Neutral Citation Number: [2024] EWHC 719 (Comm)

Case No: CL-2019-000523

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: 25/03/2024

Before :

MRS JUSTICE DIAS DBE

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Between :

(1) DELOS SHIPHOLDING S.A. **(2) NICHOLAS G. MOUNDREAS SHIPPING S.A.** **(3) FML SHIP MANAGEMENT LTD** **(4) THE NATIONAL BANK OF GREECE S.A.**	**Claimants**
- and -	
(1) ALLIANZ GLOBAL CORPORATE AND SPECIALTY S.E. **(2) AXA CORPORATE SOLUTIONS ASSURANCE** **(3) GENERALI IARD** **(4) HELVETIA ASSURANCES S.A.** **(5) MAPFRE GLOBAL RISKS, COMPANIA INTERNATIONAL DE SEGUROS 7 REASEGUROS** **(6) SOCIETÀ ITALIANA DI ASSICURAZIONI E RIASSICURAZIONI P.A.**	**Defendants**

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Peter MacDonald Eggers K.C., Sandra Healy, Charlotte Payne and Sophie Hepburn (instructed by **Messrs Hill Dickinson International**) for the **Claimants**
Philippa Hopkins K.C., David Walsh and Lorraine Aboagye (instructed by **Adams & Moore Solicitors LLP**) for the **Defendants**

Hearing dates: 18, 22-25, 29-31 January, 1, 7-9 February 2024

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JUDGMENT

The Honourable Mrs Justice Dias DBE:

INTRODUCTION

1. This claim arises out of what might be described in layman's terms as the illegal parking of the Capesize bulk carrier "WIN WIN" (the "Vessel") just inside Indonesian territorial waters off Singapore in February 2019. The layman might be forgiven for thinking that for an infringement of this nature the Vessel would have been given a metaphorical slap on the stern and a parking fine, maybe with a discount for prompt payment, and sent on her way. Instead, however, she was detained by the Indonesian authorities for nearly a year while her Master was prosecuted under the Indonesian Shipping Law, eventually receiving a suspended sentence of 7 months' imprisonment and a fine in the grand sum of around US$7,000.

2. The Vessel was insured by the Defendant insurers for war risks, including the risk of detention, and in these circumstances, the Claimants brought a claim under the policy in force at the time (the "Policy") asserting that the Vessel became a constructive total loss by virtue of being detained for more than six months and that they were accordingly entitled to recover the sum assured under the Policy. Insurers broadly accept that the requirements for a constructive total loss were met but nonetheless deny the claim on essentially four grounds: (1) the detainment was not fortuitous since the Master and/or one or more of the Claimants knew or should have known that the Vessel had anchored in territorial waters and the arrest was the consequence of their voluntary conduct in so doing; (2) the claim falls within an exclusion to the Policy; (3) the delay was materially caused by the Claimants' unreasonable conduct in breach of their duty to sue and labour; (4) Insurers are entitled to avoid the Policy for material non-disclosure. Should the claim

under the Policy succeed, the Claimants assert an additional claim for damages sustained by reason of Insurers' failure to pay the insurance proceeds within a reasonable time. There are also some minor quantum points.

3. Resolution of these issues will incidentally (and quite irrelevantly) determine whether the Vessel was appositely named or rather the opposite. Undoubtedly, the events in Indonesia were unfortunate and, as will appear below, it could be said that her detention was somewhat unlucky. On the other hand, if the Claimants' claims succeed, Insurers say that they would obtain a substantial windfall, having purchased the Vessel for less than her market value and sold her for more than her agreed residual value, such windfall being further inflated if they recover the claimed damages as well.

FACTUAL BACKGROUND

4. The First Claimant ("Delos") was the registered owner of the Vessel. Delos is an SPV registered in the Marshall Islands. Its sole nominee director was Mr Evangelos Bairactaris, a Greek maritime lawyer and registered member of the Piraeus Bar Association. He is the managing partner and principal fee earner of a firm which has provided external legal services to the NGM group of companies (the "NGM Group") for many years and he was also the sole director on a similar nominee basis of a number of other ship-owning SPVs within the group.

5. The Second Claimant ("NGM") and Third Claimant ("FML") were respectively the commercial and technical managers of the Vessel. The Fourth Claimant was the mortgagee of the Vessel and the loss payee under the Policy. Delos and NGM were part of the NGM group which is a well-known and successful Greek shipping group founded by Mr Nikolaos Moundreas. The group is entirely owned and controlled by Mr Nikolaos Moundreas and his three children but while he remains the ultimate decision-maker in the

group, day-to-day activities are supervised and monitored by his son, Mr Georgios Moundreas. Unless otherwise indicated, references to Mr Moundreas in this judgment are to Mr Georgios Moundreas.

6. The Vessel's war risks insurance had been placed with GAREX since 2008. GAREX is an underwriting agency based in Paris which specialises in marine war risks and underwrites for a pool of insurers, including, so far as relevant to this case, the Defendants ("Insurers"). The Policy was renewed for the 2018/2019 year on 29 June 2018 for the period 1 July 2018 to 30 June 2019.

7. In late 2018, the Vessel discharged a cargo of iron ore at Bayuquan in China following which she proceeded to Zhoushan for repairs. On 1 December 2018, she was joined there by a new Master, Captain Kumar. Captain Kumar had previously been employed by V-Ships and this was his first command for FML. Following completion of operations in China, the Vessel was ordered to Singapore to take on bunkers. Bunkering was completed on 13 February 2019 and on the same day NGM's Operations Department ordered her to proceed to Singapore OPL, where she was to find a safe anchorage and drop anchor awaiting further instructions. The email of instruction continued: *"Recommended anchoring position to be around the following area: Lat: 01.25N / Long: 104.34E."* It is common ground that these co-ordinates lay within Indonesian territorial waters.

8. On 14 February 2019, the Vessel left Singapore having been cleared to proceed to "High Seas". It is not in dispute that a passage plan was prepared which identified a different anchoring position. The Master explained in both his written and oral evidence that he did not use the position recommended by NGM because in his view it was too close to the traffic separation system in operation in the Straits of Singapore. The Straits of Malacca

and Singapore is one of the busiest shipping lanes in the world and vessels coming from all directions are subject to a traffic separation scheme (the "TSS") which requires them to pass through a designated channel before peeling off again when they exit the channel at the other end. In the Master's view, NGM's suggested anchoring area was too close to the TSS for comfort given that the WIN WIN was a large vessel and, once anchored, would not be able to move quickly in the event of an incident occurring.

9. It has not been possible to locate either an electronic or a hard copy version of this passage plan and this gave rise to much interlocutory skirmishing and criticism by Insurers. However, the route sheet incorporated into the passage plan has survived which shows that the Master's alternative anchoring position was in fact in international waters. Had the Vessel been able to anchor there, no problems would have arisen. In the event, however, while the Vessel was underway from Singapore, it became apparent from her radar when she was approximately half-way along the TSS that the Master's chosen position was already occupied by another vessel. The Master therefore altered the planned passage to find an alternative safe location and eventually dropped anchor in position 01 21.89N, 104 41.96E, just inside Indonesian territorial waters (the "Waiting Location").

10. The evidence of the Master, which I accept and which was confirmed by the master mariner experts, was that the Waiting Location was within an area – partly inside and partly outside Indonesian territorial waters - which was generally understood to be Eastern OPL Singapore ("EOPL Singapore") and which had for many years been used as an anchorage by hundreds if not thousands of vessels without problem. Indeed, many other vessels were also anchored in the vicinity when WIN WIN arrived and, prior to

February 2019, there had been no known instances of any vessel being detained or reprimanded by the Indonesian authorities simply for anchoring within territorial waters.

11. This all changed very suddenly in February 2019. The reasons for the change in attitude on the part of the Indonesian authorities were controversial and were explored at some length in the oral evidence. Suffice it for the present to say that starting on about 8 February 2019 the Indonesian Navy arrested a large number of ships for anchoring in territorial waters without permission, of which the Vessel was one.

12. On 17 February 2019, the Vessel was boarded by armed personnel from the Indonesian Navy who demanded and removed all her documents and told the Master that she was being detained because she had entered Indonesian waters illegally. The Master repeatedly apologised and offered to move to international waters immediately but the Navy dismissed these offers and instead ordered him to shift to a different location close to the naval base on Batam Island.

13. Meanwhile, the Master had contacted the Operations Department of NGM in understandable distress asking for urgent assistance. The Operations Department notified the NGM Group's Insurance and Claims Manager, Mr Eleftherios Tsouris, who in turn immediately notified Mr Nikolaos and Mr Georgios Moundreas. Mr Tsouris also contacted Captain Dev Lajmi of the Vessel's P&I Club, North of England ("NEPIA"). Captain Lajmi was at that time the Deputy Director (Claims) of NEPIA seconded to the Club's Piraeus office. He immediately called Mr Dughall Aitken, the CEO of the Club's local Singapore correspondents, SPICA Services Group ("SPICA"). SPICA provides services to the International Group of P&I Clubs, the Norwegian H&M market and the Fixed Premium marine market and has 23 offices throughout south-east Asia. Mr Aitken (based in Singapore) and particularly his Jakarta-based colleague, Captain Mohammed

bin Abdullah ("Captain Mohammed"), played a key role in subsequent events as they unfolded.

14. SPICA informed Capt Lajmi that the boarding and detention of anchored vessels in that part of EOPL Singapore by the Indonesian Navy was a very recent development and a new trend. From 8 February 2019, some 19 other vessels had been detained for entering Indonesian territorial waters without clearance and SPICA was acting on behalf of six of them who were entered with various P&I Clubs in the International Group.

15. The Master was initially urged by NGM and their local Singapore agents, Johnasia Shipping (S) Pte Ltd ("Johnasia"), to avoid moving further inwards to the position ordered by the Navy so that it would be easier to leave if that became possible. He accordingly refused to comply with the order to move on the grounds that it would be unsafe for a vessel the size of WIN WIN to do so, at least without the assistance of a pilot, because of the risk of grounding. The following day, however, he was ordered to a different location in the port of Batuampar and threatened with seizure of the Vessel and the arrest of himself and the entire crew if she did not move. It was therefore decided that there was no option but to comply with the Navy's order and the Vessel accordingly shifted to the new location where she dropped anchor at about 2054 on 18 February 2019. PT Buana Saka Samudera ("PBSS") (represented by Mr Hendra Irawan) were appointed by NGM on the recommendation of Johnasia to act as the Vessel's protecting agents.

16. On 19 February 2019, the Navy again boarded the Vessel and demanded to inspect the entire crew and their passports. Captain Kumar and the Second Officer were taken to the Batam Naval Base for interrogation and a Ship Investigation Report was prepared stating that the Vessel had anchored illegally without a permit.

17. On the advice of SPICA, Ms Aninda Listyarto of local Indonesian lawyers, Syam & Syam, was appointed to act on behalf of the Vessel. Syam & Syam were also representing at least two of the other vessels that had been detained at around the same time for anchoring without permission.

18. Meanwhile, at the Piraeus end, Mr Moundreas had appointed the Chief Operating Officer of the NGM Group, Mr Constantine Joicey, to act as the key contact on behalf of the Claimants to receive and filter all information from the Vessel, NEPIA, SPICA, FML and PBSS. Mr Moundreas did not himself get involved on a day to day basis. In general terms, therefore, Captain Mohammed reported to Mr Aitken, and both Mr Aitken and Syam & Syam reported to Captain Lajmi, who reported to Mr Joicey, who reported to Mr Moundreas. Mr Irawan of PBSS communicated with Mr Joicey and FML and also, after 1 March 2019, with Captain Lajmi.

19. It is quite apparent that there was a great deal of uncertainty and confusion in these early days. As stated, the detention of vessels for illegal anchoring in this area was new and completely unheralded and nobody knew quite what lay behind it or would happen next. Although Syam & Syam advised early on that it could take several months to conclude the matter if it went to court and that the Master potentially faced a fine and imprisonment, the general hope and expectation was that it ought to be possible to pay the necessary fines and get the vessels released within a matter of days or weeks at the most without going to court.

20. Attempts were therefore made over the following weeks, in parallel with the ongoing legal process, to engage in discussions with the Navy and the Indonesian authorities to see whether there was any way of getting the vessels released short of full-blown

proceedings. These talks were pursued on behalf not only of WIN WIN but also of other vessels covered by International Group members.

21. The nature and course of these discussions are discussed in more detail below in relation to sue and labour. In short, however, it eventually became apparent (precisely when was hotly disputed) that the Vessel would only be released in exchange for an illicit or “unofficial” payment, in other words a bribe, and all negotiations were terminated around 11 April 2019.

22. I should make it clear that although there is some suggestion that other vessels may have paid a bribe in order to secure early release, no such suggestion is made here. It is common ground that no bribe was paid. Nonetheless, it is Insurers’ case that the Claimants knew or should have known that an illicit payment would or might be demanded and should either not have instigated discussions at all, or at least should have terminated them much sooner. By pursuing them for as long as they did only to pull out at the last minute, it is said that the Claimants only managed to antagonise the authorities and cause them to slow down the judicial process, thereby ultimately prolonging the Vessel’s detention. Insurers say that this amounted to unreasonable conduct in breach of the Claimants’ duty to sue and labour, but for which the Vessel could and would have been released before she became a CTL.

23. The Claimants, on the other hand, assert that they had no alternative but to talk to the authorities in order to explore what options were available for getting the Vessel released as soon as possible. They maintain that it was entirely reasonable to pursue the talks until such time as it became absolutely clear that an illicit payment would be required, at which point they withdrew. Since the court case against the Master was proceeding in parallel, it made no difference to the ultimate outcome.

24. For the purposes of this introductory factual summary, it is only necessary to highlight the following further key events.

25. On 27 March 2019, Insurers were notified of the Vessel's detention in Indonesia. On 25 April 2019, Syam & Syam withdrew without warning or explanation from representing both the Vessel and five other vessels which had been detained at the same time. On 9 May 2019, the Claimants appointed Dr Yustanti of Dyah Ersita Prastowo & Partners ("DEPP") in place of Syam & Syam.

