credited to the owning company's respective bank accounts. The total of the charter charges received during the relevant period totalled US$905,995 for the Titan and US$938,008 for the Nikolas III. The total of these sums is US$1,884,003. It is not alleged and there is no evidence that suggests other sums not accounted for in this manner were received from charterers over the relevant period.

113. It is now necessary to consider Mr Sarll's response. Notwithstanding this material, Mr Sarll maintained that all hire charges during this period had been retained by MEM. He advanced this case in cross examination and in his closing submissions on the basis that (a) the ships were managed by MEM throughout the relevant period (T4/60/22-24); (b) no audited accounts for either ship owning company have been produced (T4/60/25-27); (c) the consolidated accounts on which the claimants rely record that " … *hires were earned in the amount of $1.8 million and there were liabilities of about $3.1 million*…" (T4/60/32-33); (d) the expenses incurred by the companies to whom ownership was transferred in September 2017 purported to be about US$24,000 a day by contrast with what was to be expected which is about US$6,000 per day (T4/61/8-13) and (e) that " … *If you take that and then multiply it by the 100 days in question, that would cover the entire period between May and September when the ships were managed by* …" MEM. In other words, what Mr Sarll appeared to be suggesting was a sophisticated fraud being operated by those controlling MEM by which the or part of the charter receipts due ultimately to MIHL during the relevant period had been retained by MEM by claiming false expenses for the ships. Mr Sarll submits that whether or not there was an agreement to the effect pleaded in Paragraph 20 of the Defence does not matter – see T4/61/27-29 – because

the trade debt should have gone to the new owners with the ship but hire earned prior to transfer of the ship should have remained with the selling companies.

114. There are a number of difficulties about this theory. The first is a genuine pleading point. None of these allegations have been pleaded. Although I do not accept that Mr Allen is entitled to be critical about the lack of particularity in paragraph 20, because as I said earlier his clients had remedies available to them if they had wanted to address this point ahead of the trial, he is fully entitled to complain that a wide ranging allegation of what amounts to a fraudulent conspiracy has not been pleaded at all. That of itself is enough to mean this point cannot be permitted to go further.

115. This point is made worse in my judgment by the fact that Mr Sarll simply abandoned what in fact was his client's pleaded case. His pleaded case depended on an agreement between FBC and AF on the one hand and Kolen and JF on the other that the hire for the two vessels down to 23 September 2017 would be for the benefit of the selling Owners but the operating costs of those vessels down to the same date would be met by the new Owners. As he put it in the course of his closing submissions, "… *I do not need anything about whether they agreed for the hire to enure to the benefit of the first and for the operating costs to be transferred to the second. I do not really, I am not really very interested in that …*". This is a somewhat surprising position to adopt given what had been pleaded and what was being alleged.

116. In order that this theory can work, Kolen has to avoid the documentary evidence available which shows the sums billed to charterers, the sums received from charterers being the same sums and those sums being credited to the bank accounts of the ship owning companies. Unless this can be explained away, it is fatal to Kolen's theory. As Mr Sarll accepted in the course of his oral closing submissions, "… *we fully accept that there were $1.8 million received into the bank accounts of the ship owning companies, Titan and Iris …*". Mr Sarll's answer to this point was to say that the whole of the funds should still have been in the account. However, that takes no account of the fact that running a ship involves incurring and paying expenses. Expenses fall into two categories – expenses paid as they fall due and expenses incurred but not paid immediately as they fall due which become part of the trading or operating expenses of the ship concerned. Mr Sarll suggested that all of these costs should have been accumulated and transferred on sale as part of the ships trading debt. I reject that notion. It is wholly uncommercial to suppose that any business can simply stop paying its running expenses in the hope that its owner might sell the

business at some future date, at any rate in the absence of an agreement to this effect – which was Kolen's pleaded case that Mr Sarll abandoned.

117. As I have said more than once, Kolen's case on this issue depends on its pleaded assertion of an agreement "… *that the operating costs of those vessels through that time would be met by the new Owners who assumed Ownership of the vessels from 23 September 2017* …". There is no independent evidence of any such agreement. As AF says of Kolen's pleaded allegations:

> "These claims are absurd and ignore the facts. As stated above, and as proved by documents, and as has been well known to John throughout, the hire earned by the vessels during this period was paid into the bank accounts of the MIHL subsidiaries at Credit Agricole. Accordingly, the hire did inure to the benefit of MIHL and has not been ·retained by Maritime. There was no agreement that the new owners (i.e. Smertos and Leyde) would bear the operating costs incurred during this period. Having said this, the trade debt that was outstanding as at 22 September 2017 was transferred from the MIHL subsidiaries to the new owners, and that trade debt would have included some but not all of the operating expenses incurred during the preceding four months."

I accept this evidence and to the extent that JF's evidence is different I reject his evidence. I accept this evidence because it is consistent with the disclosed documentation and is inherently much more probable and in particular inherently much more probable from a business perspective than Kolen's case advanced at trial. This is an entirely conventional approach – see Onassis and Calogeropoulos v. Vergottis [1968] 2 Lloyds Rep 403 at 407 and 431. There is nothing in Kogan v. Martin [2019] EWCA Civ 164 per Floyd LJ at paragraphs 88-89, or the requirement to consider all of the evidence identified in that authority, which prevents the evaluation of oral evidence using the techniques I have referred to.

118. Mr Sarll completed this part of his submissions by saying:

> "I might be wrong but we cannot know that. I have no idea actually whether any of this is right or wrong because I do not know. There is no verified accounts for 2017 which is going on what on earth we have been told in accountant's notes and in documents which have been put on the back of a skeleton argument despite the fact that a director of the company is asking for information."

To characterise the material supplied by the claimants in this manner is entirely wrong. The claimants' case does not depend on "… *documents which have been put*

on the back of a skeleton argument …". It depends upon disclosed invoices rendered, records of costs incurred, and bank statements recording credits to bank accounts being made. These materials are the underlying documentation that forms the basis of auditing as much of consolidated accounts as the underlying accounts of one ship subsidiaries.

