Neutral Citation Number: [2024] EWHC 1877 (Comm)

Case No: CL-2023-000013

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

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

Date: 22/07/2024

Before :

CHRISTOPHER HANCOCK KC

- -

Between :

SFL ACE 2 COMPANY INC.

Claimant

- and -

DCW MANAGEMENT LIMITED (FORMERLY ALLSEAS GLOBAL MANAGEMENT LIMITED) **Defendant**

Julian Kenny KC and Mark Tushingham (instructed by **Tatham & Co**) for the **Claimant**
David Ambrose (acting as a representative of the Defendant) for the **Defendant**

Hearing dates: 15 to 18 April 2024

- -

Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Monday 22 July 2024.

CHRISTOPHER HANCOCK KC :

Introduction

1. This is the trial of a claim in debt and for damages, arising out of an alleged repudiation of a charter dated 30 May 2022 between the Claimants (the "**Owners**") and an English company called Allseas Global Project Logistics Limited (the "**Charterers**"), based in Oldham. Under the charter, the Charterers agreed to charter the Owners' container ship, the MV Green Ace (the "**Vessel**"), for 20-24 months. The Owners' claim is founded on an alleged guarantee of the Charterers' obligations under that Charter which it is said was entered into by the Defendants, Allseas Global Management Limited ("**AGML**") who held 50% of the shares in the Charterers. On 3 April 2024, AGML changed its name to DCW Management Limited. For convenience, I will continue to refer to the Defendant as AGML.

2. At the beginning of the trial, AGML applied to me for permission, pursuant to CPR 39.6 to be represented by an employee, namely Mr David Ambrose, rather than the lawyers who had previously been instructed. The Owners did not oppose this application, taking what was essentially a neutral stance, but making clear that their principal concern was that the trial should not be adjourned (as would inevitably have been the case if I had refused AGML's application).

3. CPR 39.6 provides as follows:

> ***39.6*** *A company or other corporation may be represented at trial by an employee if –*
>
> *(a) the employee has been authorised by the company or corporation to appear at trial on its behalf; and*
>
> *(b) the court gives permission.*

4. I was referred to the relevant case law as summarised in the White Book, at 39.6.1. That paragraph makes clear that the CPR intended to introduce a greater degree of flexibility in relation to the representation of companies at trial. In the present case, I was satisfied that Mr Ambrose was authorised to represent AGML, and that, in the exercise of my discretion, it was appropriate to permit him to do so. I should like to record my gratitude to Mr Ambrose for his very clear submissions and for the responsible way in which he conducted matters on behalf of AGML.

The factual background.

The Owners

5. The Owners are part of the SFL Group ("**SFL**") which owns and manages a fleet of around 75 ships, including about 35 container ships. SFL's COO is Trym Otto Sjølie, and SFL's head of Business Development is Johannes Eckhoff. Both men work at SFL's offices in Oslo.

6. Around the beginning of 2022, the Vessel was coming to the end of a long-term time charter with Maersk, which had been broked by Charles Nordsted of Clarksons'

Copenhagen office. Clarksons are a firm of shipbrokers with various offices worldwide.

7. Knowing that the Owners were looking for new business for her, Mr Nordsted emailed the Owners' Mr Sjølie in early March suggesting the possibility of fixing the Vessel to "*Allseas*" who, he said, were "*a UK based freight forwarder and logistics provider*". This suggestion led to negotiations which are described in detail below.

Allseas

8. The Allseas group ("**AGPL**") is a group of companies based in Oldham which carry on business in shipping and freight forwarding. In 2022, the group was largely owned and controlled by Darren Wright.

   (1) AGML was 100% owned by Mr Wright.
   (2) AGML acted as the group holding company: at that time, all but two of the companies in the group were 100% owned by AGML.
   (3) The two exceptions were the Charterers and a company called Allseas Dubai LLC, as to which:
      (a) The Charterers were owned 50% by AGML and 50% by a company called 1st Containers (UK) Limited ("FCL"). Mitchell Brenner owns 75% of the ordinary share capital of 1st Containers.
      (b) Allseas Global Logistics DMCC, a container leasing company, was 49% owned by Mr Wright directly.

9. Although the group comprises a number of companies, it is managed by a single or common management. So, for example, Darren Wright describes himself as the CEO of five Allseas group companies, including the Charterers, and as sole director of AGML. Similarly, David Ambrose describes himself as CFO "*of a number of Allseas companies*".

10. As regards the Charterers:

   (1) Their registered office is at Adelaide Mill, Oldham.
   (2) Their directors are (or at least in 2022 were) Mr Wright, Mr Ambrose and Mr Brenner.
   (3) The Allseas' "*China Express*" container line was operated by the Charterers – and it was the Charterers who had chartered the ships that were used to run that liner service.

11. As regards AGML:

   (1) Its registered office is also at Adelaide Mill.
   (2) Its sole director is (or was in 2022) Mr Wright.

12. It was alleged that the Allseas group had an agreement with Clarksons' Aberdeen office under which Clarksons managed the operational side of Allseas' chartered ships, as well as arranging all necessary charters. I do not need to make any final finding on this, beyond saying that it was clear from the evidence of Mr Wright in particular that Mr Braid of Clarksons was the authorised broker of AGML and the Charterers.

The broking chain

13. Three Clarksons brokers were involved in the negotiation of the charter:

    (1) Allseas were represented by James Braid in the Aberdeen office.
    (2) The Owners were represented by Charles Nordsted of the Copenhagen office.
    (3) Liaising between Mr Braid and Mr Nordsted was Steven Goodrich of the London office. It is not clear whether Mr Goodrich was acting as a sub-agent for Mr Braid or whether he was acting purely as an intermediate broker. The Claimants' case is that this does not matter, and I agree with this.

The negotiations between the Owners and Allseas

14. In his email of 2 March 2022, to which I have made reference, Mr Nordsted emailed the Owners to say that Allseas were interested in chartering the Vessel for a period of about 24-26 months.

15. On 31 March 2022, through Clarksons, Allseas sent the Owners an indication of the commercial terms on which they would be prepared to charter the Vessel. Allseas' indication identified the Charterers as the proposed charterer (and made no reference to any guarantee).

16. On 1 April 2022, Mr Eckhoff sent a counter to Mr Nordsted, setting out the Owners' proposed terms. The Owners' counter identified the proposed charterer as: "*Allseas Global Project Logistics Limited, … to be guaranteed by TopCo.*" This was passed to Allseas via the broking chain.

17. On 25 April 2022, Allseas countered with an outline rate proposal for a 20-month charter. In response, on 26 April, the Owners sent a further indicative counter, in which, again, the charterer was identified as "*Allseas Global Project Logistics Limited, … to be guaranteed by TopCo.*"

18. On 27 April 2022, Allseas sent a firm offer to charter the Vessel for 20-24 months, in which the charterer was again identified as the Charterers, with no reference to any guarantee from AGML.

19. Later that day, 27 April, Mr Eckhoff responded with a counter-offer from the Owners, which once again added a provision that the charterer was "*to be guaranteed by TopCo*". Mr Eckhoff concluded his email to Mr Nordsted by stating as follows:

> *"Note that we request a TopCo or bank guarantee. We have been able to obtain this from big liners and don't understand why this is not possible for Allseas."*

20. In an email sent the same day, 27 April, to Mr Wright, Mr Ambrose, Mr Brenner, and others, Mr Braid passed on Mr Eckhoff's latest counter, adding:

> *"The owners of Green Ace have this morning countered again with the following and have, to our collective shock, suddenly asked for a PCG [i.e. a Parent Company Guarantee]. We have told them verbally there's no possibility of that. We will just*

> *need to counter them and in doing so say that it's not an option."*

21. Later the same day, 27 April 2022, Allseas countered again, and Mr Nordsted duly passed on this counter to Mr Eckhoff by email. Once again, the proposed charterer was the Charterers, without any guarantee from AGML. In his comments on this counter-offer, Mr Nordsted stated:

> *"Charterers have been very clear from the beginning saying that they will not provide a guarantee (corporate or bank guarantee) […] If Owners insist on a corporate or bank guarantee I am afraid we will not be able to conclude this fixture."*

22. On 28 April 2022, Mr Eckhoff responded to Mr Nordsted's email, saying:

> *"Many thanks for Allseas counter.*
>
> *We are unfo not able to discuss further without any form of guarantee. We are happy to discuss a form of bank guarantee as an alternative.*
>
> *Without a guarantee they could walk away from the contract at any time."*

23. There was then a pause in the negotiations.

24. On 12 May 2022, Mr Ambrose emailed Mr Braid, saying "*Further to recent discussions regarding PCGs, please see below for two proposals*", which were:

(1) that AGML (rather than the Charterers) would be the charterer; or
(2) that the Charterers and Allseas Dubai LLC would jointly charter the Vessel.