26. On 19 June 2019, a formal indictment was issued against the Master alleging two separate violations of the Indonesian Shipping Law. On 24 June 2019, one sick crew member was granted permission to return to his home country and on 9 August 2019 a further eight crew members were repatriated.

27. On 19 August 2019, Notice of Abandonment was given to Insurers followed by issue of a Claim Form the following day. Neither included the interest of the Fourth Claimant bank. The Notice of Abandonment was declined on 23 August 2019 and a second Notice of Abandonment was tendered on 27 August 2019, this time including the bank's interest. An Amended Claim Form was also issued on the same day adding the bank as Fourth Claimant. The second Notice of Abandonment was also declined as was a third Notice sent on 30 September 2019.

28. On 3 October 2019, the remaining crew (apart from the Master, Chief Officer and Chief Engineer) were repatriated and replaced by a Vietnamese crew. After a number of hearings and adjournments, the Batam District Court delivered its verdict on 9 October 2019 convicting the Master of one of the charges against him. He was sentenced to 7 months' imprisonment suspended for one year and a fine of Rp 1 million (around US$7,000) plus costs of Rp 5,000.

29. On 11 October 2019 the prosecutor lodged a notice of appeal to the High Court of Pekanbaru which affirmed the verdict of the District Court on 12 December 2019. The fine was paid and the Master was released on 8 January 2020, returning to India shortly thereafter. The Vessel was formally redelivered to the Claimants on 9 January 2020 on which day a new master assumed command. However, for various reasons which it is not necessary to explore in this judgment but which included difficulties caused by Covid-19, the Vessel did not in fact sail from Indonesia until 7 August 2020.

30. A fourth and final Notice of Abandonment was sent to Insurers on 18 February 2020 which was also declined.

31. In order to set the scene, it is also relevant at this stage to mention that in March 2018, some three months before the Policy was renewed, criminal charges were brought against a very well-known Greek shipowner and public figure, Mr Evangelos Marinakis, and three other people alleging against each of them that he was a member of an organised crime group and involved in drug trafficking. The charges arose out of the detention in 2014 of another vessel, "NOOR 1", in connection with drug smuggling and apparently related to the financing of the transaction rather than the actual trafficking, the traffickers themselves having already been prosecuted and convicted in 2016. Mr Bairactaris was one of the people charged alongside Mr Marinakis.

32. I make clear at the outset that:

    (a) Mr Bairactaris denies the charges absolutely;

    (b) He has not been found guilty of any offence. Indeed, it does not appear that any steps at all have been taken against him in the six years since he was charged, even to the extent of asking him for information or documents;

(c) Insurers make no suggestion that he is guilty;

(d) Mr Bairactaris remains a registered member of the Piraeus Bar Association with an apparently thriving practice.

33. Insurers assert that the charges were nonetheless circumstances which were material to the risk and were known or should have been known to the Claimants. Accordingly, they say that they should have been disclosed and that since the failure to do so induced the relevant underwriter to write the risk, Insurers are now entitled to avoid the Policy altogether.

34. It should further be noted that Insurers originally relied on two entirely different non-disclosures, both of which have now been abandoned. The present allegation was only asserted by amendment in October 2021, some six months after Insurers first became aware of the existence of the charges. For their part, the Claimants assert that Insurers' conduct in the intervening period amounted to an affirmation of the Policy.

THE POLICY

35. The Policy was concluded on 29 June 2018. Pursuant to its terms, Insurers agreed to insure part of the NGM Group fleet (including the Vessel) against war and political risks for the policy period 1 July 2018 to 30 June 2019. Delos, NGM and FML were all named assureds in respect of the Vessel and the Bank was named as mortgagee and a loss payee under the Policy. The Policy insured the Vessel for US$25 million in respect of Hull and Machinery, US$6.25 million in respect of Increased Value and US$6.25 million in respect of Disbursements and Additional Owners' Interest. These were agreed values such that the total amount recoverable under the Policy in the event of a total loss of the Vessel is therefore US$37.5 million.

36. The policy terms expressly incorporated the American Institute Hull War Risks and Strikes Clauses dated 1 December 1977 and the Addendum thereto dated 1 April 1984. As will be familiar to all those who deal with marine insurance, the Institute Hull War Risks Clauses work by effectively writing back into the Policy those perils which are expressly excluded by the Institute Hull Clauses. Determining the scope of cover is accordingly not always as straightforward as might be thought. Happily, however, it was common ground in this case that the Policy covered *"seizure, arrest, restraint or detainment, or any attempt thereat"* (these being risks which had been excluded by the American Institute Hull Clauses and written back in by the War Risks Clauses) as well as the following relevant provisions:

"…

AGREED VALUES CLAUSE
It is hereby specified that the agreed value of the vessel is admitted, whatever any fluctuation in the market value during the policy period, with the parties reciprocally waiving any other valuation. No proportional rule shall therefore be applied by the Insurers …

American Institute Hull War Risks and Strikes Clauses *…*

For Attachment to American Institute Hull Clauses

December 1, 1977 *…*

This insurance, subject to the exclusions set forth herein, covers only those risks which would be covered by the attached Policy … in the absence of the WAR, STRIKES AND RELATED EXCLUSIONS clause contained therein but which are excluded thereby …

EXCLUSIONS
This insurance does not cover any loss, damage or expense caused by, resulting from, or incurred as a consequence of:

…

e. *Arrest, restraint or detainment under customs or quarantine regulations and similar arrests, restraints or detainments not arising from actual or impending hostilities …*

Warranted not to abandon in case of capture, seizure or detention, until after condemnation of the property insured.

…

ADDENDUM TO AMERICAN INSTITUTE HULL WAR RISKS AND STRIKES CLAUSES - DECEMBER 1, 1977 (APRIL 1, 1984)

It is understood and agreed that the American Institute Hull War Risks and Strikes Clauses of December 1, 1977, for attachment to American Institute Hull Clauses (June 2, 1977), and to which this Addendum is attached are amended as follows:

…

3. *In the event that the Vessel shall have been the subject of capture, seizure, arrest, restraint, detainment, confiscation or expropriation, and the Assured, by reason thereof, has lost the free use and disposal of the Vessel for a continuous period of* [six (6)] *months (even though condemnation has not occurred), then for the purposes of ascertaining whether the Vessel is a constructive Total Loss, the Assured shall be deemed to have been deprived of the possession of the Vessel without any likelihood of recovery.*

…

5. *The Warranty at line 42 shall be amended to read: "Warranted not to abandon in case of capture, seizure, arrest, restraint, detainment, confiscation or expropriation until after condemnation of the property insured or, in circumstances set forth in 3. above, after* [six (6)] *months, whichever first occurs …*[1]

[1] It should be noted that the 12 month detainment period in Clause 3 of the Addendum was expressly amended by the Policy to 6 months in the case of the Vessel and certain other vessels save in cases of piracy where it remained as 12 months.

ALL OTHER TERMS, LIMITATIONS, CONDITIONS AND EXCEPTIONS REMAINING UNCHANGED"

37. Additionally, the American Institute Hull Clauses contained the following provisions:

*"**ASSURED***

...

If claim is made under the Policy by anyone other than the Owner of the Vessel, such person shall not be entitled to recover to a greater extent than would the Owner, had claim been made by the Owner as an Assured named in this Policy.

SUE AND LABOR

And in case of any Loss or Misfortune, it shall be lawful and necessary for the Assured, their Factors, Servants and Assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the Vessel, or any part thereof, without prejudice to this insurance, to the charges whereof the Underwriters will contribute their proportion as provided below. And it is expressly declared and agreed that no acts of the Underwriters or Assured in recovering, saving or preserving the Vessel shall be considered as a waiver or acceptance of abandonment.

In the event of expenditure under the Sue and Labor clause, the Underwriters shall pay the proportion of such expenses that the amount insured hereunder bears to the Agreed Value, or that the amount insured hereunder (less loss and/or damage payable under this Policy) bears to the actual value of the salved property, whichever proportion shall be less; provided always that their liability for such expenses shall not exceed their proportionate part of the Agreed Value ..."

THE ISSUES

38. A number of defences which had originally been relied upon by Insurers were withdrawn before trial. Others fell away during the course of the hearing.

39. As to the remainder, it was common ground that the Vessel had anchored in Indonesian territorial waters without permission, that in consequence she had been lawfully detained by the Indonesian authorities for a period exceeding six months and that detainment under the criminal laws of a country is not ordinary judicial process and may therefore amount to a restraint or detainment within the meaning of a war risks policy. On that basis, Insurers accepted that, subject to the question of fortuity, the requirements for a CTL under the Policy were established in principle.

40. This left the following issues to be determined by the court in relation to liability:

1) Insured peril/Fortuity: Did the insured peril relied upon (i.e., the detainment) lack the necessary quality of fortuity because it resulted from the voluntary conduct of the assured in the sense that the Master and/or NGM knew or should have known that the Vessel had anchored in Indonesian territorial waters and the detention was an ordinary consequence of that conduct under Indonesian law?

2) Exclusion (e): Did the detainment fall within exclusion (e) on the basis that, although it was not an arrest, restraint or detainment under customs or quarantine regulations, it was nonetheless a *"similar arrest, restraint or detainment not arising from actual or impending hostilities"*?

3) Sue and Labour:

   (a) Were the Claimants in breach of their duty to sue and labour by unreasonably and improperly instigating and/or engaging in "commercial settlement" discussions with the Indonesian Navy regarding the release of the Vessel?

   (b) If so, was this breach the proximate cause of the loss and/or does the claim fail because the Vessel would have been released within six months but for the breach?

4) Non-disclosure: Are Insurers entitled to avoid the Policy because the charges against Mr Bairactaris were not disclosed?

THE WITNESSES

41. I heard oral evidence from the following witnesses on behalf of the Claimants:

(a) Captain Kumar gave evidence principally about the circumstances in which the Vessel came to anchor where she did and the passage plan. I found him to be honest and credible. He was fair and moderate in his answers which were consistent with the contemporary documents. I accepted his evidence that he simply did not apply his mind to the question of whether or not the Vessel's planned or actual anchoring positions were within Indonesian territorial waters given that, as far as he was concerned, this was a usual anchorage area for vessels waiting EOPL Singapore.

(b) Captain Lajmi gave evidence about his involvement in the detention of the Vessel and the efforts by NEPIA and other clubs in the International Group to secure the release of their respective ships. I found him to be an honest witness who answered questions frankly and without obfuscation. Nonetheless, while I accept (as discussed further below) that there was a considerable degree of uncertainty at the outset as to whether the arrested vessels could be legally released short of a full court hearing, I am of the view that he somewhat understated the extent to which and when he first appreciated the possibility that the discussions with the authorities might lead to a demand for an illicit payment.

(c) Of all the witnesses who gave oral evidence, Mr Aitken was closest to the events on the ground at the relevant time. Despite finding him to be more than a little arrogant and inclined to become belligerent when put under pressure, I accept much of his evidence. However, I am wholly unable to accept that he did not have in mind from the very outset at least the possibility that discussions with the authorities might lead eventually to the question of an illicit payment. His written statement asserted that the February detentions were attributable to a plan by the Navy to take advantage of government policy for personal gain and his oral evidence started with an acceptance

that he considered Indonesia to be generally a corrupt country – an admission which he later sought to withdraw. Against that background, his insistence that he did not understand some of the contemporary correspondence to be talking about corrupt payments was frankly implausible.

(d) Mr Joicey was the Chief Operating Officer for all the companies in the NGM group. As such, he supervised the commercial aspects of the business, including chartering, operations and claims, but was answerable to Mr Nikolaos Moundreas and Mr Georgios Moundreas who were the main decision-makers. He worked closely with Mr Georgios Moundreas and was Claimants' contact point regarding all matters to do with the detention. By and large, I was happy to accept his evidence which for the most part was consistent with the contemporaneous documents. Again, however, I find it difficult to accept that he was not alive to the possibility that early release would involve an illicit payment at an earlier stage than he was prepared to admit. In particular, I am satisfied that he was fully aware that the negotiations being undertaken by Mr Irawan might indeed relate to an unofficial payment but was content to see what in fact emerged, even if he did not authorise these discussions expressly. As I have said, there is no suggestion that the Claimants were ever intending to pay a bribe or actually did so.

(e) Mr Moundreas was an engaging and honest witness. He answered questions straightforwardly and I was satisfied that I could accept his evidence. In particular, I accept that he played very little part in the day-to day activities of the NGM Group, being concerned with matters at a strategic level. As such, he would not concern himself with routine operational matters unless there was a particular problem to be addressed or decision to be made when he relied on those around him, principally Mr

Joicey, to bring them to his attention. I also accept that he preferred to deal with matters face-to-face or on the telephone and did not himself use email as a routine means of communication. I find it entirely plausible that, given the size of the NGM fleet, it would have been impractical for him to read and assimilate all of the very many emails which were forwarded to him by his secretary and that Mr Joicey and other senior personnel in the company were aware that they needed to send important emails to his private email address and specifically alert him to them. This is supported by an email sent to him at his private address by Mr Tsouris shortly after the arrest and the way in which subsequent emails were handled. I accept his evidence that the Claimants would never have paid a bribe or other unofficial payment but that their primary concern was to get the Vessel and her crew released as soon as possible and that they were anxious to ensure they had explored every single possibility of achieving this.

(f) Dr Yustanti was the lawyer who took over the handling of the Indonesian proceedings after the withdrawal of Syam & Syam. She was a transparently straightforward and honest witness and I had no hesitation in accepting her evidence in its entirety.

(g) Mr Tsouris was the Insurance and Claims manager for all the companies in the NGM group, having occupied that position since 2000. I found him to be straightforward and honest and I accept his evidence.

(h) Mr Nikolaos Moundreas gave evidence regarding quantum issues. He also was an engaging witness and obviously someone of great experience in the shipping world. I accept his evidence.

(i) Mr Bairactaris was a clear and precise witness. Given that his position was by no means a comfortable one, I find that he answered questions frankly and honestly, even

if he was slightly mystified by some of the hypothetical scenarios put to him. I accept his evidence.