119. Where does this leave me? First, as I have said, Kolen's pleaded case must be rejected both because Mr Sarll did not seek to make good the pleaded agreement on which it was based and in any event because it must be rejected since I have accepted AF's evidence to contrary effect. As to the unpleaded case theory concerning what amounted to an allegation of fraudulent accounting, it is wrong in principle that the claimants should be expected to respond to allegations of this sort, when they have not been pleaded and seemed to change as the hearing progressed. Mr Allen asked rhetorically in the course of his reply submissions "*... How on earth can my clients engage with whatever my learned friend's theory is in his head at any particular moment of time?"*. That was unfair to Mr Sarll, since I am sure that what he said at any time reflected exactly the instructions that he received. As to the substance if "Kolen" was substituted for "… *my learned friend's…*", the answer is however that the claimants cannot and should not be required to.

120. I was willing to extend some quite significant latitude to Kolen (and rather more than Mr Allen considered I should) because Mr Sarll had been instructed late, his client's case was in disarray and I wanted to be absolutely sure that his client had a fair opportunity to advance its case within the constraints that applied to it. Perhaps I should have been firmer. However, having listened to what Mr Sarll had to say on this issue I remain satisfied that his client was not entitled to advance the theory he advanced on its behalf concerning what amounted to serious allegations of fraud. It was not a case open to his client on the pleadings, was contrary to the evidence that I have accepted and was entitled to accept for the reasons set out above and amounted, as Mr Sarll fairly acknowledged, to nothing more than speculation.

121. Plainly, the claimants have demonstrated that "*The charter hire earned by the "MN NIKOLAS III" and "MN TITAN" for the periods 22 May 2017 to 23 September 2017 and 21 May 2017 to 23 September 2017 respectively have been paid into the bank accounts of Iris Enterprises Company S.A. and Titan Maritime Enterprise S.A*." In principle, the claimants are entitled to a declaration to that effect. A declaration to that effect will serve a useful purpose by ensuring that this particular issue is not one that

any of the claimants will be put to the cost and inconvenience of having to prove again. Such a declaration of itself does not preclude Kolen from advancing a case in fraud based on the allegations made on its behalf by Mr Sarll providing it can properly be pleaded and proved in whatever jurisdiction it chooses to advance that allegation.

122. The next question is whether I should go further and declare that the charter hire for each ship has in all the circumstances been properly accounted for, including as earnings of the First Defendant. The only answer as to why a declaration in those terms should not be granted depends on what is set out in paragraph 20 of Kolen's Defence, which I have rejected. That depends on an agreement that Mr Sarll chose not to rely on and on a pleaded assertion that " … *the income of "Titan" and "Nikolas III" through the period 21 May 2017 and 22 May 2017 respectively up to 23 September 2017 has been retained by the Third Claimant*". That is plainly unsustainable on the documentation that has been produced, the authenticity of which was not in dispute.

123. In those circumstances, I consider that AF and MEM are entitled to a declaration against Kolen that the charter hire for each ship has in all the circumstances been properly accounted for, including as earnings of the First Defendant. The burden of pleading and proving the allegations that Mr Sarll advanced in his closing submissions rested on Kolen. It failed on both counts.

124. In summary therefore, there will be a declaration in favour of AF and MEM in the terms set out in paragraph 49.5 of the re-amended Particulars of Claim.

125. The remaining question is whether I should also declare MIHL and Kolen are not entitled to any further sums with respect to the charter hire earned by the Nikolas III and the Titan for the periods 22 May 2017 to 23 September 2017 and 21 May 2017 to 23 September 2017 respectively. In light of my findings to date I consider it appropriate to declare in favour of both AF and MEM that MIHL is not entitled to any further sums with respect to the charter hire earned by the Nikolas III and the Titan but I do not consider I should go further than that. What Kolen is entitled to is a matter of accounting in relation to MIHL. What is due as between Kolen and MIHL is not the subject of EJN3.

EJN4

126. EJN4 was issued by Kolen and addressed to AF and notified to MIHL. Its effect is summarised in paragraphs 41-42 of the re-amended Particulars of Claim in these terms:

> "41. The Fourth Notice alleges inter alia that: (1) the Second Claimant has failed to account to the First Defendant and/or failed otherwise to remit to the First Defendant proceeds from the sale of the "MV CHRISTINE B"; and (2) the Second Claimant has failed to account for and/or remit charter hire to the First Defendant with respect to the "MV NIKOLAS III" and "MV TITAN".
>
> 42. The Fourth Notice demands that the Second Claimant transfer and/or remit to the First Defendant, within 10 days of the Fourth Notice:
>
> 42.1. US$3,320,587.46 with respect to the proceeds of sale of the "MV CHRISTINE B";
>
> 42.2. US$957,213 with respect to charter hire for the "MV NIKOLAS III" for the period from 22 May 2017 to 23 September 2017; and
>
> 42.3. US$814,988 with respect to charter hire for the "MV TITAN" for the period 25 May 2017 to 23 September 2017."