25. Mr Ambrose asked Mr Braid to pass on these two options to the Owners, suggesting that once he had done so, "*we can continue our negotiation*".

26. Later on 12 May 2022, Mr Nordsted passed on Allseas' proposals to Mr Eckhoff by email, saying:

> *"As you can tell from above you can either fix the vessel directly with the TopCo or you can fix with two entities (jointly and severally).*
>
> *Will you be able to proceed with the negotiations on this basis?"*

27. On 13 May 2022, Mr Eckhoff emailed Mr Nordsted with a revised offer from the Owners. The new offer identified AGML as the charterer.

28. On 16 May 2022, Clarksons passed on the Owners' offer to Allseas. Later that day, Mr Ambrose emailed Mr Braid, saying:

> *"As we are offering a PCG [a parent company guarantee], I see no reason to have these weighted payment terms.*
>
> *Suggest we go back with a final offer of US$59,500 per day. What do you think?*
>
> *We would be willing to fix subject to board approval on this basis with same provided tomorrow, 2pm."*

29. Later on 16 May 2022, Mr Nordsted emailed Mr Eckhoff, passing on Allseas' offer and saying:

> "*Have discussed your last with Allseas. They want to keep it simple in that now they have agreed to use the parent company as chartering entity (which was a major compromise on their part), they prefer not to have imbalanced charter hire, and thus can counter basis a/e as follows, firm for reply latest 1000 hours UK time tomorrow:-*
>
> *CHARTERER: Allseas Global Management Limited, Adelaide Mill, Gould Street, Oldham, Lancashire, UK, OL1 3LL*
>
> *HIRE: $59,500 pdpr incot, payable every 15 days in advance*
>
> *END*
>
> *Can you agree to a flat rate for the full period?*"

30. On 17 May 2022, Mr Eckhoff responded to Mr Nordsted's email, saying:

> *"Thanks. We very much appreciate that Charterers have agreed to use the parent company AGM.*
>
> *However, this was not an 'either or' request from our side. We insist on a front-loaded charter hire. See below counter due for reply tomorrow 1200hrs Oslo time.*
>
> *START*
>
> *HIRE: $69,500 pdpr incot for the first 12 months and $49,500 pdpr incot thereafter, payable every 15 days in advance*
>
> *END*
>
> *As you can see from the above we have compromised on the rate and are now at their last on average."*

31. Mr Braid passed on the Owners' offer to Allseas later that day.

32. On 18 May 2022 at 07:25, Mr Wright emailed Mr Braid, saying: "*Can you put a fix on this vessel"*. Later the same morning, at 09:01, Mr Nordsted emailed Mr Eckhoff, saying:

> *"We have discussed the below with Allseas this morning and I am pleased to advise that Charterers hereby re-confirm your*

> *last. As such you are now fixed on subs. I will send the recap shortly."*

33. The recap of the 'on subs' agreement was sent by Mr Braid to Mr Ambrose, Mr Wright and others later that morning, 18 May. The subjects were:

> *"- sub charterers' BOD approval 1 workday after firm main terms*
>
> *- sub owners' BOD approval 1 workday after charterers BOD"*

34. At 12:56 the same day, Mr Nordsted emailed Mr Eckhoff stating, *"Charterers are pleased to lift their BOD approval and look forward to hearing Owners' news on their own BOD approval latest tomorrow"*.

35. However the Owners did not immediately lift their BOD subject. Instead they proposed a meeting in Dubai, at which Mr Eckhoff and Mr Sjølie would have an opportunity to meet Mr Wright in person and discuss Allseas' business.

Meeting in Dubai on 24 May 2022

36. A meeting took place in Dubai on 24 May 2022, attended by Mr Eckhoff and Mr Sjølie, by Mr Wright and also by Clarksons' Mr Goodrich.

37. A note of the meeting for internal use by SFL was prepared by Mr Eckhoff on 25 May 2022. It records that there was discussion at the meeting about Allseas' business model and then goes on to state:

> *"The model is to be a niche player that target inefficiencies in traditional liner service. The main part of their business today is loading in Shanghai and discharging in Liverpool, which increases predictability and decreases transit time for retailers drastically in today's congested market. […] Allseas could take on a lot of more cargo because demand is very high, but have been picky on counterparts, and it has been a problem to get enough ships on period to grow the business. Thus, he will now provide TopCo guarantee from his Holding Company."*

38. In his witness statement, Mr Wright denied that he discussed "*anything resembling the provision of a parent company guarantee*" during the meeting in Dubai. However, in his oral evidence, he was not quite as categorical. In that oral evidence, he stated that he did not recollect discussion of a parent company guarantee and that he did not believe it would have taken place, but he did not rule out the possibility that something of this sort was discussed. I return to this subject below.

39. Following the meeting, on Friday 27 May, the Owners proposed that both sides' BOD-approval subjects be reinstated and that those subjects should then by lifted by latest COB Oslo on Monday 30 May. Mr Nordsted included in his email an updated recap which still showed AGML as the charterer.

Final negotiations on 30 May 2022

40. On Monday 30 May 2022, the Owners asked to reinstate the Charterers as the proposed charterer but then also to add a guarantee from AGML.

41. That morning, Mr Eckhoff called Mr Nordsted and explained that this was how the Owners now wished to proceed. It is alleged that Mr Nordsted then called Mr Goodrich explaining the new request.

42. Following that call between Mr Nordsted and Mr Goodrich, at around 11:46, Mr Goodrich emailed Mr Nordsted querying exactly what the Owners were asking for. In his email, Mr Goodrich asked whether what the Owners want is "*a guarantee of AGPL from AGM*" instead of a fixture with AGML directly.

43. In response to Mr Goodrich's query, by a message timed at 11:56, Mr Nordsted emailed Mr Eckhoff to double-check that he had understood what the Owners wanted correctly, saying:

> *"... we are at the moment fixed on account AGM. But you are now asking to fix with AGPL [i.e. the Charterers] and then have AGM guarantee the charter, correct?*
>
> *... To avoid any misunderstandings, please confirm that you wish to fix with AGPL (correct legal entity) with AGM guaranteeing the charter."*

44. In reply to Mr Nordsted's email, Mr Eckhoff sent an email timed at 12:04, saying:

> *"That is correct. We would like to charter out to China Express (believe there is a typo on the correct legal name in the org chart) to be fully guaranteed by AGM"*

45. It would appear that, by an email timed at 12:28, Mr Nordsted responded to Mr Goodrich's queries by quoting Mr Eckhoff's email of 12:04.

46. At around the same time, *i.e.* around midday on 30 May, Mr Braid contacted Mr Ambrose by WhatsApp asking to discuss the charter of the Vessel.

47. Following this, there were discussions between Mr Braid and Mr Ambrose about the Owners' new proposal. Those discussions are referred to in a message sent at lunchtime on 30 May by Mr Braid to Mr Wright and Mr Ambrose, in which Mr Braid refers to "*discussions this morning*", saying, "*Further to discussions this morning we have amended the Chartering entity and guaranteeing entity. I have cleared with David* [Ambrose] *so hopefully this will be the last amendment and we reach final agreement this afternoon."*

48. In all events, recaps reflecting the Owners' new proposal were sent to both the Owners and to Mr Wright and Mr Ambrose at Allseas on 30 May. Thus, two recaps were sent by Mr Nordsted, one to the Owners timed at 13.29 BST and the other to Mr Goodrich timed at 13.30 BST. Both messages contain an 'UPDATED RECAP. In each such recap, the identity of the charterer is as follows:

> *"CHARTERER: Allseas Global Project Logistics Limited… to be guaranteed by Allseas Global Management Limited…"*

49. In the recap sent to Mr Goodrich, Mr Nordsted simply says, "*Hopefully this will be the last amendment…*". Five minutes later, Mr Goodrich sent a message in exactly the same terms to Mr Braid. Copies of the relevant exchange of emails are annexed to this judgment as Annex 1.

50. The fixture was at this stage still on "subjects". In this regard, Mr Braid and Mr Brenner, Mr Wright and Mr Ambrose communicated on WhatsApp, in the following terms:

> *"[30/05/2022, 16:02:58] James Braid: gents, I have had a call from SFI on the Green Ace. They want to lift subjects simultaneously. I just wanted to confirm we are happy to do so? Tried calling David and Darren but no luck reaching.*
>
> *[30/05/2022, 16:32:15] Mitch Brenner: I'm in Barbados James , keep trying Them please*
> *[30/05/2022, 16:32:47] James Braid: Sorted now.*
> *[30/05/2022, 16:33:01] Mitch Brenner: And the result was ?*
> *[30/05/2022, 16:33:28] James Braid: We have committed. Just awaiting Owners confirmation of same.*
>
> *[30/05/2022, 17:16:42] James Braid: Gents, not counting chickens yet on the Green Ace but John Fredriksen has given the green light, but now they need a director to sign the memo. Since JF has approved they say it is a formality, but they cannot officlally lift the subs until the get the actual signature from this person. Frustrating but this should still come tonight...*
>
> *[30/05/2022, 18:00:04] Paul Mitchinson: Oh dear*
> *[30/05/2022, 18:40:33] Mitch Brenner: ?*
>
> *[30/05/2022, 20:50:27] James Braid: Gents, Following received from SFI:*
>
> *Understand that Charterers subjects have been lifted, and subject to same which please confirm, we hereby lift Owners subjects.*
>
> *I have reconfirmed the above so we are 100% fixed on the Green Ace. [30/05/2022, 20:50:49] David Ambrose: Good job. Thx.*
> *[30/05/2022, 20:51:57] Andrew Day:*
>
> *[30/05/2022, 20:52:14] James Braid: No, thank you."*

51. At 21:16, Mr Nordsted emailed Mr Eckhoff, saying, "*with all subs lifted, I am pleased to show how you are now clean fixed*" below which he set out a 'clean recap', comprising the same terms as the recaps circulated minus subjects.