(j) Ms Moisidou is the Claimants' solicitor. She gave written evidence concerning her approaches to Ms Listyarto of Syam & Syam, the refusal of the latter to give evidence in these proceedings and the fact that Syam & Syam had destroyed all their hard copy and electronic files immediately after their withdrawal from the proceedings. Ms Moisidou also gave written evidence concerning the attempts to locate the passage plan. In the event, Insurers did not require her to be cross-examined and her evidence on these matters is therefore unchallenged.

42. Insurers called only two witnesses of fact, M. de Lavergnolle and Mr Denèfle, both of whom gave evidence in relation to inducement. They were both straightforward witnesses and I have no doubt that they honestly believed what they were telling the court. However, I found their evidence to be incoherent and illogical in many respects and this inevitably cast doubt on the extent to which I was able to accept that they had in fact been induced as they claimed. I discuss this further in relation to non-disclosure below.

43. So far as the expert evidence was concerned, I heard evidence from the following:

(a) Master Mariners: The Claimants called Captain Walker while Insurers called Captain Todorov. Both were eminently qualified to give expert evidence and, unsurprisingly, there was a considerable degree of agreement between the two. Where they differed, however, Captain Todorov's views inclined very much towards a meticulous and precise "best practice" approach in line with his Curriculum Vitae which claims exceptional technical knowledge with *"meticulous attention to details"*. This was

reflected in his evidence. Captain Walker, on the other hand, had a more practical approach which I felt probably rather better reflected the reality of maritime practice.

(b) Indonesian Law: I heard evidence on behalf of the Claimants from Professor Simon Butt, Professor in Indonesian Law and Director of the Centre for Asian and Pacific Law at the University of Sydney, and from Ms Aprilda Fiona, a practising Indonesian lawyer, on behalf of Insurers. Again there was much common ground between them. Both were honest and credible witnesses and I discuss the few differences between them in the context of sue and labour below.

(c) Underwriters: Expert underwriting evidence was given by Mr Robert Clarkson on behalf of the Claimants and Mr Ole Wikborg on behalf of Insurers. Despite some faint criticisms by Insurers of Mr Clarkson's experience compared with that of Mr Wikborg, I am satisfied that both were qualified to give expert evidence. However, I was concerned that Mr Wikborg's hypothetical prudent underwriter was perhaps being held to unrealistically cautious standards – a matter which I discuss further in relation to non-disclosure below.

(d) Broking: I heard oral evidence from Insurers' broking expert, Mr Robert Aberdour. However, he and the Claimants' expert broker were essentially agreed as to the calculation of the trading profits which a hypothetical replacement vessel would have made (a matter relevant to the Claimants' claim under section 13A of the Insurance Act 2015), so that in fact he had no relevant evidence to give. He was cross-examined on the basis of an opinion he had expressed in his report as to the availability of a replacement vessel but this fell outside the ambit of the expert evidence on which the parties were permitted by the court to adduce broking evidence, and it seemed to me that his evidence on this point was accordingly inadmissible without the permission of

the court. In any event, it took matters no further as availability had been addressed by the valuation experts and Mr Aberdour's views agreed with theirs. I therefore leave his evidence on availability out of account altogether.

(e) Valuation: As there was no dispute between the valuation experts they did not give oral evidence before me.

DISCUSSION AND ANALYSIS

44. Although strict logic would dictate that non-disclosure is considered first, the other issues were hotly debated before me and raised a number of interesting points on which there appears to be scant authority. I therefore deal with the issues in the order in which they were addressed by the parties in their respective closing submissions.

(1) Insured peril/Fortuity

The facts

45. I start with my findings on the facts.

46. It was common ground and the expert master mariners agreed that:

(a) The United Nations Convention on the Law of the Sea ("UNCLOS") stipulates, amongst other things, that every state has the right to establish the breadth of its territorial sea up to a limit of 12 nm measured from the nearest point of land (or, in the case of an archipelagic state such as Indonesia, from an archipelagic baseline). It further provides that vessels have the right of innocent passage through a state's territorial waters without calling at any port, but that innocent passage does not

include stopping or anchoring except where incidental to normal navigation or rendered necessary by *force majeure*;[2]

(b) The relevant provisions of UNCLOS are described in The Mariners' Handbook, a copy of which was available to the Master on board the Vessel, and these are matters which every master should know;

(c) The Vessel was illegally anchored in so far as she had not obtained permission to anchor at the Waiting Location;

(d) However, the Waiting Location was within an area commonly referred to and identified as Eastern OPL Singapore which spanned both international, Malaysian and Indonesian territorial waters and where vessels commonly anchored awaiting orders without obtaining clearance from the relevant authorities;

(e) Although widespread use of EOPL Singapore could not of itself make it legal to anchor there, there had in fact been no previous complaint by the Indonesian authorities and no arrests or detentions solely for illegal anchoring prior to 8 February 2019;

(f) The spate of arrests and detentions (including that of the Vessel) on and after that date was sudden and unexpected.

47. The evidence of Mr Aitken and Captain Walker confirmed that the detentions by the Indonesian authorities in February 2019 for simply anchoring without permission in that part of EOPL Singapore within their territorial waters represented an unheralded change in attitude for which there was no precedent. Captain Walker, in particular, had been working closely with the Indonesian authorities in the area since 2015[3] and was able to

[2] It was not in dispute that neither exception applied in this case.
[3] In connection with the removal of the wreck of the "THORCO CLOUD".

state from his own observations and interactions with the Navy that no vessels had previously been arrested for anchoring there illegally. Indeed when the vessel STAR CENTURION was sunk following a collision in January 2019 while anchored awaiting orders in Indonesian territorial waters not far from the Waiting Location, no complaint appears to have been made by the Indonesian authorities that she had been illegally anchored. It is true that the Indonesian law experts were able to find a few instances of vessels having been arrested and masters prosecuted under the same provisions of the Shipping Law as were in play in this case, but they all involved some form of cargo transfer or other activity and none of them was concerned solely with illegal anchoring.

48. After the first few arrests, a number of P&I Clubs also issued circulars warning members of the change in policy and reminding them that although it had hitherto been customary and common practice to anchor in these waters waiting for orders, they were in fact territorial waters. Thus, by way of example only:

(a) NEPIA reported on 18 February 2019 that it had learned from SPICA about *"a rising number of vessels being detained by Indonesian authorities whilst at anchor in the waters around the island of Bintan. Bintan is a popular place for vessels to anchor due to its location near the shipping lanes. However, the anchorages are located within Indonesian territorial waters."*

(b) West of England reported on 21 February 2019 that they had been advised by SPICA of *"a recent change of enforcement policy by the Indonesian Navy."* The circular continued:

"It has been customary for vessels waiting for orders to anchor in waters around the island of Bintan but it should be noted these waters are within Indonesian territorial limits. Recently the Indonesian Navy has begun to detain vessels for "illegal anchoring". Local regulations require that, when a vessel is located within territorial waters, it must be cleared in and out of Indonesia. This also applies if the vessel is

> *only anchored and has no intention of 'interacting' with Indonesia, such as cargo operation, taking supplies, crew change, etc. An agent must also be appointed.*
>
> *Spica Services advise that they are dealing with 20 cases at present with vessels under arrest/ investigation for violating the regulation by not reporting to the Harbour Master's office when planning to anchor inside Indonesian territorial waters. For many years it has been a common practice of Masters to anchor in this region without any action being taken by the Indonesian authorities. This has recently changed with local authorities now rigorously enforcing the regulation, violations of which can lead to a fine as well as extensive delay to the vessel and may even be considered to constitute a criminal act."*

49. Other circulars from the UK P&I Club and the Shipowners' Club were to like effect.

50. As to the state of knowledge of the various actors, it was Insurers' pleaded case that the Master and/or the Claimants (later particularised as the person in NGM's Operations Department who sent the email instructions to anchor) knew or at least ought to have known that:

    (a) The Vessel was anchored within Indonesian territorial waters;

    (b) No approval had been obtained for her to do so;

    (c) Anchoring in Indonesian territorial waters without approval would or could attract a sanction.

51. My findings on these particular allegations are as follows.

The Master

52. As noted above, the Straits of Malacca and Singapore are some of the busiest shipping lanes in the world and it was not in dispute that the sea boundaries between Singapore, Malaysia and Indonesia are complex. None of the charts which were available to the Master marked the boundaries of the respective territorial seas, nor were these marked on any paper charts. Moreover, there were no other materials on board the Vessel from

which the extent of Indonesian territorial waters would have been apparent and it was not suggested that there were any other materials which she ought to have had on board.

53. The Master clearly knew that he had not obtained permission to anchor at the Waiting Location but I accept his evidence that he did not subjectively appreciate that he was anchoring in Indonesian territorial waters. Fortified by his experience over the previous 20-25 years and the presence of numerous other vessels, he regarded this as a usual anchorage and simply did not apply his mind to the question of whether he was in territorial or international waters. I find it entirely plausible that in busy sea lanes such as these, he was more concerned with finding an anchorage which was safe from a physical and navigational point of view rather than a legal one.

54. His evidence that he did not appreciate he was anchoring in Indonesian waters was consistent throughout. Although Insurers sought to suggest that his earliest communications did not state this expressly, on a fair reading those communications reflected the Vessel's current predicament and his acceptance that she had in fact anchored illegally rather than seeking to explain how she came to get there. Insurers accepted that at least from 28 February 2019 he consistently maintained in his interviews with the Navy and subsequently in his defence at trial that he was unaware he had anchored in territorial waters. This is supported by the contemporaneous evidence of other crew members which was to like effect. It is also consistent with NGM's immediate reaction which was to seek the assistance of the Singapore authorities on the basis that the Vessel was in fact in Singaporean waters (see further paragraph 71. below). I note further that the P&I circulars quoted above clearly felt it necessary to warn members that they may have misunderstood where the Indonesian sea boundaries were drawn and that parts of EOPL Singapore were in fact within Indonesian territorial waters.

55. Insurers nonetheless submitted that there was evidence to suggest that the Master anchored in territorial waters consciously. They relied on a passage from a translation of the Chief Engineer's interview by the Navy in which he referred to a call between the Master and NGM's Operations Department concerning the instructions to anchor. Any such call was firmly denied by the Master and, bearing in mind that the Chief Engineer was Ukrainian and that his interview was conducted by being interpreted from Indonesian into English and then back again, it scarcely needs saying that the scope for something to have been, literally, lost in translation was considerable. I regard this evidence as unreliable and wholly incapable of displacing the Master's oral evidence.

56. The same criticism can be made in relation to the emails from Syam & Syam to NGM sent on 19 and 20 February 2019 on which Insurers also relied in this respect. Given that English was evidently not a language in which Ms Listyarto was fluent, I cannot read these emails as providing any reliable indication that the Master knew he was anchoring in territorial waters *at the time he did so* rather than recognising later that this is what he had in fact done.

57. I regard as irrelevant the fact that the original passage plan seems to have posited an anchorage location in international waters. Insurers argued that this showed the Master consciously addressing the question of territorial waters. I reject this suggestion and find it more likely that it was a matter of pure happenstance that the Master's first choice of anchorage was in international waters rather than territorial waters. Likewise, I find that it was a matter of happenstance that the eventual Waiting Location was in territorial waters.

58. What seems to have happened is that while the Vessel was making her way to the Master's planned location he saw on the radar that it was already occupied by another

ship. His evidence was that this became apparent when he was approximately half-way through the TSS. He therefore had a choice on exiting the TSS either to head northeast and find another location in the general area of his first choice, or to head southeast. His evidence was that if he had gone northeast he would have been more likely to encounter traffic entering or leaving the TSS and the Archipelagic Sea Lane which also formed a *de facto* limit to the available anchoring area. He therefore elected to go southeast which he said (and I accept) was an altogether quieter route. However, if in fact he had had the question of territorial waters in mind, it is frankly incomprehensible that he would not have taken the more northerly route to look for a space in international waters. It was common ground that there would have been room to find a suitable location and I accept the Master's evidence that if he had been focusing on the point, he would have selected a legal anchorage and would not have deliberately courted the risk of anchoring without permission in territorial waters.

59. So far as relevant, I reject Insurers' suggestion based on the evidence of Captain Todorov that the Master should have incorporated not just one but several contingency anchorages into the passage plan. I regard this as unrealistic and an example of Captain Todorov's somewhat perfectionist approach. As Captain Walker pointed out, it was in any event likely to be a futile exercise because it was only when the Vessel got within radar range that it would be possible to see which locations were occupied and which were not. Since the whole area would have been appraised in general as part of the planning process anyway, it would be sufficient simply to attach co-ordinates of the new waypoints and eventual anchoring position to the original plan without the need to draw up a fresh passage plan while under way. This is in fact what the Master appears to have done.

60. Since I am not prepared to infer that the original passage plan demonstrated that the Master in fact had territorial waters in mind when choosing an anchorage, I likewise decline to draw any adverse inferences from the absence of that passage plan in either electronic or hard copy form. I accept the Master's evidence that the plan would only have been partially filled in electronically and that it would then have been printed out and completed by hand. The hard copy would then have been filed while the electronic version was left on the system and may have been overwritten subsequently. In circumstances where the Vessel was boarded by the Indonesian Navy who demanded all her documents and when she has since been sold, it is impossible for me to conclude on a balance of probabilities that the passage plan has been deliberately suppressed rather than simply being lost or taken by the Navy and not returned.

61. I therefore reject the suggestion that the Master in fact knew he was anchoring in Indonesian territorial waters at the time he did so.

62. Nevertheless, he frankly accepted that if he had thought about the matter from that point of view, he would have known that he was within 12 nm of Indonesian territory and that he was therefore probably in territorial waters and so exposed to the exercise of Indonesian sovereign authority in the absence of permission to anchor. The next question, therefore, is whether he should have been so aware and whether he should have reviewed the passage plan with these considerations in mind.

63. Captain Todorov was quite clear that he should, although he accepted that none of the publications which the Vessel was required to and did have on board in relation to passage planning made specific mention of territorial waters as a relevant consideration. At most, they referred to other publications which in turn referred to the provisions of UNCLOS. Captain Walker's evidence, on the other hand, was that the Master's primary

concern in selecting an anchorage would have been physical and navigational safety, although he too accepted that the Master should have known whether or not he was in territorial seas and that by anchoring there without permission he would have been exposing the Vessel to a risk of detention, if only a small one.