The declarations sought specifically by reference to EJN4 are those set out at paragraphs 49.5- 49.7 of the re-amended Particulars of Claim, which are in these terms:

> "49.5. The charter hire earned by the "MV NIKOLAS III" and "MV TITAN" for the periods 22 May 2017 to 23 September 2017 and 21 May 2017 to 23 September 2017 respectively have been paid into the bank accounts of Iris Enterprises Company S.A. and Titan Maritime Enterprise S.A. and have in all the circumstances been properly accounted for, including as earnings of the First Defendant;
>
> 49.6. The First and/or Second Defendants are not entitled to any further sums with respect to the charter hire earned by the "MV NIKOLAS III" and "MV TITAN" for the periods 22 May 2017 to 23 September 2017 and 21 May 2017 to 23 September 2017 respectively;
>
> 49.7. The First and/or Second Defendants are not entitled, under the Stockholder Agreement or at all, to receive any part of the proceeds of the sale of the "MV CHRISTINE B" from Plous Shiptrade Company to Coasters Ventures Limited in September 2017, and/or that any profit made from the sale of the "M/V CHRISTINE B" has been accounted for (see paragraph 45 above), as recorded in the document titled "Distribution of sale proceeds MV Christine B", and/or the

> Second and/or Third Claimants are not in any event liable to account to the First and/or Second Defendants with respect to such proceeds;

127. The claimants' pleaded case as to this part of Kolen's factual case is set out in paragraph 45 of their re-amended Particulars of Claim, in these terms:

> "The First and/or Second Defendants are not entitled to receive any part of the proceeds of the sale of the "MV CHRISTINE B" from Plous to Coasters. In any event, any profit made by Plous upon the sale of the "MV CHRISTINE B" to Coasters was shared with Mr Ioannis Frangos by agreement between him and the Second Claimant, by way of a credit entry in the Private Ledgers kept between the Second Claimant and Mr Ioannis Frangos. For the avoidance of any doubt, the Second Claimant and Mr Ioannis Frangos agreed in or around January 2018 that the profit made by Plous upon the sale of the "MV CHRISTINE B" was shared between them by agreeing the reconciliation set out in the document titled "Distribution of sale proceeds MV Christine B" and by the act of effecting the corresponding debit and credit entries in the Private Ledgers. Agreement upon such reconciliation and the document titled "Distribution of sale proceeds MV Christine B" was reached in meetings between Mr. Alexandros Meraklis and Mr. Evangelos Tsatiris on around 22 and/or 23 August 2017, and was memorialised when a Reconciliation for the period to 30/11/ /2017 (which included the document titled "Distribution of sale proceeds MIV Christine B ") was agreed and a copy signed by Mr Frangos was emailed to the Third Claimant on 22 December 2017."

128. Kolen's pleaded Defence to this part of the claim is at paragraph 21(ii) of its amended Defence and is in these terms:

> "The vessel "Christine B" was sold firstly on around 22 December 2016 by IMBA to Plous Shiptrade Company and was then sold again on around 2 September 2017 by Plous to Coasters Ventures Limited, a subsidiary of Navios Maritime Partners LP. It was agreed between the First and Second Claimants and the Second Defendant and Mr Frangos respectively that half the profit arising out of the sale from Plous to Coasters would be transferred to Mr Frangos. The Second Claimant admits in paragraph 45 of the Amended Particulars of Claim that she agreed to "share" the profits with Mr Frangos: the Extrajudicial Notice arises because the agreement between the Second Claimant and Mr Frangos was that she would pay half the profits to him whereas nothing whatsoever has been paid to him. The Second Defendant and Mr Frangos estimates the net profits at a figure in excess of $4.640.000. This claim is proceeding between Mr Frangos and the Second Claimant before the Greek Courts pursuant to proceedings commenced by Mr Frangos on 20th February

> 2020. Whilst it is accordingly denied that the agreement between Mr Frangos and Ms Frangou was in the terms contended for by the Claimants in paragraph 45 of their Amended Particulars of Claim, the dispute between Ms Frangou and Mr Frangos regarding the distribution of the profits made by Plous on the re-sale of the "Christine B": (i) does not arise out the Stockholder Agreement on which the Claimants found their claim to be entitled to declaratory relief from this Court, nor (ii) does it involve any party to the Stockholder Agreement, nor (iii) in the case of Mr Frangos, does it concern a party who is before this Court in these proceedings. Accordingly, in circumstances where the Claimants have failed to assert facts which establish a sustainable cause of action for declaratory relief under the Stockholder Agreement against the First and Second Defendants, the Court should decline to grant the declaratory relief sought by the Claimants insofar as it relates to any assertions made by the Claimants regarding the nature and terms of the agreement reached between Ms Frangou and Mr Frangos regarding profit-sharing following the re-sale of the "Christine B".”

129. It will be necessary for me to consider the facts surrounding these allegations in the paragraphs that follow but I should make clear at the outset that I do not accept that what is pleaded by the claimants in paragraph 45 of their re-amended Particulars of Claim (which does not differ materially from what had been pleaded in paragraph 45 of their amended Particulars of Claim), constitutes an admission by AF that she had agreed to share the profits of the subsequent sale the Christine B by Plous. To suggest that it is to ignore the first sentence of the paragraph. It will also be necessary for me to consider the impact of the allegation that JF’s claim to be entitled to share in the proceeds of sale of the Christine B leads to a different conclusion from that which I have reached generally in relation to the impact of potential litigation in Greece.

130. Leaving to one side the issue concerning charter hire, which I have addressed when considering EJN3, the issue of substance that arises in relation to EJN4, concerns the sale of the Christine B. What I say about this issue in this section of the judgment should be read together with what I have already set out earlier on this topic.

131. Most if not all the primary facts are agreed or not in dispute. It is not in dispute as I have explained that on or around 22 December 2016 the Christine B was sold by IMBA to Plous and was then sold again on around 2 September 2017 by Plous to Coasters Ventures Limited, a subsidiary of Navios Maritime Partners LP. I have set out the detail in relation to these transactions above. There are two points of substance. The first concerns whether there was an agreement between FBC and AF

on the one hand and Kolen and JF on the other to the effect pleaded by Kolen – that is that half the profit arising out of the sale from Plous to Coasters would be transferred to JF. The second issue that arises is whether, assuming there was such an agreement, any sum was due having regard to what AF alleges is due to her or companies controlled by her from JF and/or companies controlled by him. AF's case is that there could be nothing owing for the reasons summarised in paragraph 19 above and having regard to the financial detail set out in the Christine B Schedule. The third issue that arises concerns the appropriateness of granting the declarations sought in light of the allegation by Kolen that there are extant proceedings in Greece between AF and JF concerning the distribution of profits made by Plous on the re-sale of the Christine B.