52. At 21:17, Mr Nordsted sent an email in the same terms to Mr Goodrich, saying, "*with all subs lifted, I am pleased to show how you are now clean fixed*", below which appeared the same 'clean recap' as in the email he had just sent to Mr Eckhoff. Mr Goodrich then forwarded Mr Nordsted's email to Mr Braid.

53. The next day, 31 May 2022, Mr Braid sent an email to Mr Wright, Mr Ambrose and the rest of the Allseas team, recording that Allseas now had a "*fully committed fixture on the Green Ace*" and setting out a 'clean recap' in the same terms as Mr Nordsted's email of the previous evening.

The Charter

54. The contract concluded on 30 May was never signed. A drawn-up version of the contract was produced and sent to SFL in June but it was never circulated for signing.

55. However, in front of me, AGML pointed out that the charter which was drawn up stated that Charterers were "guaranteed" by AGML, and that the words "to be" had been deleted from the provision in the recap. They relied on this as an indication that Owners knew that the recap did not include a presently binding guarantee. I return to this below.

Allseas' proposals to renegotiate the charter

56. In mid-August 2022, shortly before the Vessel was to be delivered to the Charterers, Allseas approached the Owners to try to renegotiate the rate of hire agreed in the charter. Mr Ambrose explains that, around this time, the Charterers had been experiencing "*cashflow issues*" because freight rates had "*dropped significantly across the market*".

57. On 18 August 2022, Mr Wright and Mr Ambrose spoke with Mr Eckhoff and Mr Sjølie via a Teams call, during which Mr Ambrose made several proposals to the Owners.

58. On 23 August 2022, Mr Ambrose emailed Mr Braid setting out three offers to renegotiate the Charter. These offers were set out in a table entitled "*Green Ace revised charter proposal*".

    (1) The first offer was that (*i*) the duration of the Charter be changed from 20-24 months to 4 years and (*ii*) the hire rate be changed (from US$69,500 per day in year 1 then US$49,500 per day in year 2) to the following rates:
        (a) US$42,500 per day in year 1;
        (b) US$37,500 per day in year 2;
        (c) US$32,500 per day in year 3; and
        (d) US$27,500 per day in year 4.
    (2) The second offer was that the Charter would remain at 20-24 months but the hire rates be changed to US$40,000 for the first 180 days, US$ 70,000 per day for the next 185 days, then US$63,800 for the next 365 days.

(3) A "*contract termination payment*" of US$2.5 million, payable in monthly instalments over a period of 3 years (*i.e.* US$69,444 per month).

59. The Owners did not respond to these offers.

The delivery of the Vessel and the end of the charter

60. The Vessel was delivered into the charter service at Shanghai on 22 August 2022 at 11.30 UTC. Owners allege that, as a result, fifteen days' hire—*i.e.* (US$ 69,500 x 15 =) US$ 1,042,000—fell due that day. This was because hire was payable in advance under clause 7(b). No payment was however made.

61. On 23 August 2022 at 22:51, the Owners sent a message to the Charterers through Clarksons, asking the Charterers to pay the outstanding hire within 96 hours.

62. The next day, 24 August 2022 at 17:57, Mr Ambrose emailed Mr Braid (copying Mr Wright and others), saying:

> *"It is with sincere regret that we must inform you that Allseas Global Project Logistics Limited is unable to accept the Green Ace Vessel on the current charter terms.*
>
> *Freight rates have dropped such that the vessel is now economically unviable and we have explored every option possible to avoid the situation we now face. We see no alternative other than to not load Cargo on this vessel."*

63. Mr Nordsted passed this email on to the Owners. It is this email that Owners rely on as being repudiatory.

64. On 25 August 2022 at 18:45 UTC, the Owners responded, again through Clarksons, saying that they were treating the Charterers' email as a renunciation and they were electing to terminate the charter.

The witnesses.

65. I heard from the following witnesses on matters of fact:

(1) Mr Eckhoff, called by the Claimant, who was at the time a Vice President of SFL, the managers of the Owners.
(2) Mr Sjølie, called by the Claimant, who was the COO of SFL, whose evidence related mainly to the rechartering of the Vessel.
(3) Mr Wright for the Defendant. Mr Wright, as I have noted, was the sole director of AGML, and was a director of AGPL.
(4) Mr Ambrose for the Defendant. Mr Ambrose was CFO for a number of Allseas companies, and was a director of the Charterer.

The issues.

66. AGML's primary case is that it never agreed to guarantee the Charterers' performance of the charter. In that regard, it says:

(1) On its true construction, the parties' contract of 30 May 2022 did not contain a term that AGML would guarantee the Charterers' performance of the contract; or alternatively
(2) If it did include such a provision, AGML did not consent to be bound by that wording because nobody agreed to the terms of the contract *on AGML's behalf*. Specifically, AGML say, in the relevant exchange of emails, when the Allseas group's Chief Financial Officer, Mr Ambrose, agreed the terms of the contract, he did so on the Charterers' behalf only, and not also on behalf of AGML.

67. AGML's alternative case is that, if the parties did agree a guarantee, it is ineffective or unenforceable. In that regard, it relies on three further propositions:

(1) The guarantee is unenforceable under s.4 of the Statute of Frauds because its terms were not committed to writing.
(2) The contract should be rectified to remove the guarantee, either because the parties both mistakenly believed they had not concluded a guarantee or because AGML believed that, and the Owners knew AGML was making that mistake.
(3) There is an estoppel of some kind which prevents the Owners from relying on the guarantee.

68. If the parties did agree a guarantee, and if the agreement is enforceable, then AGML's final alternative case is that it has no obligations under the guarantee, or at least its obligations are much smaller than the Owners are alleging. That is because, it says:

(1) The Charterers did not repudiate the charter; or alternatively
(2) The Owners failed to take reasonable steps to mitigate their losses.

69. I deal with each of these issues in turn.

Discussion and conclusions.

Issue 1: Was there a binding guarantee contained in or evidenced by the recap emails?

70. In my judgment, the resolution of this issue depends on the true construction of the exchange of emails on 30 May 2022, which is annexed to this judgment. As I have recorded, those recap, or recapitulation messages both provided that the Charterers were to be "*Allseas Global Project Logistics Limited… to be guaranteed by Allseas Global Management Limited…*"

The parties' respective submissions.

71. AGML's case was that these emails were evidence of a binding ***charter***, but that they were simply evidence of an agreement to provide a guarantee in the future, once the terms of that guarantee were agreed. In support of that submission, AGML argued as follows:

(1) The Owners' submission that the charter was concluded on the 30th May 2022 does not consider the entirety of the negotiations in this matter nor the fluidity of the dialogue with the brokers. There had been several negotiation steps including:
    (a) 3 draft recaps issued by the Owner to the Defendant between 1 April 2022 and 27 April 2022, including the wording "to be guaranteed" by TopCo;

(b) 3 amendments by the Charterers, **removing** "to be guaranteed" by TopCo;
(c) E-mails between the parties confirming that no guarantee will be provided causing an impasse in negotiations;
(d) Importantly, an e-mail of the 11 May 2022 from Mr Nordsted of Clarksons to Mr Eckhoff stating that Allseas Top Co may be willing to sign a Bimco Charter Party Guarantee attaching a sample copy of the relevant document;
(e) Several further negotiating steps where AGML is the **charterer** even to the point that subjects are lifted by the Defendant on 18th May 2022. The Owners do not lift their subjects and the parties proceed to negotiate further.

(2) On the 30 May 2022 when updated recaps are issued they do not include wording "guaranteed by" or "fully guaranteed by" but reference a future/contingent intention "**to be guaranteed**" which is consistent with the Defendants' submission that any guarantee document would be in a single document duly understood by all and signed, as per the 11 May e-mail**.**
(3) AGML further submits that as early as the 12th June 2022, Owners knew that there was ambiguity in the Recap wording relating to the guarantee, upon advice from its own lawyers and that changes were required as "to be" was not strong enough to be binding.