64. I accept that passage planning is primarily concerned with physical and navigational safety. However, I cannot accept that the legality of the planned passage can be wholly ignored. On the contrary, it seems to me that good seamanship requires it to be taken into account – and this applies as much to a short passage to an anchorage as it does to a much longer passage.

65. I note that this is the view also reached by a very experienced maritime arbitration tribunal in relation to the AFRA OAK, another vessel arrested and detained at around the same time as WIN WIN for the same reason. The arbitration in that case arose from a charterparty dispute and concerned the application of the Hague Rules exception for act, error or default in navigation or management of the vessel. The charterers had given orders to proceed to EOPL Singapore and the tribunal had to consider whether the master's decision to anchor at the location he did was a navigational decision. In a passage quoted by Teare J with apparent approval on appeal from the award in *The Afra Oak,* [2023] EWHC 2978 (Comm) at [67(c)], the tribunal said this:

"Absent knowledge of the Indonesian Navy's campaign, the risk of illegal anchoring in Indonesian waters leading to adverse consequences for the vessel could fairly be assessed as small in early February 2019, which is no doubt why it was within the range of ordinary practice to anchor in this locality. But it does not follow that it was 'good navigation and seamanship' to court a small danger of suffering consequences of illegal anchoring for no good reason, even if it was ordinary practice. In another field, many cars as a matter of ordinary practice drive down the motorway at 71-75 miles an hour, because the drivers consider that there is little or no chance of being penalised for exceeding the speed limit slightly, even though they appreciate they are breaking the law. If an objective prudent observer was asked if this was an exercise of 'good' driving, the obviously correct answer would be 'no'."

66. So too here, despite the long-standing usage of these waters to anchor awaiting orders, I consider that the Master should have reviewed the passage plan with the legality of the proposed anchorage in mind. However, as already indicated, I am also satisfied on the evidence that if he had done so, he would have taken care to select a different anchorage in international waters either at the outset or, if he only realised subsequently that he was in territorial waters, would have moved out immediately.

67. I further find that the Master had no reason to suppose that the Vessel would be detained as a result of anchoring in territorial waters without permission. He could not reasonably be expected to be familiar with the finer points of Indonesian law and the mere fact that he should have appreciated that anchoring without permission would expose the Vessel to the exercise of Indonesian sovereign authority in general terms does not of itself mean that he should have foreseen the risk of arrest and detention when no such actions were known to have been taken before. In this regard, it is not without significance that many other vessels were anchored in Indonesian territorial waters at the time and had done so previously, whereas very few continued to do so after the February 2019 detentions. This was strikingly illustrated by the charts attached to Captain Walker's report and gave rise to the inevitable inference (accepted by Captain Todorov) that the vast majority of vessels which had previously used EOPL Singapore as an anchorage had done so without permission.

68. Finally, I reject Insurers' submission that Captain Abdullah's report of a meeting on 20 February 2019 with Colonel Robert of the Indonesian Navy is evidence that the Master was asked by the Navy to move out of territorial waters but refused to do so. The Master's evidence was quite clear that this was something he had repeatedly offered to do but which had been refused by the Navy. Colonel Robert was not involved in the initial

detention and the likelihood is that he simply misunderstood and misinterpreted what he had been told about the Master's refusal on safety grounds to comply with the Navy's initial demand to move to another location in Indonesian waters. It is inconceivable that if the Master had been given the opportunity to leave Indonesian waters, he would not have grabbed it with both hands and considerable relief.

Second Claimant

69. When asked to particularise who exactly on the part of the Claimants did or should have had the knowledge alleged, Insurers' response was that it was the person in NGM's Operations Department who sent the instructions to anchor awaiting orders. In closing, their eventual submission was that Captain Petikas "probably knew" that the Vessel had anchored in territorial waters without permission and was therefore exposed to the risk of exercise of sovereign authority.

70. The evidence established that the instructions to anchor could only have been sent by Captain Petikas or Mr Grigoriadis and I accept that in all probability either or both of Captain Petikas and Mr Grigoriadis received and read the Master's email reporting his exact anchoring location. However, neither Captain Petikas nor Mr Grigoriadis was called to give oral evidence, and in those circumstances it is impossible for me to make any definitive findings as to their respective states of mind. I am certainly not prepared to infer that either of them had the actual knowledge alleged. First, the instruction email cannot be construed as an unequivocal instruction to anchor in Indonesian waters since it only recommended a position *"around"* a particular set of co-ordinates, leaving it to the Master to determine exactly where to drop anchor. Secondly, an email sent by Mr Grigoriadis to the Master shortly after the detention expressly stated that he should not agree to follow the Navy anywhere because *"you are anchored in international waters*

and they can check whatever they want at this position." Johnasia (who could only have got their information from either the Master or NGM) likewise seem to have thought at first that the Vessel was in international waters and advised the Master on 17 February 2019 not to follow the Navy's instructions. More likely Captain Petikas and Mr Grigoriadis, like the Master, never applied their minds to the question.

71. As for Mr Joicey, he said in his written and oral evidence, and I accept, that NGM's immediate reaction after becoming aware of the detention was to seek the assistance of the Singapore Navy on the basis that they thought the Vessel was in Singapore waters and that they only realised the true position when they were informed by Johnasia that in fact she was in Indonesian waters. Although the Master's email reporting the exact anchorage location was forwarded to Mr Moundreas' general email address, I accept his evidence that he would not have read it or, if he even glanced at it, focussed on it at all. He may well have indicated to the Operations Department that there was no immediate employment for the Vessel and that she should anchor off Singapore to await orders but I reject the suggestion that he concerned himself with matters such as her precise anchorage location or that he should reasonably have been expected to do so.

72. But in any event, whether different people within NGM thought that the Vessel was in international waters or in Singaporean waters, I find it implausible that they would have instructed the Master not to co-operate with the Indonesian Navy if they had known and appreciated that she was in fact in Indonesian waters. In short, I do not accept that anyone in NGM actually knew that the Vessel was anchored in Indonesian territorial waters. As such, the question of whether the knowledge of Captain Petikas is to be attributed to Mr Moundreas does not arise and I say no more about it.

73. That said, I am prepared to go some way with Insurers in finding that the Operations Department (although not Mr Joicey or Mr Moundreas personally) should have appreciated that the initial co-ordinates they provided and the actual Waiting Location were in Indonesian waters. This is for much the same reason that I find the Master should have had the legality of any anchorage in mind. However, as with the Master, I find that no-one at NGM appreciated the risk that the Vessel would be arrested or detained or should have appreciated this even if they had known that she was in territorial waters.

74. In summary:

    (a) Neither the Master nor anyone at NGM or any of the other Claimants actually knew that the Vessel had anchored in Indonesian waters until after she had been arrested;

    (b) The Master should have reviewed the passage plan with territorial waters in mind;

    (c) If he had done so, he would have selected an alternative legal anchorage;

    (d) NGM's Operations Department should likewise have known that the co-ordinates they proposed were in Indonesian territorial waters, although they did not instruct the Master to anchor at this or any other precise location;

    (e) Neither the Master nor anyone at NGM or any of the other Claimants appreciated or should have appreciated that the Vessel might be arrested and detained as a result of anchoring in Indonesian territorial waters without permission.

The law

75. It is not controversial that insurance is concerned with the risk or uncertainty of loss. This does not mean that coverage is limited to events which are unexpected or unforeseeable; it can include loss caused by events which are both probable and

foreseeable. Nonetheless, it does not protect the assured against losses which are certain to result or which are caused by ordinary wear and tear or are deliberately caused by the assured and it is in this sense that it is said that a loss must be fortuitous in order to be covered: see *British and Foreign Marine Insurance Co. Ltd v Gaunt,* [1921] 2 AC 41, at 52 (*per* Viscount Finlay) and 57 (*per* Lord Sumner); *The Miss Jay Jay,* [1987] 1 Lloyd's Rep. 32, at 38-39; *The Cendor Mopu,* [2011] UKSC 5; [2011] 1 Lloyd's Rep. 560 at [39]-[46].

76. On behalf of the Claimants, Mr Peter MacDonald Eggers KC submitted that there were three obvious categories where a loss would not be considered fortuitous:

    (a) Where it was caused by the wilful misconduct of the assured;

    (b) Where it was the result of ordinary wear and tear or was damage incidental in the ordinary course, or due to inherent vice;

    (c) Where the loss was inevitable.

77. He relied on section 55(2) of the Marine Insurance Act 1906 as reflecting this categorisation. It was not in dispute that despite the passage of the more recent Insurance Act 2015, the law on insured perils and fortuity had not changed and that it was therefore permissible to have regard to the provisions of the 1906 Act in this regard. So far as material, section 55(2) provides as follows:

"(a) The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew;

…

(c) Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter

insured, … or for any injury to machinery not proximately caused by maritime perils."

78. Two things follow from the express provision in sub-section (a) that wilful misconduct of the assured precludes recovery:

    (a) The insurer is not relieved of liability where the loss is caused by mere negligence, whether that of the assured itself or of the master or crew: *Arnould, Law of Marine Insurance and Average* (20th ed.) para. 22-06; *The DC Merwestone,* [2013] Lloyd's Rep.I.R. 582 at [36].

    (b) It is likewise irrelevant that the loss is caused by the wilful misconduct of the crew as opposed to that of the assured itself.

79. Section 55(2) does not, of course, purport to be exhaustive of the circumstances in which the assured is disentitled from recovering but Mr MacDonald Eggers submitted that once one went beyond the three categories identified in paragraph 76. above, it was difficult to know where to draw the line between what was fortuitous and what was not.

80. On behalf of Insurers, Miss Philippa Hopkins KC said that it all depended on the type of policy and type of peril concerned and that care should be exercised when looking at authorities on, for example, perils of the sea. As she correctly pointed out, perils of the sea are somewhat different to other insured perils, since the concept of fortuity is built into the definition of the peril itself through the exclusion of the *"ordinary action of the wind and waves".* Likewise, she submitted, accident policies also raise different considerations. For example, in *Charlton v Fisher,* [2001] EWCA Civ. 112; [2002] QB 578 at [60] which concerned motor insurance, Rix LJ pointed out that even deliberate conduct may have consequences which are unintended and accidental since the driver who deliberately speeds or drives dangerously does not usually intend to crash. However, while Miss Hopkins accepted that an accident caused by an intentionally speeding driver

is an accident even though it is foreseeable, she queried whether the arrest and detainment would still be regarded as accidental if the driver had instead been arrested and detained for speeding.

81. She developed this argument by submitting that war risk policies likewise raised special considerations of their own. She started from the non-controversial proposition that the scope of any insurance cover has to be determined by looking at both the perils insured and the exclusions to the policy since the one informs the scope of the other. This is particularly the case with war risk policies on the Institute Clauses which, as noted above, work by writing back into the cover those perils which are excluded from the standard Hull Clauses. The scope of the exclusions is therefore obviously critical to the proper interpretation of the cover: see *The Wondrous,* [1991] 1 Lloyd's Rep. 400, at 416-417.

82. In her submission, there was a particular tension in war risk policies between acceptance that detainment under criminal laws could be covered on the one hand (see, for example, *The Aliza Glacial,* [2002] EWCA Civ. 577; [2002] 2 Lloyd's Rep. 421 at [44]; *The Anita,* [1970] 2 Lloyd's Rep. 365, at 377) and the fact that the operation of the ordinary criminal law usually has nothing to do with war or war-like perils. She drew attention to the comment of Rix LJ in *Royal Boskalis Westminster NV v Mountain,* [1997] L.R.L.R. 523, at 535 that, *"It is also necessary to distinguish between the ordinary application of the laws of a country, albeit by political or executive act, and intervention which is out of the ordinary course of events and contains some element of fortuity in it"* which she said recognised this tension.

83. However, the lynchpin of her argument that fortuity in war risk policies was to be treated differently from other cases was the decision of Hobhouse J (as he then was) in *The Wondrous (supra)* and, in particular, the following statement:

"But it was still necessary to show that the detention was fortuitous. How to characterize the element of fortuity in this context is not easy. If the owners had asked themselves at the time of placing the cover or at the time of making the charter-party whether detention for any substantial period after loading a cargo at Bandar Abbas was to be anticipated or likely to occur in the ordinary course, they would have correctly answered that it was not. But on the other hand, where a situation comes about as a result of the voluntary conduct of the assured, it would not normally be described as fortuitous. It did not happen by chance but by the choice of the assured. Put another way, it would be in the ordinary course that, if the owners of a vessel do not pay the port dues for which they are liable to the port authority in respect of the stay of the vessel in that port (or provide acceptable security), the vessel will not be cleared. For the purposes of the law of insurance, in the absence of an express agreement to the contrary, a policy should not be construed as covering the ordinary consequences of voluntary conduct of the assured arising out of the ordinary incidents of trading; it is not a risk."

84. The facts of *The Wondrous* can be summarised as follows. In that case, a vessel had been chartered to load molasses at Bandar Abbas in Iran. She arrived on 10 March 1987 and by 14 August 1987 had loaded 23,000 tons of cargo. However, she did not ultimately sail until 17 October 1988, since she was unable to leave port due to absence of customs clearance. To obtain clearance, it was necessary to pay port dues and a local tax on freight and also to provide a foreign currency guarantee. Under Iranian law, the exporter (who in this case was the charterer) was responsible for providing the guarantee, while the owners were responsible for the port dues and taxes. However, as between owners and charterer under the charterparty, the latter were also the responsibility of the charterer. The charterer failed to pay the dues and taxes or to provide the guarantee and the vessel was not allowed to leave port, thus depriving the owners of the opportunity to use her to earn hire.