132. I turn to this last issue first, because if Kolen is correct in submitting that the court should not grant a declaration sought because there are extant proceedings in Greece concerning the same subject matter as that covered by the declaration then it would be wrong in principle to attempt to resolve issues that could and should be addressed in the proceedings in Greece. I have referred in general terms to the applicable principles much earlier in this judgment.

133. There is a foundational factual issue, which is whether there are extant proceedings in Greece as alleged. I conclude there is no dispute about this. The point has been alleged in clear terms in paragraph 21(ii) of the amended Defence and has not been denied in paragraph 15.5 of the amended Reply, where two points alone are made being (a) the claim to relief in respect of EJN4 falls to be determined by the English High Court pursuant to the terms of the SHA and (b) "*... the second defendant has not disputed the jurisdiction of the Court in this claim"*.

134. It is necessary to start by recalling the parties to the oral agreement on which Kolen relies in paragraph 21(ii) of its amended Defence. Its pleaded case is confused. It is alleged that the agreement was between FBC and AF on the one hand and Kolen and JF on the other but was that "… *half the profit arising out of the sale from Plous to Coasters would be transferred to* …" JF. Later in the same paragraph is alleged that "… *the agreement between [AF] and [JF] was that she would pay half the profits to him* …". The claimants rely on the fact that any such agreement would be a fraud on the minority shareholder in MIHL as one of the bases on which I ought to conclude that there was no such oral agreement as alleged. For reasons that I have set out at length earlier, I reject Kolen's case that there was any such agreement.

135. I record that one of the amendments that Mr Sarll sought in his failed amendment application was permission to amend paragraph 21(ii) of the amended Defence so as to allege that the payment was to be made to MIHL rather than JF personally. Whilst I accept that this precludes it being suggested that the difference between JF's oral evidence (in which he maintained the payment was to be to MIHL not himself personally) and his pleaded case demonstrates inconsistency, what it does not explain is how the alleged oral agreement came to be pleaded in these terms in the first place or why the proceedings in Greece are between AF and JF (which is consistent with the alleged agreement being one made personally between them) rather than between FBC and Kolen. Although these inconsistencies are relied on by the claimants as justifying me concluding there was no agreement in the terms alleged, I reject the submission that I should reach that conclusion by reference to those inconsistencies alone. I reject that not least because EJN4 is consistent with the alleged oral agreement being one that required the profit to be paid to MIHL. It remains the case however that EJN4 is addressed to AF personally.

136. Against that evidential background the first issue I have to consider is whether (assuming for these purposes that the claimants are able to prove this part of their claim factually) I should grant the declaration sought in paragraph 49.7 of the re-amended Particulars of Claim as a matter of discretion since the issue concerning the treatment of the profits from the sale of the Christine B by Plous is the subject of the Greek proceedings. Kolen's pleaded case is that it would be an inappropriate exercise of discretion for this court to grant a declaration that is intended to, or at any rate would or might have an, effect on the outcome of these proceedings.

137. I now return to paragraph 15.5 of the amended Reply, where the claimants allege that (a) the claim to relief in respect of EJN4 falls to be determined by the English High Court pursuant to the terms of the SHA and (b) "*... the second defendant has not disputed the jurisdiction of the Court in this claim"*.

138. As to (a), if and to the extent that Kolen alleges the oral agreement was between FBC and Kolen, neither will be affected by the Greek proceedings at least directly because neither are apparently parties to those proceedings but the dispute would be one " … *arising out of* …" or which was related to the SHA and thus is one over which this court would have exclusive jurisdiction by operation of clause 13.13 of the SHA. If and to the extent the agreement on which Kolen relies is between JF and AF personally, then neither are parties to the SHA and thus do not come within the scope

of clause 13.13 to the extent that is relevant. However JF has not disputed jurisdiction and each have been represented and have given evidence in these proceedings. If and to the extent the agreement was between MIHL acting by JF and AF and Plous acting by AF, that dispute would not be subject to the exclusive jurisdiction provision within the SHA since Plous was not a party to the SHA, but I am satisfied that Plous is wholly owned and controlled by AF, AF has been fully and properly represented in these proceedings and thus that Plous's case (which is exactly the same as AF's) has been fully and properly put. MIHL of course is a party to these proceedings and is separately represented. Thus there is no question that the court has jurisdiction to grant the declarations sought to the extent that it is otherwise appropriate to grant the junctions sought and the fact that Plous is not a party is not a good reason for refusing in the exercise of discretion a declaration that the claimants would otherwise be entitled to. However, that has never been the real issue. That has always been the impact of any declarations sought in these proceedings on the extant Greek proceedings.

139. In relation to that, Kolen pleads that it would be inappropriate in the exercise of my discretion for me to grant the declaration sought because:

i) The proceedings in Greece are between AF and JF;

ii) Neither AF or JF are parties to the SHA

iii) None of the parties to the SHA are parties to the proceedings in Greece; and

iv) JF is not a party to the proceedings I am trying.

This leads Kolen to plead that I should decline to grant the declaratory relief sought insofar as it relates to any assertions made by the Claimants regarding the nature and terms of the agreement reached between AF and JF regarding profit-sharing following the re-sale of the Christine B.

140. I reject that pleaded case for the following reasons. First, although it is asserted in paragraph 21(ii) that the agreement was a personal one between AF and JF that is not in fact Kolen's case. That is apparent from the terms of EJN4. In EJN4, the relevant "agreement" is said to be a decision by MIHL (inferentially acting by AF and JF) to sell the Christine B for US$13.75m to be structured as a sale to Plous with the profits from such sale being returned to MIHL. Thus as I see it the real dispute is a derivative claim between Kolen as a shareholder in MIHL and Plous for the payment

to MIHL of the profits from the sub sale of the Christine B by Plous to Navios. The fact that AF is not a party to the SHA is immaterial because she is a party to these proceedings and fully and properly represented and the fact that Plous is not a party to these proceedings is not material because Plous is wholly owned and controlled ultimately by AF and there is no difference between Plous's case and AF's case. Both contend that there was no profit sharing agreement.