72. Owners' case, by contrast, was as follows:

(1) The terms of the contract concluded on 30 May are evidenced by:
(a) the 'updated recap' email sent by James Braid to David Ambrose and others and approved by Mr Ambrose and
(b) the 'clean recap' sent by James Braid to Mr Ambrose and Darren Wright on 31 May, to which there was no protest from anyone at Allseas.
(2) Both recaps contain a clause providing:

> "*CHARTERER: Allseas Global Project Logistics Limited… to be guaranteed by Allseas Global Management Limited*"

(3) The words "*to be guaranteed by Allseas Global Management Limited*" mean that that AGML will see to it that the named charterer – Allseas Global Project Logistics – will perform its obligations under the charter (so that AGML will be responsible if the charterer fails to perform). To say that a contracting party – here, the charterer – is "*to be guaranteed*" by a guarantor is an abbreviated way of saying that the guarantor promises that the relevant party will perform its contractual obligations.
(4) AGML's case, namely that the phrase "*to be guaranteed by Allseas Global Management Limited*" means that the guarantor – AGML – will provide a guarantee in the form of some kind of further (signed) instrument, but only if and when the parties agree the terms of such an instrument is not persuasive, for two reasons.
(a) The words used – "*to be guaranteed by [AGML]*" – do not suggest that AGML's guarantee is contingent either on (i) AGML and the Owners agreeing terms or (ii) AGML executing some further document.
(b) The suggestion that the guarantor's obligation is contingent on either (i) the parties agreeing the terms of a guarantee, or (ii) the guarantor executing a document containing the guarantee, is an uncommercial one:

it would convert the relevant wording into an unenforceable agreement-to-agree and therefore leave the Owners with no enforceable rights.

(5) The argument that the phrase in question was merely an agreement that the parties should seek to agree a guarantee at a later date is particularly implausible in this case, given that, prior to 30 May 2022, the parties had agreed (subject to BOD approval) that AGML would contract with the Owners *as the charterers*, an arrangement that was in effect or in substance a guarantee by AGML.

73. In short, say the Owners:

(1) the wording used in the two recaps means that the charterer's performance is to be guaranteed by AGML – and
(2) that wording is properly construed as a promise to guarantee which is intended to be effective without further agreement or formality.

The authorities to which I was referred.

74. I was referred to a number of cases in relation to this issue and the next one.

75. The first was The Anemone [1987] 1 Lloyd's Rep. 546. That case concerned an oral guarantee given in a conversation between a Mr Bott, on behalf of the proposed guarantor, Shirlstar, which became binding when the charter was concluded. Staughton J, as he then was, had to consider whether there was a sufficient note or memorandum of the guarantee to satisfy the Statute of Frauds. He concluded that there was such a note in the form of an exchange of telexes.

76. The second case was The Anangel Express [1996] 2 Lloyd's Rep. 299, a decision of Waller J. In that case, the judge held that, on the facts, there was no agreement between guarantor and the guaranteed party, with the result that the claim on the guarantee must fail. This was, as I have indicated, essentially a decision on its own facts.

77. Next was the case of Golden Ocean Group Ltd. v. Salgaocar Mining Industries Pvt Ltd. and Anr [2012] 1 Lloyd's Rep. 542. In that case the Court of Appeal had to consider a charter which was evidenced by an exchange of emails, in which there was reference to the Charterer as "Trustworth Pte Limited Singapore fully guaranteed by SMI." The essential issue for the Court of Appeal was whether evidence of a guarantee in such an exchange of emails sufficed to satisfy the requirements of the Statute of Frauds.

78. Lastly, I was referred to The C Challenger [2021] 2 Lloyd's Rep. 109, a decision of Foxton J. In that case, the judge had to consider a number of issues. First, he dealt with Charterers' claim for rescission of the charter, based on misrepresentation. He rejected that claim, holding that although various representations were made which were untrue, Charterers had not been induced to enter into the charter by those representations, and, in any event, Charterers had affirmed the charter. He held that his findings in relation to the charter applied equally to the guarantee which had been given in that case. He then went on to consider whether Charterers were entitled to terminate the charter for breach, holding that they were not, and, further held that their

purported termination was itself a repudiatory breach, entitling Owners to terminate and claim damages.

79. It was at this point in his judgment that he had to consider the question of whether the guarantee was binding and satisfied the requirements of the Statute of Frauds. In paragraphs 328 to 335, the judge concludes that if an email or telex is sent by an intermediary broker or a broker authorised by the relevant party (here AGML) to send the message, which includes a sufficient note or memorandum of the guarantee to satisfy the Statute of Frauds, then this will suffice for the purposes of the Statute.

80. The Owners argued that in these cases, the Courts have consistently rejected arguments that the wording in question does not constitute an immediately effective guarantee. They argued that the unrealistic or uncommercial quality of AGML's argument was emphasised in *The C Challenger*, supra, where Foxton J quotes Tomlinson LJ's statement in *Golden Ocean v Salgaocar Mining* [2012] 1 Lloyd's Rep 542 at [30], that, "*It is not sensible to contemplate that the charterparty should become binding on the parties thereto in the absence of a guarantee enforceable by the owners against the guarantor.*"

81. AGML, for their part, argued that each of the cases relied on by Owners was distinguishable, because in those cases there was clear documentary evidence of guarantee documents being provided. Conversely, say the Defendants, in this case there is an ambiguously worded "to be guaranteed" contained within 2 e-mails which, AGML submit, is insufficient to bind the Defendant to a US $37m alleged guarantee. AMGL submits that in this case no guarantee documentation was issued until 24th August 2022 when there had been material drafting changes to the wording agreed in the Recap. This revised wording was not agreed. AGML thus alleges that it was Owners that repudiated the charter when they terminated.

Discussion and conclusions.

82. I start with a consideration of the relevant principles of contractual construction, which are summarised in Lewison on The Interpretation of Contracts, at Section 1, which states:

> *"Interpretation is the ascertainment of the objective meaning of the language in which the parties have chosen to express their agreement, in its documentary, factual and commercial context. That meaning is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. Both the text and the context are tools in the process of interpretation.*
>
> *The text must be assessed in the light of (i) the natural and ordinary meaning of the words, (ii) any other relevant provisions of the contract, and (iii) the overall purpose of the clause and the contract. The factual context includes facts and circumstances known or assumed by the parties at the time that the document was executed. It also includes background knowledge which would reasonably have been available to the*

> *parties in the situation in which they were at the time of the contract.*
>
> *The process is a unitary and iterative one by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. The weight to be given to each will depend on a number of factors, including the formality of the agreement and the quality of the drafting.*
>
> *If the language of the contract is unambiguous the court must apply it. But if there are two possible interpretations, the court is entitled to prefer the interpretation which is consistent with business common sense as at the date of the contract and to reject the other. Nevertheless, the commercial consequences of one interpretation as against another do not detract from the importance of the words.*
>
> *In exceptional circumstances the court may conclude that the parties have used the wrong words. If it is clear what the error is, and the nature of the correction required, the court may correct it.*
>
> *In carrying out its task, the court must disregard the parties' subjective intentions, and (except for limited purposes) the negotiations that preceded the making of the contract."*

83. The limited circumstances in which regard may be had to be negotiations preceding the making of the contract have been described in the past as the "factual matrix" to the contract: see Prenn v Simmonds [1971] 1 WLR 1381, which is, in essence, the aim or commercial purpose of the transaction.

84. Applying these principles, I hold as follows:

(1) At the outset of the negotiations, Owners made it clear that they required a guarantee, whilst Charterers made clear that they would not provide one.

(2) However, there came a time when Charterers relaxed their position on this. In my judgment, there must clearly, on the basis of the documents, have been some discussion of the provision of security from a company further up in the corporate chain other than AGPL, and I am afraid that I am unable to accept the evidence of Mr Wright that there was no such suggestion discussed in Dubai. Instead, I think that his more guarded evidence given orally is more reliable, and, most importantly, the notes of the meeting in Dubai made by Mr Eckhoff are clear on this, as is the fact that there was a change of the identity of the Charterer from AGPL to AGML even before this meeting. It is in my view clear that AGML had accepted that it would have to provide corporate security over and above that provided by AGPL.

(3) Following the meeting in Dubai, there remained agreement that the "parent company", (ie AGML) would be the security for the fixture, even though it was

not, as I accept, a 100% parent. It is also, however, clear that Owners wished for more than the security provided by AGML and wished for the security of the line which would have access to the corporate revenue provided by the service – here AGPL. It was this that led to the terms of the recap which reflected the fact that Owners could look to both AGPL and AGML.

(4) I do not accept the submission that AGML were agreeing to provide a guarantee on terms yet to be agreed. This would amount to no more than an agreement to agree, providing no real security at all. Moreover, the suggestion that a guarantee has to include detailed terms is in my view misconceived. The function of a guarantee is to add a further party on the same terms as the principal debtor, which will be responsible if the principal debtor defaults. The terms of a guarantee are thus the same terms as those of the principal debt. Whilst I accept that often the terms of a guarantee will indeed be formalised, as Mr Ambrose submitted, then this does not have to be the case.