85. The owners claimed under their loss of hire and freight policies. The loss of hire policy was on the Institute War and Strikes Clauses Hulls Time, which covered detainment excluding detainment by reason of infringement of customs regulations and also excluding loss or damage from *"any financial cause"*. Hobhouse J held that the entirety of the detention was excluded by the customs regulations exclusion. However,

irrespective of that, he held that the owners could not in any event have recovered in respect of detention prior to 30 September 1987 because *"The dominant and ... only proximate cause was the fact that to that date the owners had neither discharged nor acceptably secured their liabilities."* The liabilities in question were the port dues and taxes which, as between the owners and the Iranian authorities, it was the owners' liability to pay. Since only the payment of money was involved, the owners could at any time have satisfied these debts and removed that particular obstacle to the clearance of the vessel. On 30 September 1987, however, the owners entered into a settlement agreement which involved securing their liabilities and the judge held that the detention thereafter was beyond their control in the sense that although they could in theory have satisfied the charterer's obligation to put up the foreign currency guarantee themselves, these matters were *"in no sense ordinary incidents of ownership of the vessel or ordinary trading; it was fortuitous that the owners should find themselves in a position where they would be forced to bear these liabilities, which were in no sense their responsibility, if the vessel was not to be detained."* It is therefore clear that Hobhouse J was drawing a clear distinction between the earlier period of detention which he did not regard as fortuitous and the latter which he did.

86. Since the claim failed for other reasons, the judge's reasoning on this point is technically *obiter*. Nonetheless, commercial lawyers will always pay the utmost heed and attention to any statements of principle by Mr Justice Hobhouse. On the facts in *The Wondrous*, the owners made a deliberate and conscious choice not to pay the port dues and taxes for which they, and they alone, were liable to the Iranian authorities and without which the vessel could not be cleared – this being the ordinary and inevitable consequence of non-payment. One can therefore readily see that the detention of the vessel (in the sense of refusing to allow her to leave port) was not fortuitous because it was brought about by the

assured's deliberate and voluntary conduct. The same result could no doubt have been reached on the basis of causation.

87. Founding herself on this decision, Miss Hopkins argued that the conduct of the Vessel in anchoring at the Waiting Location was entirely voluntary, that by anchoring in Indonesian territorial waters she voluntarily exposed herself to the operation of the local law and that her consequent arrest and detention, being entirely lawful, were not only foreseeable, but simply an ordinary consequence of that voluntary conduct.

88. With the greatest respect to her arguments, however, which were most skilfully and attractively presented, I am unable to agree. In my judgment, what Mr Justice Hobhouse had in mind was loss which was bound to result from the conduct voluntarily entered into *"by the choice of the assured"*. In the case of port dues, it is invariably the case worldwide that a vessel will not be cleared and allowed to leave port unless they are paid and any owner will know this. On the facts before him, therefore, it could properly be said that the detention was the ordinary consequence of the owners' deliberate and voluntary choice not to pay. The decision in *The Wondrous* therefore says no more than that consequences which can be expected to flow in the ordinary course of events from a deliberate choice made by the assured are not fortuitous.

89. As so stated, the proposition has two aspects:

    (a) there must be some choice by the assured;

    (b) the consequences must be such as to flow in the ordinary course of events.

90. As to the first of these, the concept of choice implies awareness that a decision is being made between two or more options which are different in some relevant sense. Thus, in the context of this case, it is not sufficient to say simply that the Master had a choice to

anchor at location x or location y. If both x and y were in international waters, no significance would attach to the choice between them. The same would be true if they were both in territorial waters.

91. In my judgment, therefore, the Master and/or NGM cannot be said to have made a choice to anchor at the Waiting Location in the sense Hobhouse J had in mind in *The Wondrous* unless they were subjectively aware that they were choosing to anchor inside territorial waters rather than outside. To that extent, the situation is akin to one of recklessness. On my findings of fact set out above, they did not have such subjective knowledge and it makes no difference to say that they should have done. If an assured is unaware that it is making a choice which carries legal significance, then even if it ought to have known, that is at most mere negligence and it would be contrary to the spirit of section 55(2)(a) to deny recovery on grounds of fortuity in those circumstances. Moreover, it is artificial to posit a counterfactual situation where the Master was aware that he was anchoring in territorial waters but nonetheless went ahead and continued to do so. As I have found above, if he had realised that this was the case, he would either have moved or not anchored there in the first place.

92. As to the second aspect of the proposition in *The Wondrous*, it seems to me that the situation which Hobhouse J had in mind was akin to one of inevitability. There is no conceptual difficulty in ascertaining whether particular consequences arise out of the ordinary incidents of trading. The only question is whether the assured must subjectively appreciate that the consequences which eventuated were in fact the ordinary consequences of its conduct.

93. Obviously, if the assured knows that its vessel *will* be detained or deliberately courts the risk, being reckless as to whether or not it eventuates, then it will be guilty of wilful

misconduct. At the other end of the scale, I do not accept that mere foreseeability of the consequences is sufficient to render the detention non-fortuitous. Miss Hopkins relied in this context on a decision of the United States Court of Appeals, Second Circuit in *Blaine Richards & Co., Inc v Marine Indemnity Insurance Company of America,* (1981) AMC 1 where the court commented in passing that what was excluded by the FC&S clause from an All Risks policy (and thus reinstated in the war risks policy) were losses from the *"unforeseeable actions of sovereign states"*, including seizures and detentions by both civil or criminal authorities. However, there was no discussion of the point and this case is a slender basis for her argument.

94. In my view, the answer flows from my conclusion that something akin to inevitability is required in order for a loss to be regarded as an ordinary consequence of the assured's conduct in the ordinary course of trading. Once it is established that a particular consequence is inevitable in the sense that it is bound to eventuate in the ordinary course, I do not see why in principle it should matter whether or not the assured is subjectively aware that it is so inevitable. The assured's state of mind does not affect the inevitability or otherwise of the loss. It follows that I agree with Miss Hopkins that subjective awareness by the assured of the ordinary consequences of its conduct is not required.

95. Nevertheless, I find that as at mid-February 2019, arrest and detention were not ordinary incidents of merely anchoring in Indonesian territorial waters without permission. Not only was such a response wholly unprecedented, but it was also extraordinarily heavy-handed when shipowners might reasonably have expected some advance warning of the Indonesian government's change of policy[4] and/or a simple warning and request to move out of territorial waters. Immediate arrest and detention were therefore unexpected.

[4] Such warning was in fact given by the Malaysian authorities in 2014 when they similarly began to insist on vessels obtaining clearance in order to anchor in Malaysian waters.

96. In this respect, it seems to me that there is a real distinction between this case and the facts in *The Wondrous*. As already noted, it is universal practice worldwide that a vessel will not be allowed to leave port until all port dues and local taxes have been paid. The same could certainly not be said on 14 February 2019 as regards detention for anchoring one mile inside territorial waters in a location commonly used for years by vessels anchoring EOPL Singapore without objection from the Indonesian authorities.

97. Thus, whilst detention was a *permissible* and *possible* consequence of the Vessel's choice of anchorage, and even foreseeable should anyone have cared to investigate the position under Indonesian law, it could not in my judgment be said to be an inevitable or even ordinary consequence in the circumstances prevailing at the time. The position might well have been different if there had been even a few arrests for illegal anchoring in previous years, although it would then be necessary to determine what level of arrests elevated detention to an "ordinary consequence". However, that was not this case and I decline to grasp that particular nettle.

98. I do not regard the somewhat opaque comment of Rix LJ in *Royal Boskalis* as detracting from the analysis suggested above. He contrasts the ordinary application of laws with intervention out of the ordinary course of events but, while he refers to *The Wondrous*, he does not elaborate further and, in particular, he does not consider one of the points which arises here, namely whether the ordinary application of the criminal law (in the sense that arrest for illegal anchoring was a permissible response) can at the same time be out of the ordinary course of events (in the sense that it was a completely unprecedented and unexpected response to what had happened). In *Royal Boskalis*, of course, the law in question was very much *not* an ordinary law, but was a new law introduced as a response to sanctions imposed on Iran following its invasion of Kuwait and which had

retrospective effect. Moreover, it was held that the cause of the detention was in any event not the law, but rather the claimants' decision to remain in Iraq to continue performance of their dredging contract.

99. Miss Hopkins' alternative analysis was that the court must, by construing the insured perils and exclusions together, determine whether the detainment under consideration is *"the sort of arrest, restraint or detainment which the draftsman had in mind"*: see *The Wondrous,* [1992] 2 Lloyd's Rep. 566, at 572 *per* Lloyd LJ. This to my mind does not advance the argument so far as fortuity is concerned and is really a repackaging of her argument on the application of exclusion (e) (as to which see below).

100. In conclusion on this issue:

(a) There was no wilful misconduct (and in any event, wilful misconduct is not alleged);

(b) There was no <u>choice</u> by the Master or the Claimants to anchor inside territorial waters rather than outside;

(c) In any event, the arrest and subsequent detention of the Vessel was not the ordinary consequence of that conduct arising out of the ordinary incidents of trading.

101. The loss is accordingly not deprived of its fortuitous character and this ground of defence fails. It is therefore unnecessary to consider whether a finding of non-fortuity as against NGM would necessarily have affected the claims of the other Claimants bearing in mind that this was a composite policy.

(2) Exclusion (e)

102. The Vessel was detained under the Shipping Law of Indonesia (Law 17/2008) passed in 2008 which replaced an earlier law. The preamble to the Law refers to Indonesia as an

archipelagic state with very wide territorial waters. It records the object and purpose of the Law being, amongst other things, to strengthen national resilience, to provide for a national transportation system to support economic growth and regional development and to strengthen state sovereignty. The national transportation system is stated to include sea transport, harbour affairs, shipping safety and security and protection of the marine environment.

103. The Law covers a very wide range of matters and it is accepted that, as indeed was obvious, the individual provisions of the Law did not all address each of the objectives set out in the preamble.

104. The Vessel was initially detained under Articles 193(1)(a) and 219(1) of the Shipping Law, although in the event the Master was only prosecuted under Article 193(1)(a). These two Articles provide (in translation) as follows:

"Art 193

(1) During sailing, Masters must comply with the provisions related to:

a. trafficking procedure; [scil. traffic]
b. shipping lanes;
c. route system;
d. area of shipping of ship traffic; and
e. Shipping Navigation Aid Means.

...

Art 219

(1) Each sailing ship shall have a Sailing Consent Letter issued by a Harbourmaster.

…"

105. It will be recalled that the Policy excludes loss caused by, resulting from or incurred as a consequence of "*Arrest, restraint or detainment under customs or quarantine regulations and similar arrests, restraints or detainments not arising from actual or*

impending hostilities." The experts on Indonesian Law agreed that Vessel had not been detained under any customs or quarantine regulation. Insurers nonetheless asserted that the exclusion applied on the basis that there had been a similar arrest, restraint or detainment not arising from actual or impending hostilities.

106. It was common ground that this submission gave rise to two sub-issues: (1) a question of law as to the correct construction of the exclusion; (2) a question of fact as to whether the exclusion as so construed applied to the events which had occurred. It was also not in dispute that the burden of proof was on Insurers in both respects.

Construction

107. The critical question in this regard, on which the diligence of seven counsel has been unable to unearth any authority, either English or American, is the meaning of the word *"similar"*. Similar to what and in what respects? Although the experts vouchsafed some views on these matters in their reports, it was agreed that the question of construction was for the English court alone and that the ordinary principles of construction applied, namely what a reasonable person with all the background knowledge which was reasonably available to both parties at the date of the contract would have understood the wording of the exclusion to mean. In the specific context of an insurance policy it is, as I have noted above, necessary to construe any exclusions together with the insured perils so as to arrive at a coherent construction of the policy as a whole. I also accept that where there are alternative constructions, the fact that one of them deprives the policy of most of the cover which it would otherwise provide is a relevant factor in determining which of them is correct.

108. So far as concerned the background against which the exclusion fell to be construed, the following were not in dispute:

(a) The exclusion does not exclude arrests etc. under any regulations of whatever nature, only arrests under certain specified regulations, viz. customs and quarantine regulations.

(b) The exclusion has been part of the American Institute War Risks Clauses since at least the 1940s, although neither party had been able to disinter its legislative history despite their best efforts. It is possible, to put it no higher, that the *"similar arrests"* wording was added at some stage by amendment but, if so, no-one knows when or why.

(c) The corresponding exclusion in clause 4.1.5 of the English Institute Clauses 1983 is not in the same terms. This provision originated with the 1959 Institute Clauses when it was confined (so far as relevant for present purposes) to detainments *"under quarantine regulations or by reason of infringement of any customs regulations"*. The words *"or trading"* were added in the 1983 revision: see *The Kleovoulos of Rhodes,* [2003] EWCA Civ. 12; [2003] 1 Lloyd's Rep. 138 at [29].

(d) The phrase *"customs regulations"* in clause 4.1.5 is to be construed broadly and in a businesslike manner to include regulations, in whatever form and wherever to be found, which regulate or deal with the imposition of customs duties and the importation and export of goods. This includes regulations banning imports just as much as regulations imposing duties on imports with the result that arrests for smuggling are within the exclusions: *The Kleovoulos of Rhodes (supra); The Anita,* [1970] 2 Lloyd's Rep. 365; *The B Atlantic,* [2012] EWHC 802 (Comm); [2012] 1 Lloyd's Rep. 629 at [22]-[25]. Nonetheless, the express addition of trading regulations in 1983 indicates that there are some limits and that the words *"customs regulations"* cannot be construed as referring to trading generally.

(e) Like the English Institute Clauses, the American Institute War Risks Clauses are intended to be used in policies covering vessels trading worldwide. The words should accordingly not be construed from a narrowly English (or US) perspective.

109. Against this background, Mr MacDonald Eggers argued that *"similar"* means something more than similarity in formal aspects. Thus, it is not sufficient that the arrest in question may have been carried out by the same agency or authority that carries out arrests under customs or quarantine regulations. Nor is it sufficient that the procedure for arrest and subsequent detention/release is the same as under customs or quarantine regulations. In this regard, he relied on the *Kleovoulos of Rhodes (supra)* at [43].

110. His submission was that the words required an arrest under regulations which were materially the same as customs or quarantine regulations otherwise, he said, the assured would not know whether it was covered or not. In this latter regard, he relied on *Marc Rich & Co. AG v Portman,* [1996] 1 Lloyd's Rep. 430, at 448 where Longmore J held in the context of a demurrage liability cover which stipulated *"C/P: Asba 2 or similar"* that provisions which extend the ambit of charterers' liability for demurrage beyond what was provided in the unamended Asba 2 form were not *"similar"* and that the endorsement only covered immaterial amendments.