141. It is not material that JF is not a party to these proceedings because Kolen is the shareholder in MIHL and a party to these proceedings and there is no difference between Kolen's position and that of JF in relation to the issues that matter. It is immaterial that none of the parties to the SHA are parties to the proceedings in Greece because the relevant parties are as I have said all parties to these proceedings or are parties whose interests are identical with the parties to these proceedings.

142. In light of these conclusions, I am satisfied that all those affected by the declarations being sought in relation to EJN4 are either before the court or will have their arguments put before the court – as to which see Rolls Royce (ibid.) at paragraph 120(6) – and not all the relevant parties (and in particular MIHL is not) are party to the Greek proceedings. I am satisfied that the grant of declaratory relief is the most effective way of resolving the issues that arise because all relevant parties are before this court - as to which see Rolls Royce (ibid.) at paragraph 120(7).

143. There are a number of other factors that arise which support the conclusion that the Greek proceedings ought not to be treated as a discretionary bar to the grant of declarations that it is otherwise appropriate to grant. First, Mr Sarll did not rely on this point in his oral submissions. His only mention of the pleaded case was at T4/72/20-23, where he said:

> "…In the particulars of claim, they make the point that it was agreed between the two of them and then, the amended defence says well, there are proceedings in Greece for that because what happened was, upon that allegation being made, as I understand it, [Mr Frangos] said, "Well, if there is that kind of agreement, it is not my case and I do not believe that is what occurred at all. That is never what I have ever said, but if so, then we will litigate that in Greece, please, because it is obviously not English law."

Although it is not as clear as it might have been, two points emerge from this – first Mr Sarll was making clear that his client's case was not that the agreement was for JF's benefit but was for the benefit of MIHL but secondly, and perhaps in

consequence, that no attempt was being made to rely on the discretionary considerations that might apply to the grant of declarations intended to influence the outcome of foreign proceedings or which would or may have the effect of influencing such proceedings.

144. If this is wrong and this was an attempt to rely on the authorities relevant to the exercise of the discretion in such a context, it was mistaken because as I have explained the proceedings in Greece do not involve any of the parties directly concerned with what is being alleged and all the parties affected by the dispute referred to in EJN4 are before the court or have had all relevant arguments deployed before the court.

145. Whilst I accept, and in any event it is obvious from the authorities referred to earlier, that generally English courts avoid giving what amounts to advisory rulings on issues for the benefit of foreign courts, that factor ceases to have significant weight where the relevant parties are not or are not all before the foreign court concerned and all the relevant parties are before the English court or will have their arguments put before the court. It was suggested that the fact that the alleged agreement relied on by Kolen was subject to Greek law might be material but it is not. Neither party has relied on any expert evidence of Greek law. In the absence of such evidence, as is trite, English courts proceed on the basis that English law and the law of any relevant foreign system of law is the same. Once that assumption has been made it is difficult to see how JF can be prejudiced by declarations by an English Court given that he did not challenge the jurisdiction of the English court at any stage either on the basis that a Greek Court would be the better court to resolve issues of Greek law or at all. Either such declarations as I grant will have no impact at all on the Greek proceedings or, if they do, he is to be taken to have accepted that outcome by not challenging jurisdiction when he could have.

146. I now turn to the factual issues that arise. The first concerns whether Kolen has proved the agreement on which it relies. This ultimately depends on whether I accept JF's oral evidence or that of AF. I have already set out in summary form the principles that apply to the assessment of oral evidence in a case such as this and I don't need to set it out again. As I have said already, I accept that had Kolen been given permission to amend its pleadings, it would have amended paragraph 21(ii) of the amended Defence so as to remove from it the suggestion that the agreement relied

on was for the personal benefit of JF. This is no longer part of Kolen's case and in any event I reject it for all the reasons set out earlier.

147. I leave out of account in assessing JF's evidence the fact that his pleading asserted the oral agreement for his personal benefit when his oral evidence was that the agreement was that the profits would be returned to MIHL. That would be unfair to the extent that his intention was to amend his pleaded case on this issue at the start of the trial.

148. That said it is worthwhile noting that Kolen's case on this issue has developed over time. Paragraph 21(ii) as it is currently pleaded enabled it to be submitted that the court ought not to grant the declarations sought because the issue was one that was the subject of proceedings in Greece. However the cogency of that point was either destroyed or very greatly reduced once it was acknowledged that the agreement was not that JF should benefit personally but that MIHL should benefit. Secondly, in the context of this trial, as I have said already the claimants' secondary case is that even if there was an agreement in the terms alleged in the amended Defence it would take Kolen nowhere because once all permissible set offs and cross claims were taken into account there was nothing due and owing to JF. The cogency of that point is damaged by an assertion that the true agreement was for the benefit of MIHL not JF. As I have said however, EJN4 states or implied that the agreement on which Kolen relies was for the benefit of MIHL. In truth therefore Kolen's case on this issue has been surrounded by confusion.

149. The amended defence contains a Statement of Truth signed by JF. All this means that great caution needs to be exercised before JF's oral evidence is accepted other than when it is admitted, is against his interests or those of Kolen or is corroborated.