85. As to the authorities to which I was referred, I do not regard these as of any great assistance in relation to this first issue. This first issue is in reality one of contractual construction and hence other decisions on different facts are not, in my view, helpful. I regard the authorities to which I was referred as more relevant to Issue 3, which raises the separate question of whether any guarantee in fact given is rendered unenforceable by virtue of the Statute of Frauds.

86. Overall, therefore, I hold that there was a binding agreement evidenced in the terms of the recaps, which was that AGML would guarantee the obligations of Charterers.

Issue 2: Were those emails evidence of a guarantee, as opposed to a charter?

The parties submissions.

87. AGML submitted as follows:

(1) The Recaps expressly state "Subjects: sub **Charterers' BOD** approval". There is no mention of Guarantors BOD. AGML notes that the composition of the Boards are different in each company.

(2) Although the Owners submits that throughout negotiations Mr Ambrose had spoken for both Allseas companies, AGML refers to a message from Mr Nordsted to Mr Eckhoff that states "*just learned that the owner of Allseas is on plane flying back to Dubai and he will have to sign off on the counter*" the counter expressly being Allseas Global Management Limited as charterer. The Owners then proceeded to meet Mr Wright in Dubai to sign off on the 'deal' on the instruction of SFL's controlling shareholder, billionaire Mr Fredriksen. The Defendant submits that it is logical sense that Owners would want the only director and principal of AGML to execute a $37m guarantee.

(3) As to whether a reasonable third party would have understood that a guarantee was being given, the Defendant refers again to **Charterers Subs** being lifted and the ambiguous wording inferring a future/contingent event in respect of the guarantee. The Defendant also submits that it is unreasonable to assume that a $37m guarantee has been finalised on wording "to be guaranteed" and "Approved. Thx" absent any other contractual documentation.

88. The Owners' case is that they concluded the contract with both AGML and the Charterers because a reasonable third party would have understood that both Allseas companies had approved the terms of both the 'updated recap' and the 'clean recap'. In this context, the Owners made two submissions.

89. First, when Mr Ambrose responded to the 'updated recap' on 30 May by saying '*Approved*', a reasonable third party would have understood that approval to have been given on behalf of both AGML and the Charterers.

(1) The 'updated recap' proposed to bind both the Charterers and AGML, and Mr Ambrose's response ("*Approved*") did not expressly limit itself to approving only the former. On the contrary, it appears to approve the whole 'updated recap'.
(2) There was no feature of the background or context that would have led a reasonable person to infer that Mr Ambrose intended to approve the 'updated recap' only on behalf of the Charterers. Mr Ambrose had been conducting the negotiations on behalf of AGML and there was no one else who might have been expected to provide approval on behalf of AGML.

90. Second, when Mr Braid sent the Allseas team the 'clean recap' on 31 May, and there was no protest to the effect that AGML had not approved its terms, a reasonable third party would have inferred that AGML was tacitly approving its terms.

91. In short, Mr Ambrose's '*approved*' of 30 May should be construed as an approval given on behalf of both the Charterers and AGML.

Discussion and conclusions.

92. As I understood it, it was not contested that Mr Ambrose had the authority to enter into the charter, and would have had authority to enter into a guarantee, if the exchange of recap emails, on its true construction, amounted to a valid guarantee.

93. The question under this head is therefore again whether a reasonable person, with the background knowledge which was or should have been available to these parties, would have understood that AGML was agreeing to enter into an <u>immediately</u> binding guarantee.

94. In my judgment, a reasonable person would have understood that this was the case. I reach this conclusion for, essentially, the same reasons as under Issue 1, above. Indeed, I agree with Mr Kenny KC that this issue does not raise any further issues over and those raised by issue 1.

<u>Issue 3: Was the guarantee rendered unenforceable by virtue of s.4 of the Statute of Frauds?</u>

95. Section 4 of the Statute of Frauds provides as follows:

> *"Noe Action shall be brought . . . whereby to charge the Defendant upon any speciall promise to answere for the debt default or miscarriages of another person . . . unlesse the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in Writeing and signed by the partie to be charged therewith or some other person thereunto by him lawfully authorized."*

96. I start by noting that there is no dispute as to signature. The exchange of emails was one which was approved by each party, having been approved by the brokers. Therefore, the question is simply whether the exchange of emails is sufficient to satisfy the requirement of writing in the statute.

The parties' respective submissions.

97. In this regard, AGML submitted as follows:

(1) The written guarantee must state all the material terms of the contract which have been expressly agreed. This was not provided.
(2) Whilst Owners mention a **see to it** guarantee in their skeleton argument, there is no mention of this or any other guarantee term anywhere in any of the correspondence between the Defendant and the Owners so the essential requirements of the written memorandum have not been met.
(3) Clause 7c of the charter party (which was not circulated until 24th August 2022) is silent on the guarantor and the Owners recourse to same in the event of default.
(4) There is no mention of how the guarantee of is triggered. Upon non payment? Upon demand?
(5) The only potential enforceable guarantee is the document issued on the 24th August 2022 which is not agreed, signed or accepted by the Defendant.
(6) It is the Defendants' submission that if the court were to assume the contents of a guarantee then it would be creating the guarantee for the Claimant and depriving the Defendant of its legitimate statutory defence under section 4.
(7) The Owner references Golden Ocean v Salgaocar Mining (ref supra) where the Court of Appeal held that a charter guarantee consisting only of the words "*fully guaranteed by"* was a sufficient memorandum to satisfy the requirement of s4. However, the Defendants submitted that in that case all documentation including the charter party wording and form and wording of the guarantee had been issued and the court was able to look through many exchanges to form a view that s4 had been satisfied. In this case, the only reference to a contract of guarantee by the Owner is three words "to be guaranteed" in two e-mails less than 24 hours apart. The later drafting amendment dated 12 June 2022 attempting to remove the "to be" as instructed by the Owner's lawyers is material in this context as even the Owner was not satisfied with its own drafting.
(8) Overall, said AGML, it could not be right that it was bound by virtue of wording that is both onerous and unclear. This is the precisely the mischief that s4 is designed to protect against.

98. Turning to Owners' submissions, these were as follows:

(1) For the purposes of the Statute, the 'updated recap' and Mr Ambrose's response is a memorandum in writing of AGML's agreement to guarantee the Charterers' performance of the charter (or, if it makes any difference, part of the series of emails containing that agreement).
(2) That the agreement to guarantee consists of no more than the words "*to be guaranteed by [AGML]*" does not detract from that proposition.
(3) In *Golden Ocean v Salgaocar Mining* [2012] 1 WLR 3674, the Court of Appeal held that a charter guarantee consisting only of the words '*A/C [the charterer]*

fully guaranteed by [the guarantor]" was a sufficient memorandum to satisfy the requirement of s.4: see page 3682 at paragraph 14 of the quotation and [30].

Discussion and conclusions.

99. In my judgment, the exchange of emails, which was in writing and signed by an authorised representative of AGML, was sufficient to amount to an agreement in writing for the purposes of the Statute. The decision in the Golden Ocean case provides, in my judgment, clear support for this conclusion, and I am bound by that judgment. I would in any event have reached this conclusion for myself.

Issue 4: Should the contract be rectified?

100. In this regard, AGML argue that the contract should be rectified to provide for the provision of a guarantee in due course, but not a requirement to provide an immediate guarantee.

The parties' submissions.

101. In this regard, Owners submit as follows:

(1) Mr Ambrose's evidence is that he was operating under a mistake on 30 and 31 May. He says that his understanding was that, although the charter was agreed and fully fixed, the guarantee by AGML was not. He believed – he says – that there would have to be some further negotiation and the execution of a signed instrument before the guarantee would be effective.
(2) The Owners do not accept that Mr Ambrose was actually mistaken in the way he describes. (If he was under such a mistake, they ask, why did he not ask Clarksons about when and how the guarantee was going to be concluded? Surely, they say, he would have asked Mr Braid what the next steps were regarding the completion of the guarantee?)
(3) However even if he was mistaken as he says he was, there is no evidence – or basis for suggesting – that:
    (a) The Owners were operating under the same mistake; or that
    (b) The Owners were aware of Mr Ambrose's mistake.