111. Adopting this approach, he argued that on an objective construction the *"similar"* wording in exclusion (e) achieved the same end result as had been arrived at in the construction of clause 4.1.5.

112. For her part, Miss Hopkins advanced three possible constructions of exclusion (e).

113. The first was that the wording covered any detainment not arising from actual or impending hostilities. I reject this out of hand and, to be fair to Miss Hopkins, she did not

press it with any vigour. Clearly this is not what the clause means on an objective reading otherwise it would simply have referred to *"arrest under regulations"* or (as in *Piraeus Bank AE v Antares Underwriting Ltd,* [2022] EWHC 1169; [2022] 2 Lloyd's Rep. 1) *"arrest under the criminal law of any state"*. As it is, the express reference to customs or quarantine regulations can only be regarded as a limiting feature which on a natural and ordinary reading must qualify the meaning of *"similar"*.

114. A further objection to this construction is that it would restrict cover for arrests and detentions to war-related arrests. Since it was common ground that detentions under the criminal law were covered under the Policy, this would be a radical change in the basis of cover which to my mind would need to be much more clearly expressed before it could be regarded as expressing the common intention of the parties. It would also have the effect of excluding politically motivated detentions. Miss Hopkins accepted that war risk policies can in principle cover detainments which are not war-related but argued that it did not necessarily follow that this particular policy did so and that the words *"not arising from actual or impending hostilities"* was not to be found in most wordings. This is true. However, the wording is part of the standard American Institute War Risks Clauses and I am unable to accept that the parties intended to effect such a fundamental change to the cover for arrests and detainments by virtue of an exclusion.

115. Insurers' second suggested construction was that, in addition to arrests under customs and quarantine regulations, the exclusion covered detainments which were under regulations but not arising from actual or impending hostilities. As she explained, this differed from her first suggested construction by distinguishing between ordinary peacetime regulations (other than customs or quarantine regulations) which gave rise to criminal penalties and the arbitrary exercise of executive power without legislative basis

and for purely political purposes, such as occurred in *The Silva,* [2011] EWHC 181 (Comm); [2011] Lloyd's Rep. I.R. 470. On this construction, the former but not the latter would be excluded unless war-related. She submitted that it was unsurprising to have a wide regulations-based exclusion in what was primarily a war risks cover.

116. I reject this construction also. In my judgment it differs very little from her primary construction since the result is still to restrict cover for detentions to war-related cases when the assured would otherwise be covered for politically motivated and other non-war-related detentions. The likelihood of a case such as *The Silva* where the vessel's detention was not war-related but was not under any regulation either seems to me to be too remote to be allowed to dictate the construction of the exclusion.

117. In any event, it is very difficult to spell this construction out of the wording. If it was what the parties intended, they expressed themselves in an extraordinarily obscure way and I am not persuaded that this was in fact their objective intention even if (as seems likely), the *"similar"* wording was introduced at some stage by amendment and can therefore fairly be construed as extending the ambit of the original exclusion. I do not accept that the words *"not arising from actual or impending hostilities"* would be rendered redundant if this construction were rejected. On the contrary, I can well see that regulations might be introduced in the face of actual or impending hostilities which dealt in substance with matters pertaining to customs and quarantine.

118. This left Miss Hopkins' third suggested construction which, at least in its final formulation, was not so very different from that espoused by Mr MacDonald Eggers, namely that the detainment must be similar in nature to a detainment under customs or quarantine regulations.

119. It seems to me that this is broadly correct although I would express it slightly differently. In my judgment an arrest, restraint or detainment is *"similar"* for the purposes of exclusion (e) if the underlying purpose and objective of the arrest is materially the same as the underlying purpose and objective of an arrest under customs or quarantine regulations. I therefore substantially accept the submissions of Mr MacDonald Eggers that exclusion (e), properly construed, arrives in a different way at the same result as clause 4.1.5 under the English Institute Clauses. Under the latter, the effect of *The Kleovoulos of Rhodes* and *The Anita* is that *"customs regulations"* is to be construed broadly as extending beyond simply matters of customs duties to anything regulating exports and imports. In the absence of any *"similar"* wording, this was the only way in which the clause could be construed to cover things to do with smuggling. By contrast, exclusion (e) has express *"similar"* wording to which effect can be given by construing it to cover arrest for breach of any regulation which in substance equates to a *"customs regulation"* as construed under English law, whether the arrest itself is made under a customs regulation or some other law.

120. This construction is further supported by what seems to me to be a significant difference in the wording between the English and American clauses. Clause 4.1.5 excludes detainments *under* quarantine regulations or *by reason of infringement* of any customs or trading regulations whereas exclusion (e) excludes detainments specifically *under* customs or quarantine regulations or similar arrests. Thus, under the American clause, it is possible to have an arrest for a reason which substantively infringes a customs regulation (in the sense ascribed by *The Kleovoulos of Rhodes* and *The Anita*) but which is not an arrest under an actual customs or quarantine regulation, for example a prohibition on import contained in a trading regulation. This would have been excluded under clause 4.1.5 even without the addition of *"or trading"* because it would be an arrest

"by reason of an infringement of customs regulations". However, without the *"similar"* wording, it would not be excluded under exclusion (e) if the arrest itself was not made under a customs regulation. It therefore seems to me that the *"similar"* wording was intended to extend the ambit of the clause and that it is given sufficient effect by construing it to exclude such arrests even if not made *under* a customs or quarantine regulation properly so called.

121. I make the following further observations.

(a) It is the substance and character of the regulations which is important rather than the way in which they are promulgated or enforced: see the comments of Clarke LJ in *The Kleovoulos of Rhodes (supra)* at [16(xv)] and [43]. Accordingly, I reject Insurers' rather faint suggestion that it was sufficient that the regulations be formally or procedurally similar to customs or quarantine regulations.

(b) I did not find appeals to the *eiusdem generis* rule or the maxim *noscitur a sociis* of particular assistance in elucidating this question. For one thing, it is difficult to spell a genus out of only two specified matters and, despite agreeing with Miss Hopkins that customs and quarantine are often referred to in the same breath, I can see no compelling reason why the court should strain to find a genus where none naturally springs to mind. It is more likely, in my view, that customs and quarantine regulations are simply classic examples of regulations under which a vessel is likely to be detained in the ordinary course of events because they are regulations with which she will necessarily have to comply every time she puts in to port. I therefore conclude that there is no meaningful genus which links customs and quarantine regulations and that it is sufficient for an arrest to be similar either to an arrest etc. under customs regulations *or* to an arrest etc. under quarantine regulations.

(c) I do not consider that *Marc Rich v Portman (supra)* is of any relevance to this particular exercise. In the context of demurrage liability under two different forms of charterparty, one can see the sense in saying that the words *"or similar"* were intended to refer only to other wording which, albeit not identical, did not materially extend the scope of the charterer's liability for demurrage. By contrast, in this case, the *"similar"* wording is plainly intended to extend the first part of the clause and, on my construction, it does so by extending the ambit of the exclusion to regulations which, albeit not themselves customs or quarantine regulations cover matters relating to quarantine or customs duties or the export and importation of goods.

Similarity on the facts

122. On the basis of the construction I have adopted, it is then necessary to determine whether the arrest of the Vessel under the Shipping Law was similar to an arrest under customs or quarantine regulations.

123. Miss Hopkins submitted that it was, because of the close relationship between the provisions under which the Vessel was detained and the Indonesian Customs Law and Quarantine Law. She emphasised the following aspects of each of these laws:

(a) Shipping Law:

(i) Article 80 provides that government activities in port include the safety and security of shipping, customs, immigration and quarantine;

(ii) Article 111, which deals with designated foreign trade ports, refers to the provision of facilities for agencies dealing with shipping safety and security, customs, immigration and quarantine;

(iii) Article 207 provides for the Harbourmaster to perform shipping safety and security functions, including law enforcement in the area of sea transport and protection of the marine environment;

(iv) Articles 211 and 212 vest authority in the Harbourmaster to co-ordinate customs, quarantine, immigration and other government activities in port and authorises him to seek assistance from the military (including the Navy) under his co-ordination. She submitted that there was significant co-operation in practice between the Navy and the customs and quarantine enforcement officials through a number of joint initiatives, including a Memorandum of Understanding ("MOU") concluded in January 2019;

(v) Bearing this in mind, it could properly be said that both Articles 193(1)(a) and 219 are directed to matters of shipping safety and security, sovereignty, foreign trade and economic growth and a desire to control who or what passes in and out of Indonesian waters.

(b) The Customs Law:

(i) The Customs Law deals with imports and exports, duties, border controls and smuggling;

(ii) The objective and purpose of the Customs Law is to improve and enhance the national economy and to monitor the flow of goods in and out of Indonesian territory;

(iii) Accordingly, at least some parts of the Customs Law (particularly those concerned with smuggling) are concerned with state security, sovereignty, foreign

trade and economic growth and a desire to control who or what passes in and out of Indonesian waters.

(c) The Quarantine Law:

(i) This Law covers general health protection but also includes provisions relating to the admission of people and goods from abroad;

(ii) It establishes a system of quarantine control and associated clearances which are likewise directed at upholding sovereignty, state security and a desire to control who or what passes in and out of Indonesian waters.

124. Given these features, Miss Hopkins submitted that there was a close connection between the purpose of the relevant provisions of the Shipping Law and various parts of the Customs Law and Quarantine Law and that detention under one was accordingly similar to detention under another within the meaning of exclusion (e).

125. I cannot accept this submission which seems to me to assert similarity at far too high a level. Many laws can be said to relate to national safety or security or to the upholding of national sovereignty which have nothing to do with customs or quarantine, for example laws against public protest or anti-terrorism legislation. National safety/security and sovereignty in themselves are therefore too unspecific to amount to a unifying factor which justifies a finding of similarity. Even a desire to regulate who or what passes in or out of national territory could also be said to underpin laws which have nothing to do with customs or quarantine, such as immigration, asylum and nationality laws.

126. Accordingly, none of these suggested unifying factors satisfactorily explains the specific reference in exclusion (e) to customs and quarantine regulations. The express designation of these two types of regulation, and only these two types, necessarily means

in my judgment that the objective intention of the clause was to identify a similarity with one or other of those types of regulation specifically and not some similarity which might be shared with all sorts of other unrelated regulations, let alone with regulations generally. Furthermore, Articles 193(1)(a) and 219 are primarily directed at controlling navigation in territorial waters, not with controlling what goes in or out of Indonesia.

127. I therefore find that there is no sufficient similarity between the Vessel's arrest and an arrest under the Customs Law or Quarantine Law to attract the operation of the exclusion.

128. Alternatively, Miss Hopkins invited me to find that the arrest was similar to an arrest under customs regulations because I could infer on the facts that it was part of a campaign by the Indonesian authorities against smuggling. She argued that the February 2019 arrests were all part of an anti-smuggling initiative undertaken pursuant to the January 2019 MOU referred to in paragraph 123.(a)(iv) above, which was apparently signed between a variety of ministries, including the finance ministry and the armed forces.

129. As Mr MacDonald Eggers pointed out, this was not a pleaded case and there was no evidence about the initiative or the MOU other than a press release. In particular the court had no documentation emanating from the Indonesian government itself on this matter. However, while it is undoubtedly the case that the MOU was signed as part of an anti-smuggling initiative, it is clear from a Britannia bulletin dated 15 February 2019 attaching the release, as well as from the evidence of Mr Aitken which I accept on this point, that the focus of the initiative was the Batam Free Zone and the east coast of Sumatra at the western end of the Singapore Straits around the port of Tuas. Bintan Island and the area where the February detentions took place (some 70 nm to the east) was not mentioned at all.

130. It is true that the Britannia bulletin and a number of other circulars, including an ICS circular dated 14 March 2019, guidance from the Hong Kong Shipowners' Association in May 2019 and a Tradewinds article dated 22 May 2019, suggested a link between the initiative and the February 2019 arrests but even a cursory reading of these circulars makes clear that this was pure supposition without any solid evidential basis. It is entirely understandable why, in the absence of any other explanation for the February arrests, the P&I Clubs might have drawn a link to the publicly announced anti-smuggling initiative around Batam, but in truth they were no better informed than the court is today and I cannot draw any reliable inference that there was in fact any such link.

131. Furthermore, there is not a shred of evidence to suggest that the Vessel was in fact arrested on suspicion of smuggling. She had no cargo on board and was not under charter at the time. The authorities made no mention of smuggling at any stage of the investigation or subsequent court proceedings, in contrast to the previous detentions of the vessels SWIFT HAWK and AN KANG where allegations of smuggling were made. But even if the Vessel had been boarded initially because of a suspicion of smuggling, the actual arrest was for traffic violation and sailing without clearance, neither of which had anything to do with smuggling, regulating the flow of goods, import duties or quarantine.

132. As I have found above, on the proper construction of exclusion (e), it is the object and purpose of the arrest which needs to be similar to the object and purpose of an arrest under either customs or quarantine regulations. In my judgment, there was no such similarity on the facts of this case. Rather the arrest of the Vessel and the other vessels detained around the same time was prompted by a change of policy on the part of the government with a view to asserting sovereignty as appears from Captain Abdullah's report of his meeting on 20 February 2019 with Colonel Robert and the Harbourmaster.

133. Mr MacDonald Eggers further argued that the arrest was not similar to arrest under customs or quarantine regulations because the purpose of the detention was to permit the Navy to extract a bribe from the Claimants. I am not prepared to make any such finding. Under the prevailing Indonesian legislation, there was a legitimate and justified reason to arrest and detain the Vessel and the fact that the authorities may subsequently have indicated that they would accept a facilitation payment in return for releasing her is insufficient for me to infer that this was their intention from the outset.