150. There are a number of reasons why in my judgment AF's evidence is to be preferred on this issue over that of JF. I have already drawn attention to the fact that an agreement for the benefit of AF and JF personally at the expense of MIHL would be a breach of fiduciary duty owed by both JF and AF to MIHL and a probable breach of fiduciary duty owed by AF to the Navios Group. That led me to conclude that I should reject this case even if Kolen had not abandoned it. I have also concluded that the terms in which the Christine B schedule was formulated was consistent only with either an agreement in the terms that Kolen had pleaded (which it has abandoned and which I would have rejected in any event) or an after the event demand by JF for a share in the profits that Plous made by selling on the Christine B. This factor weighs very strongly in favour of AF's case on this issue being correct irrespective of

whether what is set out in the Christine B Schedule was agreed because it could only have been drawn up in that way if at that time JF was demanding a half share in the profits.

151. In my view these conclusions are supported by obvious commercial sense as I explained earlier. First when Christine B was sold to Plous it was not financed 100% by the loan from ABN Amro that Plous was able to obtain. That loan was for about US$9m leaving Plous to fund the balance needed by MIHL to discharge the debt secured to the vessel of US$10.4m. AF says and I accept that she either directly or indirectly paid the balance. Indeed, Mr Sarll did not dispute that this shortfall had to be funded and it was funded by AF funding Plous – see T4/65/1-4. If the sale to Plous had been in the expectation that the vessel would then be sold on Navios and the whole of the profit derived from the sub sale transferred to MIHL, it is improbable that Plous or AF would have been willing to take the risk of funding that part of the acquisition without any compensating payment whether for the cost of borrowing the balancing sum or otherwise. There is an added reason why this is improbable. At the time of the sale AF says and I accept that the vessel had outstanding trade debt of US$1m or thereabouts, all of which was transferred to Plous. On Kolen's case all this debt would have been borne by Plous. That Plous would have taken up this level of cost and risk is improbable when it is remembered that MIHL still had a minority shareholder who on this analysis would benefit from the sub sale but bear none of the risk. However that is the outcome for which Kolen contends as is apparent from the terms of EJN4. It is significantly more in accord with inherent and commercial probability that the two transactions – that is the purchase of the vessel by Plous and its subsequent sale to Navios were in reality as well as legally two separate transactions. Plous was a company wholly owned by AF. It had no interest in purchasing the Christine B, taking all the risk for financing the acquisition and the trade debt and then accounting for the whole of the profits to MIHL. There was no obligation on Plous or AF to purchase the vessel. Its only interest was in purchasing the vessel so that it could be traded or sold as it chose in its sole best commercial interests.

152. Thirdly, there is no evidence of any sort that suggests there was an agreement to the effect alleged. I accept that of itself this is a point of limited weight because it might be expected that an agreement such as that alleged would be arrived at orally between brother and sister and not recorded in writing but it acquires more weight when it is remembered that MIHL had a minority shareholder whose interests would be

prejudiced by the sale of an asset that on Kolen's case was worth US$13.75m at a price of US$10.4m at the time of the sale to Plous. The absence of any record placed MIHL at risk on this hypothesis. This is a risk that could have been relatively easily managed by establishing a structure that protected MIHL's alleged interest – whether by corporate structuring or by security documentation. If MIHL had been jointly owned by AF and JF the absence of such arrangements might have been understandable but that was not the position. In any event, the importance of the absence of any written record gains weight when considered together with the commercial improbability of what Kolen alleges to have been agreed.

153. Fourthly, Kolen's case depends upon an assertion that it was agreed at the time of the sale to Plous that the vessel would be sold on by Plous to the Navios Group for US$13.75m. There are a number of difficulties about that. First, it would appear to be common ground that at the time of the sale to Plous the dry bulk charter market was at a historic low. As Mr Sarll put in in his closing oral submissions, in 2016, MIHL "… *Badly needs money because of the catastrophic state of the freight market that year* … ". It is also common ground and to the extent that it is not I find that the market value of ships such as the Christine B is heavily influenced by the state of the charter market at the time of any sale. Even assuming that it was obvious at the time of the vessel's sale to Plous that that charter market would, or even was beginning, to recover (and there is no independent evidence about this) there could be no certainty as to when this recovery would occur to a level that would justify a sub sale at a price that (on Kolen's case) was agreed at the time the vessel had been sold to Plous at US$10.4m. This lends further weight to the inherent improbability of an arrangement in the terms contended for by Kolen.

154. Fifthly, it is difficult to see how the sum of US$13.75m could have been agreed as the price at which the vessel was to be sold to the Navios Group at the time of the sale to Plous at US$10.4m. As I have said, the charter market was seriously depressed at that time, there could be no certainty as to when the market would improve so as to justify a sale at that price and in any event, as AF explained, given that the Navios Group consists of publicly quoted companies, it was not open to her to agree on its behalf to purchase the vessel at such a price. She said and I accept that once the Group had decided in principle to consider a purchase of the vessel and independent committee was established in order to arrive at the correct price to be paid for the vessel. That committee was independently advised and AF played no part in its deliberations. The price offered was the result of those internal deliberations informed by independent

advice. There is no logical basis on which it could have been anticipated that such a process would have resulted in an offer to the cent of what Kolen alleges had been agreed at the date when the vessel was sold to Plous or that such a process could have resulted in an offer to the cent of what had been supposedly agreed at the time of the sale of the vessel to Plous.

155. Mr Sarll placed some reliance on a valuation of the vessel at the time she was sold to Plous that valued the vessel at US$12.5m. However that does not assist. First, that value does not enable Plous or for that matter Kolen to know whether and if so when in the future the vessel will have a resale value of US$13.75m. Secondly, it does not assist in demonstrating that the sale to Plous was at an undervalue. The sale took place at the price it did because MIHL's lender Commerzbank was willing to take a discount for a speedy settlement because it was withdrawing from the ship finance market. The sale to Plous at a price that enabled MIHL to discharge its liabilities to its lenders was of obvious commercial value to the company given that the vessel was worth less than the sum that Commerzbank had lent MIHL and given the amount of the vessel's unpaid trade debt. Had it been thought that the vessel was in reality worth more than the sum Commerzbank was willing to accept to discharge its mortgage over the vessel, she would have been sold at a higher price in the market given MIHL's distressed financial state. That would only not be so if there was a fraudulent conspiracy between JF and AF by which cash could be released to each at the expense of the minority shareholder in MIHL. That case has been abandoned by Kolen and is in any event one that I would have rejected. If, as Kolen now alleges, all profit made by Plous from the sale of the ship was to be returned to MIHL then there would have been no point in not selling the vessel immediately for its true value. If the vessel truly had been worth US$12.5m when in fact it was sold to Plous for US$10.4m, why would it not have been sold immediately for that sum? It would have covered the unpaid trade debt, discharged the discounted secured sum and left some cash for MIHL. In such circumstances, why would Plous have taken all the risk that was involved in a purchase by it in effect as trustee for MIHL? In truth this vessel was sold to Plous at its true market value and that sale benefitted MIHL materially by removing at a stroke both what it owed Commerzbank and the vessel's unpaid trade debt.