102. The absence of any evidence to support either of these propositions is fatal to the claim for rectification:

(1) In order to establish rectification for common mistake, AGML would have to prove the former. In *FSHC Group Holdings Ltd v GLAS Trust* [2020] Ch 365, at [176], Leggatt LJ said, "*before a written contract may be rectified on the basis of a common mistake, it is necessary to show … that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record*."[1]
(2) In order to establish rectification for unilateral mistake, AGML would have to

[1] Indeed in the same passage, the judge adds that it also necessary to show that the parties communicated to each other the mistake that they shared: "*it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an 'outward expression of accord' meaning that, as a result of communication between them, the parties understood each other to share that intention.*"

prove the latter, i.e. that Owners were aware of Mr Ambrose's error: see *Thomas Bates & Son v Wyndhams Ltd* [1981] 1 WLR 505 at 516 per Buckley LJ.[2]

103. Turning to AGML's case, they agree that Bates is authority for the requirements identified in footnote 2, above and below. There is therefore no disagreement on the principles applicable. As to the application of those principles, AGML submit that Owners became aware of their ambiguous guarantee wording and mistake on 15th June 2022 following advice from their own legal team. AGML submit that the Owners did not notify AGML of the amended drafting as it knew this was a material change, by virtue of the amendment of "to be guaranteed" to "guaranteed by". AGML submits that the Owners became alive to the fact that they had not concluded the guarantee contract following Mr Ambrose's requests for the full contract document on 20th August 2022. They submit that this prompted the message from Mr Nordsted to Mr Goodrich that "We need to get Allseas to sign it ASAP".

104. Overall, say AGML, this meets the requirements of Buckley LJ's requirements so that the recaps of 30th May 2022 should be rectified, to reflect AGML's understanding that "to be guaranteed" represented an agreement to enter into a guarantee document on terms to be agreed, rather than an immediately binding guarantee.

Discussion and conclusions.

105. I can deal with this submission briefly.

106. There is no real dispute of principle under this head. As I understand it, AGML's case is premised on an allegation of unilateral mistake, and it is common ground that the requirements for such are accurately set out in Bates v Wyndhams. I have set these out above. The question therefore is whether those requirements are satisfied in this case.

107. AGML's case under this head is that Mr Ambrose mistakenly believed that the recap emails did not contain a binding guarantee; that Owners knew this to be the case; that the Owners failed to point this out; and that the mistake was calculated to benefit Owners.

108. In my judgment it is both unnecessary and undesirable to reach any conclusion on the state of Mr Ambrose's knowledge. I am quite satisfied, on the evidence, that whether or not Mr Ambrose was mistaken, Owners had no knowledge of any such mistake. In my judgment, the facts and matters I have set out above fall very far short of establishing such knowledge.

109. Accordingly, I hold that this plea should be rejected.

Issue 5: Is there an estoppel of some sort?

[2] In that case, the learned Lord Justice held that such rectification requires that: (*i*) A mistakenly believes that the document says something other than what it does say; (*ii*) B was aware of A's mistake; (*iii*) B has not pointed out A's mistake; and (*iv*) the mistake was calculated to benefit B. On the other hand, in this context, "*actual knowledge extends to the situation where that party wilfully shuts his eyes to the obvious or wilfully and recklessly fails to make such enquiries as an honest and reasonable man would make*": see *Global Display Solutions v NCR* [2021] EWHC 1119 (Comm), per Jacobs J at [447] and [458].

110. I did not understand this submission to be pursued, and thus I do not deal with it further.

Issue 6: Did the Charterers repudiate the charter?

The legal requirements for repudiation.

111. As regards the law, Owners asserted that a party renounces his contract when he expresses an intention either not to perform it at all or only to perform it in a way that is substantially inconsistent with its terms: see *Spar Shipping AS v Grand China Logistics Holding Co Ltd* [2015] 2 Lloyd's Rep 407 at [208], *per* Popplewell J (as he then was). In that paragraph the judge said the following:

> *"(1) Conduct is repudiatory if it deprives the innocent party of substantially the whole of the benefit he is intended to receive as consideration for performance of his future obligations under the contract. Although different formulations or metaphors have been used, notably whether the breach goes to the root of the contract, these are merely different ways of expressing the 'substantially the whole benefit' test: The Hongkong Fir at pages 66 and 72; The Nanfri [[1979] AC 757] at pages 778G to 779D.*
>
> *(2) Conduct is renunciatory if it evinces an intention to commit a repudiatory breach, that is to say if it would lead a reasonable person to the conclusion that the party does not intend to perform his future obligations where the failure to perform such obligations when they fell due would be repudiatory . . .*
>
> *(3) Evincing an intention to perform but in a manner which is substantially inconsistent with the contractual terms is evincing an intention not to perform: Ross T Smyth & Co Ltd v T D Bailey, Son & Co [1940] 3 All ER 60, page 72. Whether such conduct is renunciatory depends upon whether the threatened difference in performance is repudiatory . . .*
>
> *(4) An intention to perform connotes a willingness to perform, but willingness in this context does not mean a desire to perform despite an inability to do so. As Devlin J put it in Universal Cargo Carriers Corporation v Citati [1957] 2 QB 401 at page 437, to say: 'I would like to but I cannot' negatives intent just as much as 'I will not'."*

112. On appeal, Gross LJ in essence endorsed the judge's description of the appropriate test. He said as follows:

> *"72. There was no real challenge to the test adopted by the judge (at para 208) and but for one consideration I would be content to adopt, with respect and without more, the judge's summary of the applicable legal principles. The one*

consideration was that there was argument around the edges of the test, seeking to buttress the rival positions on the issue of whether the judge had failed to apply the test correctly. In the circumstances, I venture the brief observations which follow.

73. First, it is readily apparent that there are a variety of formulations of the test for renunciation in the authorities. Thus, in Ross T Smyth & Co Ltd v T D Bailey, Son & Co [1940] 3 All ER 60, Lord Wright put it this way (at page 72):

"I do not say that it is necessary to show that the party alleged to have repudiated should have an actual intention not to fulfil the contract. He may intend in fact to fulfil it, but may be determined to do so in a manner substantially inconsistent with his obligations, and not in any other way."

In The Hongkong Fir, Diplock LJ (at page 72) in the context of repudiation, posed the question whether the events which had occurred as a result of the breach:

". . . deprived the charterers of substantially the whole benefit which it was the intention of the parties as expressed in the charterparty that the charterers should obtain from the further performance of their own contractual undertakings."

In Decro-Wall International SA v Practitioners in Marketing Ltd [1971] 1 WLR 361, at page 380, Buckley LJ expressed the test as follows:

"To constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract . . . Will the consequences of the breach be such that it would be unfair to the injured party to hold him to the contract and leave him to his remedy in damages . . .?"

74. Secondly, although efforts have been made to seize on the difference between "substantially the whole benefit" (The Hongkong Fir) and "a substantial part of the benefit" (Decro-Wall), there is less to this difference than meets the eye. As Lord Wilberforce observed, authoritatively, in Federal Commerce and Navigation Co Ltd v Molena Alpha Inc (The Nanfri, Benfri and Lorfri) [1979] AC 757, at page 779:

"The difference in expression between these two last formulations does not . . . reflect a divergence of principle, but arises from and is related to the particular contract under consideration: they represent, in other words, applications to different contracts, of the common principle that, to amount to a repudiation a breach must go to the root of the contract."

For my part, I gratefully and respectfully adopt Lord Wilberforce's formulation.

75. Thirdly, although these expressions are necessarily open-textured, that is a consequence of the need to apply them in the widest range of factual circumstances. I respectfully agree with and adopt in this regard the following passage from Arden LJ's judgment in Valilas v Januzai [2015] 1 All ER Comm 1047, at para 59:

"The common law adopts open-textured expressions for the principle used to identify the cases in which one contracting party ('the victim') can claim that the actions of the other contracting party justify the termination of the contract. I will use the formulation that asks whether the victim has been deprived of substantially the whole of the benefit of the contract. The expression 'going to the root' of the contract conveys the same point: the failure must be compared with the whole of the consideration of the contract and not just a part of it. There are other similar expressions. I do not myself criticise the vagueness of these expressions of the principle since I do not consider that any satisfactory fixed rule could be formulated in this field."

76. Pausing here, I acknowledge with respect Lewison LJ's criticisms in Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd [2013] BLR 400, at para 50, that the trouble "with expressing important propositions of English law in metaphorical terms is that it is difficult to be sure what they mean" – together with his further observation that the description of a breach "going to the root of the contract" is a "conclusory description" (citing the High Court of Australia in Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd(2007) 233 CLR 115, at para 54). However, in practice, such expressions are useful and readily capable of application; a search for a more precise test is unlikely to be fruitful. Further, given Diplock LJ's analysis in The Hongkong Fir, it is perhaps not surprising that the various formulations of the test focus on the nature and gravity of the consequences of the breach and are, in that sense, conclusory.