(3) Sue and labour

The law

134. The American Institute Hull Clauses impose an express duty to sue and labour in the terms set out in paragraph 37. above. Section 78(4) of the Marine Insurance Act 1906 further provides as follows:

> *"It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss."*

135. It is now well-established on the authorities that while breach of this duty is not independently actionable by the insurer, it will have a defence to a claim under the policy where the breach of duty has the effect of breaking the chain of causation between the operation of the insured peril and the loss: see *National Oilwell (UK) Ltd v Davy Offshore Ltd,* [1993] 2 Lloyd's Rep. 582, at 618, approved by Phillips LJ in *State of The Netherlands v Youell,* [1998] 1 Lloyd's Rep. 236, at 244-245:

> *"… if after the advent of an insured peril or when the advent of an insured peril was obviously imminent the assured or his agent failed to act to avert or minimize loss in circumstances where any prudent uninsured would have done so, the chain of causation between the insured peril and the loss will be broken. Clearly if the insured peril is not the proximate cause of the loss the assured cannot recover."*

136. The duty to sue and labour is thus in many respects analogous to the duty to mitigate in the face of a breach of contract where a causation analysis is similarly appropriate.

137. In *Borealis AB v Geogas Trading SA,* [2010] EWHC 2789 (Comm); [2011] 1 Lloyd's Rep. 482 at [44]-[45], Gross LJ held in the context of the duty to mitigate that in order to break the chain of causation the conduct in question *"must constitute an event of such impact that it 'obliterates' the wrongdoing…"* of the defendant. However, unreasonable conduct alone will not necessarily have this effect since the defendant's breach might still remain an effective cause of the loss. In other words, unreasonable conduct is a necessary but not sufficient requirement for breaking the chain of causation. The parties proceeded on the basis that the same principle applies equally to the duty to sue and labour and I agree.

138. Further, just as the standard of reasonableness applied to the victim of a breach of contract is not a high one bearing in mind the dilemma in which the breach has placed him, so too action taken by an assured while in the grip of a peril will not be weighed in too nice a set of scales. Accordingly, even an error of judgment or negligence is unlikely to constitute a new intervening cause unless it is so significant as to displace the operation of the insured peril: *State of The Netherlands v Youell (supra),* at 245.

139. In essence, as stated by Jacobs J in *ABN Amro Bank NV v Royal & Sun Alliance Insurance plc,* [2021] EWHC 442 (Comm); [2021] Lloyd's Rep. I.R. 467 at [789], *"the question is whether the insured failed to act to avert or minimise loss in circumstances where any prudent uninsured would have done so. If so, then the chain of causation between the insured peril and the loss will be broken."* The corollary of this proposition where the complaint is that the assured did something rather than failed to do something,

is of course that the chain of causation will only be broken if the assured acted in a way in which no prudent uninsured would have acted.

The facts

140. It was accepted by Miss Hopkins that cases of unreasonable conduct by an assured breaking the chain of causation were rare and that the facts would have to be unusual. Phillips LJ in *State of The Netherlands v Youell (supra)* pointed out in 1998 that there had been no example of this happening since the Marine Insurance Act was passed in 1906. As far as I am aware that remains the case twenty-six years later.

141. Nonetheless, Insurers originally alleged four separate ways in which the Claimants acted unreasonably and in breach of their duty to sue and labour:

(a) The failure of the Master to acknowledge his fault in anchoring in Indonesian waters;

(b) The failure of Delos and/or NGM to attend for interview in Indonesia;

(c) Delay in issuing a "borrow to use" ("BTU") application[5] in the Indonesian proceedings;

(d) Becoming side-tracked into discussions with the Navy which involved considerations of a bribe or similar.

142. The third of these allegations was abandoned in Insurers' written opening submissions. The first and second were abandoned in their written closing submissions.

143. That left the allegation concerning the discussions with the Navy which, as amended in the Rejoinder, was that:

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[5] This is a procedure under Indonesian law whereby a vessel can be released pending trial against the provision of security.

"The First and/or Second Claimants and their agents initiated and pursued a series of contacts with the Indonesian authorities with a view to exploring whether a "settlement" with the Navy, on a "commercial" basis or by paying "fines" that might be paid without going through an official court process, was possible. Any such payment, had it been made, would not have been an official or lawfully imposed fine, but would have been a bribe or similar thereto, and it is to be inferred that the First and/or Second Claimants were aware that that would be the case."

144. It was common ground that the burden of proof was on Insurers to make good their case both as to unreasonable conduct and as to causation.

145. Mr MacDonald Eggers complained that it was not clear on Insurers' case what the Claimants could or should have done differently or what difference it would have made if some alternative course had been pursued. He cautioned against judging the Claimants' conduct with the benefit of hindsight when the Vessel was in the grip of a casualty. He also pointed out with some force that the allegation that discussions had been *"initiated"* by the Claimants *"and their agents"* and the implicit plea that the steps taken by those agents were authorised by the Claimants had only emerged in the Rejoinder long after the exchange of witness statements. Accordingly, his clients had not had an adequate opportunity to address these matters in their factual evidence, in particular with Mr Irawan.

146. I bear all these points in mind.

147. A lot of time and energy was expended in the cross-examination of the Claimants' witnesses concerning the discussions which took place. They were the subject of a minute examination of many emails and a detailed chronology submitted by Insurers with their closing submissions. While the chronology, in particular, was most helpful, I trust that the parties will forgive me if I do not address the course of the negotiations in similar detail in this judgment. This is because I have reached clear conclusions which do not depend on the minutiae of the discussions.

148. It is important at the start to note that:

(a) From 17 February 2019, the Vessel was in a challenging and possibly dangerous situation. The Master was at risk of arrest and imprisonment in a foreign jurisdiction where he did not speak the language and the prospect of incarceration in an Indonesian gaol must have been truly terrifying for him and the rest of the crew;

(b) The Claimants were additionally faced, not just with potentially lengthy deprivation of an income-producing asset, but also its possible confiscation by the Indonesian state. They were therefore under considerable pressure from both a humanitarian and a commercial perspective to get the Vessel released quickly;

(c) This was an unprecedented situation. There had been no previous arrests of this nature and there was also evidence (accepted by Insurers) that, having arrested all these ships pursuant to the government's change of policy, the Navy did not know quite what to do with them and had received no clear instructions on this score. Indeed, it appears from one report by Captain Abdullah that the Harbourmaster himself was not overly impressed with the unfavourable international publicity that had been generated by the arrests;

(d) It is therefore hardly surprising that the Claimants wanted to make certain that they had explored every single avenue for getting the Vessel released. I regard this as an entirely normal and reasonable response on the part of any prudent uninsured;

(e) It was also reasonable and prudent in my judgment for the Claimants to rely heavily on NEPIA to guide and co-ordinate any attempts to release the Vessel. Assisting and protecting shipowners whose vessels have been arrested is, after all, an important part of what P&I Clubs do. Moreover, NEPIA had local correspondents and were in a

position to act in conjunction with other P&I Clubs whose vessels had also been arrested. It is a matter of record that Mr Joicey copied almost all of his correspondence to Captain Lajmi;

(f) In the situation in which the Vessel found herself following the detention, it was by no means unreasonable to think that an essentially minor traffic infringement would incur a mild reprimand and a fine which could be paid without the need to go to court.

149. The Claimants could not reasonably have been expected to be familiar with the Indonesian criminal justice system. On the recommendation of SPICA and NEPIA, they therefore quite properly retained Syam & Syam, who advised (on 18 February 2019) that the court process would take several months and (on 21 February 2019) that the only possibility within that process for paying fines was after a judicial decree as to the amount to be levied. On the other hand, they were also receiving information and reports from NEPIA, SPICA and Mr Irawan of PBSS. For example, on 18 February 2019, when passing on advice previously received from Syam & Syam, Mr Aitken advised that he had heard there was room for negotiation with the Navy so that the case could be settled amicably out of court.

150. Insurers sought to suggest that this could only have been a reference to an illicit or unofficial payment. I do not accept that this was clear at this very early stage. Even if it could have been foreseen that it *might* turn out to be the case, no-one – even the Navy – seemed to know quite how to proceed, and it could equally well have turned out to be a perfectly legitimate way of dealing with the authorities. In addition, Syam & Syam themselves advised, both on 20 and 21 February 2019, that it might be possible to expedite the legal process or lodge a BTU application. There were therefore multiple different possible avenues to explore.

151. An initial meeting on 20 February 2019 between Captain Abdullah and Colonel Robert (the Assistant Commander of the Western Fleet (ARMABAR) and thus a very senior figure in the Navy) can only have served to increase the confusion. Initially Colonel Robert suggested that the Claimants could settle with the local naval office by admitting the charges and paying a fine and said that this would be above board and legal. After making a telephone call, however, he seemed to backtrack but nevertheless suggested that Captain Abdullah should still proceed to meet with the naval authorities in Batam.

152. Faced with this degree of uncertainty, I do not consider that it was unreasonable for the Claimants to explore all these possibilities. While admitting liability and paying an immediate fine in return for release of the Vessel was not precisely the same as a BTU application which only permitted a vessel to leave on provision of security, it was not so very different. And it is by no means clear from the material before me that the Claimants or NEPIA should have supposed at this early stage that it could not be done legitimately. Indeed, many of the early communications are entirely consistent with this being a permissible and legal course to adopt.

153. Perhaps most importantly, the Indonesian law experts were agreed that informal discussions in this sort of situation are both permissible and common practice in Indonesia. Indeed, the evidence of Professor Butt was that discussions were the only way in which the Claimants could hope to achieve an early release in practice, since even the BTU procedure was discretionary and there was no other mechanism under the Criminal Code for securing the release of property which had been seized.

154. I have therefore reached the clear conclusion that the initiation of discussions was not unreasonable in the circumstances. I accept the evidence of Captain Lajmi that the whole situation was utterly bewildering and that they were initially trying to identify someone in

authority from whom they could get an authoritative indication of where the blockage was and what was possible or not in order to expedite matters.

155. What, then, of the continuation of the discussions? The documents show that two separate lines of communication were being pursued: one through SPICA (Captain Abdullah) and Syam & Syam; the other through Mr Irawan. Nevertheless, there was some overlap in the sense that Mr Irawan was present at some meetings (for example the interviews of the Master) which Syam & Syam also attended.

156. The efforts of SPICA and Syam & Syam were conducted under the aegis of NEPIA in co-operation, from about mid-March, with other members of the International Group. The discussions began towards the end of February and involved a retired two-star navy general, General Slamet Soebandi, who had himself formerly been the Commander of ARMABAR. General Soebandi was retained by NEPIA on behalf of WIN WIN and another vessel which they represented and it was hoped that he might be able to advise how best to approach the matter and also exercise some influence on the Navy so as to secure a speedy release. At the very least, having someone of his stature on board would mean that they would be listened to with respect. Initially this tactic appeared to be bearing fruit, since an email from Captain Abdullah to Captain Lajmi on 1 March 2019 reporting on a meeting between General Soebandi and General Arshad suggested that the latter was indeed receptive to expediting the process in a way which was not obviously illegitimate.

157. However, further meetings on 8 and 11 March 2019 did not materially advance matters, and I should also note that the naval officer in charge of all the arrested ships indicated at the former meeting that the owners should not *"at the moment"* entertain any offers from naval intelligence officers offering to assist with settlement in exchange for payment.

158. On 16 March 2019, there was another meeting between General Arshad, Captain Abdullah and General Soebandi who was by now participating also on behalf of other clubs in the International Group. In cross-examination, Captain Lajmi accepted the possibility that this meeting might lead to a discussion about an illegitimate payment but made the fair point that they were not certain exactly what was being proposed. Almost a month had passed without anything happening and the predicament of the Master and crew was a significant factor in their thinking.

159. In his report of the meeting to Mr Aitken, Captain Abdullah stated that General Arshad had started by indicating that the matter would be handled through the legal process and that it would be up to the prosecutor whether to accept a BTU application. However, he had then gone on to disclose confidentially that he had received an offer from lawyers on behalf of the AFRA OAK to pay IDR5 billion in exchange for the release of the ship. He had suggested that it might be possible to negotiate the release of the Vessel with the prosecutor on payment of a settlement sum through the mechanism of a BTU application, provided that the Master remained behind to stand trial which would then be concluded very quickly. He had said that there were provisions which allowed the prosecutor to drop the charges in exchange for a settlement sum for *"payment of the ship release process including settlement of fine"*. When it had been suggested to him that IDR5 billion was very high, General Arshad had said that this was the figure which had been offered by the AFRA OAK and that other lower offers had been received on behalf of other ships. This was nothing to do with him and any settlement would have to be negotiated directly with the prosecutor's office.

160. This account clearly raises more than a suspicion that such a "settlement" would involve an illicit payment, although General Arshad's reference to provisions permitting

the prosecutor to drop charges in return for a settlement figure including the fine and the costs of the release process equally suggested that it could be a legally sanctioned path to take. In any event, it was still not entirely clear precisely what the payment would cover and whether the transaction would be properly documented. Captain Abdullah's own estimate of the sums which might have to be paid was IDR2-3 billion (around US$137,000-US$206,000) and was, I accept, well above what could have been imposed by way of legitimate fine for the offences with which the Vessel was charged, but not necessarily outside all reasonable contemplation if the costs of the investigation and process to date were also to be taken into account.

161. Captain Abdullah's report was not, however, passed to the Club or to NGM. Instead only a very brief summary was given. This did not include any figures and said little more than that Owners could make a BTU application against an appropriate guarantee and that the Master would have to remain behind. Alternatively, they could plead for leniency with the prosecutor.

162. NEPIA, NGM and the other clubs supporting a joint approach thereupon agreed to collaborate in the continuation of discussions by using Syam & Syam in an attempt to elucidate exactly what a settlement of this nature would entail. However, from 21 March 2019, it became progressively more likely that the suggested "settlement" would involve an illicit payment, and NEPIA and the other clubs therefore made plain that they could not have anything to do with what amounted to a bribe or facilitation payment.

163. Meanwhile, Mr Irawan was conducting his own negotiations with the Navy and Insurers levelled considerable criticism at NGM for having permitted these discussions to take place on the grounds that they were more obviously likely to involve an unofficial payment. I consider this criticism to be unfair.