156. Mr Sarll submitted that I should infer that the position was as asserted by JF because there would be no other reason why he would have agreed to the vessel being sold for US$10.4m when it was worth US$12.5m. I do not accept this reasoning. As Mr Sarll

accepted at T4/67/24-25, this reasoning depends upon it being accepted that a sale at the price paid by Plous of US$10.4 plus the trade debt was an under value. This reasoning is entirely circular. It is much more likely that JF agreed to the sale because he knew that a sale at the price to be paid by Plous was the realistic market price at the time.

157. There is a further point that needs to be considered. Assuming hypothetically that AF was able to deliver a purchase by the Navios Group at US$13.75m., the question that arises is why it was necessary for the vessel to be sold first to Plous and then the Navios Group. The first explanation offered was that because a sale from MIHL would have been a sale from a company in which AF was interested. This was hopeless as an explanation since Plous was a company that is wholly owned and controlled by AF. Mr Sarll accepted the lack of merit in this point – see T4/68/1-6. That this point was relied on at all illustrates why I have to be cautious about accepting what JF says save where it is corroborated, admitted or against his interests.

158. The second explanation was equally lacking in merit. It was that it was necessary to disguise the true value of the vessel from Commerzbank. It will be recalled that the purchase price being paid by Plous was the sum needed to discharge the loan secured on the vessel less the discount for speedy settlement that Commerzbank was offering. JF's explanation was that if the bank knew the true value of the vessel it would not have offered the discount or would have withdrawn it. Aside from the fact that there is no evidence whatsoever to support any of this, it makes no sense. All that the bank was concerned to obtain was the sum necessary to discharge the sum due to it less the discount it had offered for an early settlement. It had approached MIHL on the basis that it was withdrawing from the ship finance market, not the other way round. It had no interest in the true value of the vessel since anything over what was required to discharge the debt net of the reduction offered was money belonging to MIHL. In fact Plous purchased the vessel by re-mortgage at a sum less than was required to discharge the sum due to Commerzbank with the balance being provided by AF and Plous. This makes this point all the stronger. As things stand, the question I put to Mr Sarll – namely why was it necessary to enter into a two stage sale rather than a single stage sale to the Navios Group at the price that JF maintains AF could procure the Navios Group to pay - went unanswered. This is a significant point given the claimants' case that the sale to Plous and the sale to Navios were two separate transactions, between different parties, at different times, in different market conditions and with different financial imperatives.

159. At one point, Mr Sarll asked rhetorically, why Plous would take responsibility for the trade debts of the vessel unless there was a profit that could be made from a sale on to the Navios Group. Again this reasoning was circular since it was intended to suggest that the only credible answer was because AF knew the vessel was to be sold on to the Navios Group. That makes no sense as an answer given the lapse of time before the sale on to the Navios Group and the substantial risk being taken by Plous in the interim. The much more probable answer is AF's - that Plous was buying the ship for the sum necessary to relieve MIHL of the discounted debt it had amassed in connection with the vessel. I have no doubt that AF perceived there to be some benefit for Plous from the transaction. I doubt that she would have willingly taken on the risk to which I have referred if she did not. The reality is that MIHL was a distressed seller and Plous a willing purchaser. The real point is not that made by Mr Sarll but the point that Plous would not have taken on all those liabilities and risks unless it was purchasing the vessel for its own benefit. Whether in fact AF thought the vessel could be sold at a profit is not to the point. That she may have thought that does not lead to the conclusion there was an agreement in the form JF contends for – on the contrary it makes it more likely there was no such agreement and AF was willing to purchase the vessel not for any altruistic reason but because she saw an opportunity to make a profit in a market that either was improving or could reasonably be thought likely to improve in the near term whilst at the same time relieving MIHL from some of its financial distress.

160. None of these points can be viewed in isolation from my rejection of the notion that AF in her capacity as the CEO of a publicly listed company would enter into an arrangement by which that company would purchase the vessel in the future at an over value as inherently unlikely.

161. In the end this part of Kolen's case depended on me accepting that AF would so abuse her position as either directly or indirectly to procure the purchase by the Navios Group of the vessel at US$13.75m irrespective of whether that was the vessel's true value at the time of that purchase for the purpose of benefitting the shareholders of MIHL. In the end the credibility of this case depended upon JF's evidence summarised by Mr Sarll in his closing submissions as being:

> "… according to her brother, he believed that she had such influence at Navios that she undoubtedly could cause them to agree a purchase of 13,750 come August. It need not necessarily be the case that there is an independent valuation committee because she is Navios, why could she not just

> achieve the price of 13,750 come August the following year to make good the agreement that she had made with her brother and Mr Brantl in December in the previous year? She had that power."

There is no evidence that supports either directly or inferentially a finding to this effect. It would involve concluding that AF was willing to act and in fact acted in flagrant breach of the fiduciary and other duties that she owed the Navios Group as a director of a group of publicly quoted companies. As I have concluded earlier this is inherently improbable and would require the clearest evidence before I could conclude on the balance of probability that this what occurred – see Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563 per Lord Nicholls at 586, where it is made clear that whilst the standard of proof in a civil case is always the balance of probabilities, the more serious the allegation, or the more serious the consequences of such an allegation being true, the more cogent must be the evidence if the civil standard of proof is to be discharged.