77. Fourthly, the starting point when considering the seriousness of the anticipated breach of contract is the benefit the innocent party was intended to obtain from performance of the contract: Lewison LJ, in Ampurius, at para 51; Koompahtoo, at para 55. This intended benefit serves as the yardstick against which the divergence of the anticipated breach is to be measured. In this regard, it is important to keep in mind that a renunciation is not confined to an evinced unwillingness to perform the contract at all; an evinced unwillingness to perform the contract according to its terms

> *(whether through inability or otherwise) may likewise amount to a renunciation if the performance proffered is substantially inconsistent with that party's obligations thereunder: Ross T Smyth v Bailey (supra). Further, renunciation may be inferred where it is apparent that the defaulting party is doing no more than procrastinating in the hope that something may turn up: Forslind v Bechely-Crundall 1922 SC (HL) 173, at page 191, per Lord Shaw of Dunfermline.*
>
> *78. Fifthly, as is clear from the authorities, the test for renunciation is, mutatis mutandis, essentially similar to that for repudiation. However, as renunciation looks to the future, it may be inferred from both the nature and causes of past breaches (even if by themselves insufficient or irrelevant for repudiation) and the evinced unwillingness to perform in the future. As the test for repudiation has been equated with that for frustration (Diplock LJ in The Hongkong Fir, at page 69), the same could be said of the test for renunciation; if so, then it is to be kept in mind that:*
>
> *". . . frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do."*
>
> *Lord Radcliffe, in Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696, at page 729.*
>
> *Plainly, this formulation cannot be applied mechanistically to renunciation; no formulation should be. The application of any such test, however precisely formulated, must necessarily be context and fact specific."*

113. I did not understand there to be any real dispute as to the appropriate test in law. In any event, I would gratefully accept the test laid down by Popplewell J (as he then was), as endorsed in the Court of Appeal in the Spar Shipping case.

Was there a repudiation – the parties submissions.

114. Owners' case was that AGPL, by their email message of 24 August 2024, repudiated the charter. I have already set out the terms of that message.

115. AGML's submissions were as follows:

(1) The message of 24th August 2022 was not a repudiatory breach. Instead, it was a message confirming that the charter could not be performed on its then current terms.
(2) The Charterer was seeking to restructure the charter payment mechanism and on

the same day there was a note from James Braid to Charles Nordsted confirming the same.

(3) The e-mail message of the 23rd August 2022 then made two legitimate proposals to restructure the charter's payment mechanism, which according to Mr Hubbard's expert report is a process that he has seen many times in the container charter market. Importantly, say AGML, none of the proposals worsen the Owners financial position over the life of the charter.

(4) The Defendant was simply attempting to renegotiate weighted payment terms ($69,500 per day) which were fixed at six times the normal rates for a vessel of this type against the back drop of falling FEU rates and temporary cash flow difficulties, which was perfectly reasonable and to be expected in the ordinary course of commercial relations.

(5) AGML noted that:

(a) pursuant to clause 7 of the relevant charter party the Owners could withdraw the Vessel if the charterer failed to make payment of the amount due within 96 running hours of the receipt of notification from the Owners;

(b) The 1st hire invoice pursuant to the charter was issued to the Charterers on 23rd August 2022 at 09:48;

(c) On 23rd August 2022 at 22:51, a notice was received from the Owners stating that the Charterers is in default of its payment obligation and pursuant to clause 7 c of the charter party agreement, the Charterers is put on notice that the Owners reserved its right to withdraw the Vessel if payment is not received of $1,042,500 within 96 hours;

(d) At this point the charter party document had not been received from the Owner or the Owner's Broker;

(e) A repudiation notice was then received by Clarkson from Owners on 25th August 2022 at 20:45 or 2 days and 11 hours later which is 59 hours from receipt of the initial invoice or 42 hours from the later notice.

(6) The withdrawal notice was premature and the Owners repudiated/renounced the charter by withdrawing the Vessel due to non-payment in breach of clause 7.

Discussion and conclusions.

116. I start by considering whether the withdrawal notice was premature. In view of the provisions of clause 7, and in particular the 96 hour notice period, if the failure to pay hire had stood alone, then I would have regarded the withdrawal as premature.

117. However, the failure to pay hire is not what the Owners rely on as justifying termination of the charter. Instead, their case is that the email of 24th was repudiatory, or renunciatory, in the sense I have identified above. I have concluded that Owners are correct in this regard. In my judgment, the Charterers' email of 24th August was clearly repudiatory, since it clearly conveyed to a reasonable person the fact that Charterers were unable to perform the charter according to its terms and would thus not do so.

118. This does not however mean that AGML's submissions are irrelevant. Instead, in my judgment, they go to their plea of mitigation, which I consider below.

119. Before turning to mitigation, however, I consider first the actual loss suffered by Owners.

Pure Quantum

Available market?

120. The expert evidence is that there was no available market for a replacement charter with a minimum duration of 20-24 months. I accept this evidence.

121. In the light of that evidence, the Claimants submitted that the proper measure of the Owners' losses is the difference between (*i*) the amounts that the Owners would have earned if the charter had been performed and (*ii*) the amounts that the Owners have actually earned from the Replacement Fixtures: see *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2015] EWHC 718 (Comm), [2015] 2 Lloyd's Rep 407 at [222] per Popplewell J. Again, I accept this submission.

122. In that regard, the question that I have to determine is what the difference is between what the Owners have earned and what they would have earned under the charter with the Charterers?

The parties submissions.

123. After the charter was terminated, the Owners, so they said, looked to charter out the Vessel at the highest achievable rate in order to mitigate their losses. The Owners engaged Clarksons and Maersk Broker to try to find alternative employment.

124. The upshot was that, between September 2022 and May 2023, Owners entered into four successive replacement time charters for the Vessel (the "**Replacement Fixtures**") with Aladin Express DMCC ("**ALX**").

125. The measure of loss is thus the difference between the amounts in fact earned and the amounts which would have been earned.

126. In this regard, I have received the following evidence:

(1) The three factual witness statements and exhibits of Mr Sjølie.
(2) The expert reports of Mr Hubbard on behalf of AGML and of Mr Dowell on behalf of Owners.

127. Owners' case was that their actual losses under the charter come to a total of **USD 27,406,062.39** as explained below.

(1) Owners' actual position as a result of the repudiation of the charter

128. It is first necessary to consider the actual position in which the Owners find themselves as a result of the Charterers' repudiation of the charter and the termination of the charter on 25 August 2022.

129. The Owners entered into Replacement Fixtures with ALX at different rates of hire. The total income earned by Owners under the Replacement Fixtures (between the date

of the first fixture on 6 September 2022 until the earliest contractual redelivery date of 22 April 2024) was **USD 9,324,207** broken down as follows:

Period	**Days**	**Hire Rate (USD per day)**	**Total Hire (USD)**
06/09/22 to 13/09/22	7	1	7
14/09/22 to 07/11/22	55	22,000	1,210,000
08/11/22 to 28/02/23	113	14,500	1,638,500
29/02/23 to 23/06/23	115	13,100	1,506,500
24/06/23 to 22/04/24	303	16,400	4,969,200
Total			**** Expression is faulty ****

130. Over this period, the Vessel has been off-hire for a very limited period. The total deduction to be made in respect of off-hire is **USD 17,873.30**, namely:

(1) USD 7,440.30 on 18 September 2023;
(2) USD 10,091 on 18 January 2024; and
(3) USD 342 on 23 March 2024.

131. After making these deductions, the sub-total of the Owners' earnings is USD 9,306,333.70 (*i.e.* USD 9,324,207 less USD 17,873.30). It is then necessary to deduct brokerage @ 1.25% and address commission @ 1.25% from this sub-total, which comes to USD 232,658.34. Accordingly, the net hire earned by Owners (less brokerage fees) comes to **USD 9,073,675.36**.

132. It is then necessary to add a figure for income in respect of communications, victualing and entertaining ("**C/V/E**") at USD 1,200 per month as per the Replacement Fixtures with ALX. This leads to total income of **USD 23,434.52** for the 594-day period between 6 September 2022 and 22 April 2024, *i.e.* ([USD 1,200 x 12 months] / 365 days) x 594 days.

133. As a result, the net income earned by the Owners over the period between 6 September 2022 and 22 April 2024 comes to a total of **USD 9,097,109.88**.

(2) The 'but for' scenario if the charter had not been repudiated

134. It is then necessary to compare the Owners' actual position with the 'but for' position, assuming that the charter had not been repudiated by the Charterers and then terminated by the Owners on 25 August 2022.

135. In this scenario, the Owners would have earned total income (between the date of termination on 25 August 2022 and the earliest contractual redelivery date of 22 April 2024) of **USD 37,247,500** broken down as follows:

Period	**Days**	**Hire Rate (USD per day)**	**Total Hire (USD)**
25/08/22 to 24/08/23	365	69,500	25,367,500
25/08/23 to 08/03/24	195	49,500	9,652,500
08/03/24 to 22/04/24	45	49,500	2,227,500

Total	**** Expression is faulty ****

136. It is then necessary to make a deduction of **USD 53,904.59** in respect of an assumed allowance for off-hire over this period (based on the actual off-hire periods referred to above) broken down as follows:

(1) 0.4537 day off-hire (as per actual off-hire time: 7,440.30 / 16,400) with value USD 22,457.00 (0.4537 x 49,500);
(2) 0.6153 day off-hire (as per second actual off-hire time 10,091 / 16,400) with value USD 30,457.59 (0.6153 x 49,500); and
(3) 0.02 day off-hire (as per actual off-hire time: 342 / 16,400) with value USD 990 (0.02 x 49,500).

137. After making these deductions, the sub-total of the Owners' earnings would have been USD 37,193,595.41 (*i.e.* USD 37,247,500 less USD 53,904.59). It is then necessary to deduct brokerage @ 1.25% and address commission @ 1.25% from this sub-total, which comes to USD 929,839.89. Accordingly, the net hire which the Owners would have earned (less brokerage fees) comes to **USD 36,263,755.52**.

138. It is then necessary to add a figure for income in respect of C/V/E at USD 500 per month as per the terms of the charter. This leads to total income of **USD 9,961.64** for the 606-day period between 25 August 2022 and 22 April 2024, *i.e.* ([USD 500 x 12 months] / 365 days) x 606 days.

139. As a result, the net income which the Owners would have earned over the period between 25 August 2022 and 22 April 2024 comes to a total of **USD 36,273,717.16.**

(3) Comparison between the Owners' actual position and the 'but for' scenario

140. Having regard to the foregoing, Owners' losses arising from the repudiation of the charter come to a total of **USD 27,176,567.83**, *i.e.* by subtracting Owners' actual earnings of USD 9,097,109.88 from Owners' income in the 'but for' scenario of USD 36,273,717.16.

(4) Unpaid hire

141. In addition, the Charterers breached the charter by failing to pay hire prior to termination in the sum of **USD 229,494.56**, broken down as follows:

(1) The Vessel was delivered on 22 August 2022 at 11:30 UTC. The Owners terminated the Charter on 25 August at 18:45 UTC.
(2) The Vessel was accordingly on hire for 3.30208 days, during which time the Owners earned hire of US$ 229,494.56 (*i.e.* US$ 69,500 per day x 3.30208 days).

(5) Total losses

142. The Owners' losses therefore come to a total of **USD 27,406,062.39**.

143. AGML accepted the figures that I have set out in the preceding paragraphs. Accordingly, subject to the question of mitigation, there was no dispute on quantum.

Was there a failure to mitigate?

144. The last issue that I have to decide is whether, as AGML contend, Owners failed to act reasonably to mitigate their loss.

145. Starting with the law, I regard the statement of general principle in Chitty on Contracts, 35th ed, at 30-100 as an accurate one. That states:

> *The first rule:*
>
> *"... imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps." It is not strictly a "duty" to mitigate, but rather a restriction on the damages recoverable, which will be calculated as if the claimant had acted reasonably to minimise his loss. The onus of proof is on the defendant, who must show that the claimant ought, as a reasonable man, to have taken certain steps to mitigate his loss, and that the claimant could thereby have avoided some part of his loss. Any loss which is directly caused by a failure to meet this standard is not recoverable from the defendant."*

146. In this instance, as I note below, what AGML rely on are various offers made by them to Owners. The topic of offers by a Defendant who is in breach to the Claimant has been considered in a number of cases, and is the subject of a discussion in Chitty, op cit, at 30-112, where it is said that:

> *"The opportunity to mitigate the loss may arise through an offer made by the party who committed the breach of contract: if the claimant unreasonably refuses to accept the offer he is in breach of his duty to mitigate his loss. Thus in a construction contract, the employer's refusal to allow the contractor to remedy defective work may amount to a failure to mitigate with the result that the employer can recover no more than it would have cost the contractor to do the work. In Payzu Ltd v Saunders a seller in breach of his contract declined to deliver goods on the agreed credit terms but offered to do so on terms of "cash on delivery", and the buyer refused and claimed as damages the difference between the contract price and the higher market price on the date for delivery, the refusal of the buyer to accept the seller's offer was held to be unreasonable, and resulted in a reduction in the damages. Similarly, where the plaintiff bought a ship from the defendant, who could not deliver her on the agreed date, it was held that it would have been reasonable for the plaintiff to mitigate his loss by*

> *accepting her late delivery at the original price. (The plaintiff was, of course, entitled to claim damages for any residual loss arising from the delay.) Where the vendor offered to repurchase a house which he sold with vacant possession but which was in fact occupied by a protected tenant, it was held that the buyer was not obliged by the doctrine of mitigation to accept the offer: his choice to retain the house and to sue for damages for the breach of contract was not to be subjected to the test of reasonableness."*

147. Turning to AGML's submissions on the facts, they contended as follows:

(1) The Defendant's expert, Mr Nicholas Hubbard stated that "I would point out that an operator with a very similar trading background, namely RIF Line, could perform their 18 month charter on Taichung at $35,000. That strongly suggests to me (ie Mr Hubbard) that Allseas would have been able to do so also". Thus, AGML argued, Owners could have earned $35,000 a day for the relevant period.
(2) The Defendant's position is 2 commercial offers were made all of which may not have resulted in any losses for the Claimant if accepted. Furthermore, the Defendant also submits that it was not asked to make any offers to the Owners without prejudice to their rights to recover the balance of their losses.
(3) The Owners then chose to repudiate the charter party for non-payment and withdrew the Vessel on the 25th August 2022.
(4) On 31st August 2022, the Owners began arresting the Charterers vessels, namely the Allseas Pioneer in Rotterdam in circumstances that the Defendant's former legal team describe as Mala Fides or Crassa Negligentia.
(5) The Defendant's submission is that the Owners not only failed to mitigate their losses but that they then immediately set about unnecessarily taking punitive actions against the Charterers accelerating their insolvency.

148. Owners denied that their failure to accept AGML's offers was unreasonable. They relied on the following principal factors:

(1) First, they did not accept that Allseas would in fact have been able to perform the charter even on the terms being proposed.
(2) Secondly, and more importantly, even if Allseas would have been able to perform the charter on the revised terms being proposed, Owners were not acting unreasonably in refusing to agree those terms. The amendments being proposed were not terms under which performance would continue but always without prejudice to any claims that the Owners might have in respect of the Charterers' failure to perform the original terms. They were proposals, essentially, that the Owners simply agree to accept a reduced hire for the services of the ship or a 'wash out' payment of (substantially) less than the value of the hire that the Charterers had agreed to pay. Mr Ambrose was therefore in effect inviting the Owners to surrender *gratis* their contractual right to millions of dollars of hire. The Owners' refusal to do that was not unreasonable.

Discussion and conclusions.

149. I have noted above the test for mitigation. The burden is, in this case, on AGML to show that the Owners acted unreasonably in some way which caused some or part of their loss.

150. In relation to the evidence of Mr Hubbard, which was to the effect that Owners could have chartered the Vessel out on the market for $35,000 per day, I cannot accept this evidence for two principal reasons.

(1) First, Mr Hubbard was not called and was therefore not available for cross-examination. Because he was not called, then, strictly speaking, his report was not in evidence before me. In any event, because he was unavailable for cross examination, I am unable to place any great weight on that evidence.
(2) Secondly, the suggestion made by AGML that the Vessel could have been chartered out for $35,000 per day is in my judgment inconsistent with the agreement between the experts that there was no market for vessels of this type at the relevant time for the relevant duration.

151. This leaves the question of whether Owners acted unreasonably in failing to accept the Charterers' offers of alternative performance, as set out in the email of 23 August, to which I have made reference above. I have concluded that Owners cannot be said to have acted unreasonably in this regard, essentially for the reasons put forward by Mr Kenny.

(1) The proposals put forward by Charterers were not without prejudice to Owners' rights to claim damages. The proposals would have led to a loss of rights on the part of Owners. Thus, these proposals would not have led to a mitigation of Owners' losses, but rather would have prejudiced Owners' overall rights.
(2) In addition, whether Charterers would have had the financial wherewithal to perform on these revised terms remained unclear.

152. Overall, therefore, I have concluded that AGML has not satisfied the burden of proof (which is on it) of showing that Owners acted unreasonably and therefore caused part of their own loss.

Overall conclusions.

153. Overall, therefore, I can summarise my conclusions as follows:

(1) There was a binding guarantee evidenced in the exchange of emails on 30 May.
(2) That exchange of emails satisfied the requirements of the Statute of Frauds.
(3) The contract of guarantee should not be rectified.
(4) The charter was repudiated by the Charterers.
(5) The loss suffered by Owners by reason of this repudiation was USD 27,406,062.39.
(6) There was no failure on the part of the Owners to mitigate their losses.

154. Accordingly, I hold that Owners are entitled to recover USD 27,406,062.39 from AGML pursuant to the guarantee given by AGML.

155. I would be grateful if the parties could draw up an order giving effect to this judgment. I will deal separately with any questions of interest, costs and other consequential matters if these cannot be agreed, and I reserve jurisdiction to myself to do so. Any order should reflect this fact.