162. In those circumstances, the onus of proving the agreement that Kolen relied on rested squarely on Kolen. In my judgment it has manifestly failed to prove it and in those circumstances that is in effect the end of its case on the EJN4 point that I had not already addressed when considering EJN3.

163. In those circumstances, it is not necessary that I say much about the Christine B schedule. However, I accept the claimants' case that this document was prepared on behalf of an increasingly exasperated AF following an after the event demand by JF for a share in the profits made by Plous from the sale of its property the Christine B for the purpose of demonstrating that he had more than had the benefit of any such share. As I have made clear already, I consider the fact that the schedule was prepared in the form it was prepared is consistent only with JF seeking a 50% share in the profits made by Plous at the time the schedule was prepared. Since it is no longer JF's case that there was a pre-existing agreement between him and AF to share the profits from the sale to the Navios Group, it follows that the fact the schedule was prepared in the form it was is consistent with and corroborates AF's case that it came into existence following an after the event demand from JF for a 50% share of the profits. I accept the claimants' evidence and in particular that of AM that this document was agreed between the representatives of JF and AF once it had been formulated because it reflected the financial reality at that time. It is not an admission that JF was entitled to half the proceeds of sale of the Christine B but an attempt on behalf of AF to demonstrate that had he been, nothing in fact would have been due.

164. Returning to the declarations sought, I consider that the claimants are entitled to a declaration in the terms set out in paragraph 49.7 of the re-amended Particulars of Claim to the effect that the First and/or Second Defendants are not entitled to receive any part of the proceeds of the sale of the "MV CHRISTINE B" from Plous Shiptrade Company to Coasters Ventures Limited in September 2017. I do not see that any other declarations are needed. Those relevant to charter hire charges have been addressed when I considered EJN3 and the Christine B schedule is of no materiality because its contents do not arise. I also accept that Plous is not under an obligation to account for hire earned by the Christine B after her sale to Plous. I will hear counsel as to how that can sensibly be incorporated into the Christine B declarations.

Other Declarations Sought

165. I have dealt with those sought in paragraphs 49.8 – 49.13 and I need say nothing more about them beyond re-iterating that they are not necessary or appropriate and are refused as an exercise of discretion for the reasons set out earlier.

166. I am satisfied on the evidence that the claimants are entitled to a declaration in the terms set out in paragraph 49.14 and in truth Mr Sarll did not dispute this beyond reminding me that JF made no admissions concerning the signature of the minutes – see T4/76/18-22. That takes no one anywhere in the light of the handwriting expert evidence which in my judgment establishes that JF signed the document as alleged.

167. I am satisfied that the claimants are entitled to a declaration in the terms sought in paragraph 49.15 for the reasons set out earlier in this judgment. Once the evidence from the handwriting experts is accepted that is really the end of this issue. There is no credible basis offered as an explanation for how JF's signature came to be on the relevant document other than on the basis that he willingly joined with his sister in appointing Mr Goldman as a director of MIHL. None was offered by Mr Sarll in his closing submissions other than to say that the allegation was not admitted.

Money Declarations

168. Paragraphs 50 and 50A of the re-amended Particulars of Claim are concerned with declarations concerning sums said to be due from MIHL to the claimants. These claims do not appear to be in dispute as between the claimants and MIHL.

169. Kolen appears to dispute the claimants' entitlement to the declaration sought on the basis that the claims do not arise out of the or any of the EJNs. Whilst this is not in

dispute it is irrelevant having regard to the very wide terms of clause 13.13 of the SHA. The sums claimed appear to be evidenced by the audited accounts and the contrary is not suggested by any of the defendants. In those circumstances, I consider that the claimants are entitled to declarations that deal with these issues. However, the re-amended Particulars of Claim are cast in terms that are too wide and too imprecisely formulated to permit declarations that mirror what is set out there. I will hear counsel on the hand down of this judgment as to the terms of the declarations to be made under these paragraphs.

Claims by and Against MIHL by Kolen

170. MIHL adopted the submissions made by the claimants concerning the declarations and I need say no more than I have done already about any of those.

171. Kolen's defence includes a claim for US$770,665.65. The claim is based on what is said in paragraph 6 of the Defence namely

> "… the charter hire of "Nikolas III" and "Titan" for the periods 22 May 2017 to 23 September 2017 and 21 May 2017 to 23 September 2017 respectively has not been properly credited or at all in any of the financial statements. The charter hire for these periods, which amounts to US$1,622,454, is not earnings of MIHL. The charter hire should be released by MIHL to those entitled to it, including 47.5% thereof to Kolen, namely US$770,665.65. The First Defendant admits it holds or held these funds: it does so wrongfully."

My understanding from Mr Sarll's opening submissions is that this is not being pursued because he said (T1/41) that:

> "There was previously a counter-claim but it simply requested money to be transferred. We acknowledge the fact that you cannot get money out of MIHL as simply as that. There would have to be a resolution in order for a cash distribution to occur..."

That this was Ms Pounds' understanding is made clear by paragraph 4 and footnote 1 of her written closing submissions. The application for permission to amend made by Mr Sarll on the first day of the trial having failed, it would appear to follow that he accepts that this counterclaim cannot be pursued. That Mr Sarll accepts this to be so is apparent from Mr Sarll's oral closing submissions at T4/79/20-29. In those circumstances, it is not necessary I say anything more about it.

Conclusion

172. The claimants and MIHL are entitled to the declarations sought to the extent set out above. This judgment has addressed the relevant issues of substance between the parties and I believe has also identified the declarations to which the claimants and MIHL are entitled. However, I will hear counsel further as to the terms of the declarations that follow from this judgment.