164. I accept the evidence of Mr Joicey and Mr Moundreas that they did not ask or instruct Mr Irawan to offer or solicit any offer for an unofficial payment. However, given that Mr Irawan was in a position to talk to different people from those whom Captain Abdullah and General Soebandi were meeting, it was not unreasonable for them to allow Mr Irawan to go ahead and see what emerged until such time as they were sure that it was not legitimate.

165. In this regard I note that one of NGM's paramount concerns was that NEPIA should be happy with what was taking place – understandably, since the last thing NGM would have wanted to do was to prejudice Club cover. Thus NEPIA was aware of Mr Irawan's discussions from an early stage and, indeed, was anxious to co-ordinate them with the discussions being pursued by SPICA. On 1 March 2019, Mr Joicey also asked Mr Irawan to keep Captain Lajmi in copy, which I consider he is unlikely to have done if he had known for certain that Mr Irawan was negotiating a bribe. Captain Lajmi's evidence was that nothing Mr Irawan was reporting at that date looked like a bribe and it simply seemed as if he may have found another way to pay a legitimate fine. Mr Joicey gave evidence that Mr Irawan's references to "fines" suggested legitimate payments to him and that in any event he was simply investigating the options at this stage. Moreover, it was around this time (4 March 2019) that NEPIA and the Claimants received information that the Navy was in fact authorised to accept fines without the case going to court (see paragraph 176. below).

166. As it happened, Mr Joicey was more than a little suspicious that Mr Irawan was on the take himself. Thus, when Mr Irawan advised Captain Lajmi and Mr Joicey on 10 March 2019 that an amount of around US$60,000 might be required to get the Vessel released, Mr Joicey realised that he was probably talking about something unofficial but was

careful not to antagonise him as he did not want him to obstruct the other discussions which were being conducted by SPICA, Syam & Syam and General Soebandi. He therefore merely said that the amount demanded was too high and asked him to stop negotiating. Captain Lajmi likewise recognised that this was probably not a legitimate payment and made an internal compliance report on 12 March 2019.

167. There is some indication that Mr Irawan was not best pleased at being stood down and did indeed try to sabotage Captain Abdullah's discussions, although he does not appear to have succeeded. On 23 March 2019, Mr Joicey indicated through Johnasia that NGM might be prepared to make a payment provided the money was paid to Johnasia in escrow to be released only after the Vessel had sailed. His evidence was that this was his way of trying to flush out whether Mr Irawan really was talking about something illicit. In his response to Johnasia, Mr Irawan made it clear that this would not be acceptable and set out for the first time exactly what was being demanded and to whom it would be payable. His breakdown included payments to prosecutors, judges and the Navy totalling about US$92,500. Mr Joicey forwarded this email to NEPIA and SPICA and received a response from Mr Aitken clearly suggesting (despite the latter's protestations to the contrary) that this was the same as the offer being discussed through Captain Abdullah and that the only difference was that figures had now been provided.

168. Since it was pellucidly clear that the payment proposed by Mr Irawan could not possibly be legitimate, NGM called an immediate halt to his activities on 25 March 2019.

169. However, that is not quite the end of the story, because even though NEPIA and NGM had been told by Mr Aitken that this was the same offer as that being discussed by Captain Abdullah, a further meeting with the Navy had already been arranged for 27 March 2019 in a mere two days' time. Moreover, as Captain Lajmi explained in

evidence, he still wanted to be absolutely certain that *only* a bribe was on offer as he wanted to leave no stone unturned in their efforts to secure the release of the Vessel. For that reason, NEPIA and the other clubs considered that it was worth continuing discussions with the authorities in order to see whether they might instead be prepared to accept a properly documented fine as an official payment for the release. The view they took was that, despite their concerns about what was being proposed, they had nothing to lose at that stage and that Syam & Syam should continue to attend the meeting but only on the basis that they were not authorised to agree to anything.

170. In an email dated 25 March 2019 to Captain Abdullah (copied to Mr Joicey and Mr Aitken) Captain Lajmi reiterated that the none of the clubs could or would participate in, condone or encourage any unofficial facilitation payments and instructed Captain Abdullah that any sums demanded should be notified to Mr Joicey directly. This, he explained, was because even if the demand was for a bribe, which the Club would obviously not touch, the Claimants were still entitled to know what terms were being put forward so that they could make up their own minds whether to accept irrespective of NEPIA's position. Mr Moundreas likewise said that he would have wanted to know where they stood: *"at least knowing if that is the end of the road, it's better to know it than not to know it."*

171. At the meeting on 27 March 2019, Syam & Syam were told that the Navy was concerned about the number of parties claiming to be representatives of the various shipowners. The Navy official attending the meeting said that a BTU application should be made to the prosecutor and that he would try to expedite the investigation so that the file was passed to the prosecutor soon. He also advised that there were past and future costs for both the Navy and the prosecutor which would have to be covered.

172. The International Group then authorised a further meeting between Captain Abdullah and the Navy on 6 April 2019 at which Captain Abdullah was informed that the Navy would be prepared to release the vessels provided all procedural matters were concluded and the costs agreed and paid with no negotiations on quantum. Payment was originally demanded in cash through a sole bank account, although when told that would be impossible, the Navy apparently agreed to accept payments through individual ship agents. Following a further meeting on 10 April 2019, Mr Aitken reported clearly on 11 April 2019 for the first time that the Navy was unwilling to provide any invoice for the payments or to sign a release document. Moreover, payment would not secure the release of the Master.

173. At that point, all concerned recognised that there was no hope of securing the release of the vessels legitimately and negotiations were terminated.

174. There was considerable debate before me as to when the Claimants, NEPIA or SPICA realised or should have realised that the discussions were leading towards payment of a bribe. Insurers' case was that it was unreasonable to continue discussions after the point at which it must have been obvious that they involved an "unclean" deal. Miss Hopkins submitted that the behaviour of the Claimants was wholly unreasonable and erratic, particularly if they always knew that they would never pay a bribe in any event. She said that raising the Navy's hopes only to pull out at the last minute was bound to end in tears and that if the Claimants chose to tweak a tiger by the tail they should not be surprised if it turned round and bit them.

175. Ultimately, I considered this to be a fairly arid debate. As I have already indicated in my summary of the witnesses, I had the clear impression that the relevant participants had in mind rather earlier than they claimed at least the possibility that a bribe might at some

stage be demanded. In the case of Mr Aitken, I find that he was aware of this possibility from the outset. The others started to become suspicious during the course of March. For example, Captain Lajmi was sufficiently concerned by 12 March 2019 to lodge the internal compliance report referred to above in respect of Mr Irawan's activities.

176. However, it is not without significance that there was an indication on 4 March 2019 that the Navy were authorised to levy fines without submitting the file to the prosecutor. Although that proved an illusory and short-lived hope, it indicates that it was not unreasonable at that date to suppose that legal release might yet be achieved, particularly if the Navy itself was uncertain how to handle the arrested vessels. Moreover, at the meeting on 16 March 2019, General Arshad's reference to provisions allowing the prosecutor to drop the charges in exchange for a settlement sum covering the fine and costs of the process continued to hold out the tantalising prospect of a legitimate early release.

177. But whether or not particular individuals appreciated the *possibility* that they might sooner or later be asked for a bribe, I find that it was not until 11 April 2019 that they knew this was the *only* way of securing the release of the Vessel short of allowing the court proceedings to take their course. As Mr Joicey said, *"hope dies last."* I also find that, whatever the level of suspicion, in the peculiarly difficult situation in which the Club and the Claimants found themselves, it was not unreasonable to continue discussions until they were sure of the position. After all, the Vessel was stuck in Indonesia, the Master was being threatened with imprisonment and there was evidence that the mental health of the crew was suffering. NEPIA was acting in conjunction with other respected P&I Clubs, all of whom had a zero-tolerance approach to bribery. The Claimants were clearly relying on NEPIA to take the lead and guide the process and they would have taken

comfort from the fact that the Clubs considered it proper to continue. A finding that the Claimants acted unreasonably necessarily means that so too did all the other Clubs involved. That would be an ambitious submission and Mr Moundreas' evidence had an air of sincerity about it when he said *"I think the best organisation to deal with this kind of issues, by nature, are the P&I clubs and the IG group, much better than that Greek shipowner, because this is their job, this is what they do. So if you ask my opinion whether I thought I had a better solution than the IG and my P&I club, my answer is no, I did not have a better solution."*

178. Insurers further complained that having more than one iron in the fire (Captain Abdullah and SPICA on the one hand and Mr Irawan on the other) was muddying the waters and ultimately only made matters worse. I consider that this is a submission which can only be made in hindsight and with the perspective of distance. In the confused situation prevailing at the time, the Claimants cannot be criticised for pursuing all lines of enquiry. As Captain Lajmi said, if they had not explored every option, they would not have been doing their job properly.

179. A further important factor to my mind is that there was no indication at the time that the Claimants would be any worse off if the discussions failed. On the contrary, the court proceedings were continuing in parallel and Syam & Syam had reported on 27 March 2019 that the Navy was trying to expedite the investigation and pass the file to the prosecutor as soon as possible. There was therefore nothing to suggest that unsuccessful negotiations would slow things down and despite Insurers' submission that this should have been obvious, I cannot agree.

180. Accordingly, I find that the Claimants were not in breach of their duty to sue and labour as alleged. Other prudent uninsureds might have pulled the plug on discussions sooner;

many more, I suspect, would not. Captain Lajmi's acceptance under some pressure in cross-examination that it was possibly unwise to continue with the discussions after 28 March 2019 (or even 1 March 2019 as was suggested to him at one point) was given with the benefit of considerable hindsight and I am certainly not prepared to find – as I would need to do if Insurers are to succeed – that *no* prudent uninsured would have acted as the Claimants did.

181. It is therefore unnecessary for me to determine whether SPICA or PBSS or Syam & Syam were the Claimants' authorised agents for the purposes of suing and labouring. So far as relevant, I find that none of the actors was authorised to negotiate for or offer an illegitimate payment as opposed to undertaking exploratory and clarificatory discussions. I accept the evidence of the Claimants that they would not themselves ever have paid a bribe and, moreover, that they were only prepared to make any payment with the approval of NEPIA whom they likewise knew would not entertain any such payment.

Postscript on causation

182. Strictly speaking, it is unnecessary to go further: first, because the question of causation does not arise on my finding that there was no breach of the duty to sue and labour; secondly, because even if there was a breach, I do not consider that the Claimants' conduct comes anywhere near the degree of unreasonableness that would be required to break the chain of causation; and, thirdly, because I agree with Mr MacDonald Eggers that there is insufficient evidence in any event to discharge Insurers' burden of proving that, but for the discussions, the court proceedings would have been concluded any sooner than they in fact were.

183. Had I concluded otherwise, however, a potentially interesting question would have arisen as to how the causative impact of the Claimants' breach should be taken into

account. The difficulty arises because in most cases it is possible to point to a particular incident which takes place at a more or less finite point in time and breaks the chain of causation between the loss and an insured peril which has already operated. In CTL cases arising out of detention, however, the insured peril (or at least the effect of the initial detention) has to operate over an extended period and where both the operation of the insured peril itself and the unreasonable conduct are each cumulative over time and simultaneous, the analysis becomes a little tricky.

184. One answer was suggested by Evans-Lombe J in *Barings plc v Coopers & Lybrand,* [2003] Lloyd's Rep. I.R. 566 at [838] and cited with approval by Gross LJ in *Borealis v Geogas (supra):*

> *"It seems to me that what will constitute [conduct breaking the chain of causation] is so fact-sensitive to the facts of any case where the issue arises that it is almost impossible to generalise. If one must do so, I would say that it must be some unreasonable conduct, not necessarily unforeseeable…, a new cause coming and disturbing the sequence of events…, not necessarily reckless…,* ***which may result from an accumulation of events which in sum have the effect of removing the negligence sued on as a cause…, which accumulation of events may take place over time."*** (Emphasis added.)

185. This approach contemplates that the unreasonable conduct may, as it were, creep in gradually until it eventually removes the detainment as the cause of the delay.

186. As I have had cause to remark in another context, the snagging of judicial robes in the impenetrable thickets of causation is nothing new and it seems to me that there may be some difficulty in applying that approach here. I am not sure that Miss Hopkins' invitation to view causation as a net rather than a chain (picking up on the *dictum* of Lord Shaw in *Leyland Shipping Co. v Norwich Union Fire Insurance Society,* [1918] AC 350, at 369) necessarily makes things any easier. For example, if I had concluded that the Claimants' conduct was sufficiently unreasonable by, say, March 2019 to break the chain of causation in principle, the problem is that not very much delay, if any, had been caused

to the judicial process by then and the subsequent delays of which Insurers complain all lay in the future and to that extent were completely speculative. Further, even if I had been satisfied that the unreasonable conduct in March and April caused two months delay in October and November (because of the prosecutor's unsuccessful appeal), what justification would there be for deducting that two months from the six months' detention which *ex hypothesi* had already occurred prior to 20 August 2019? Does time run proportionately more slowly for the purpose of calculating the period of detention for so long as the consequences of the unreasonable conduct are being felt? If so, on what basis can it be said that the initial detainment is no longer an effective cause? Conversely, if there is a breach of the duty to sue and labour but for which the vessel would have been released before she was deemed to become a CTL, but that breach is not such as to obliterate the detainment completely as an operative cause, is it right that the insurers should nevertheless be called upon to pay for a CTL which would otherwise not have occurred?

187. While these, to my mind, are all interesting questions they will have to await resolution on some other occasion.

(4) Non-disclosure

188. Section 3(1) of the Insurance Act 2015 imposes a duty on an assured to make a fair presentation of the risk to the insurer before the contract is entered into. By virtue of section 3(4) of the Act, a fair presentation includes *"disclosure of every material circumstance which the insured knows or ought to know."* Section 7(3) provides that a circumstance is material *"if it would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms."* However, section 8(1) makes clear that an insurer only has a remedy for breach of the duty of fair presentation if

it can show that, but for the breach, it would either not have entered into the contract at all, or would only have done so on different terms.

189. The circumstances which Insurers allege were not disclosed to GAREX prior to conclusion of the Policy were first pleaded in their Amended Defence served formally on 14 January 2022 and are as follows:

> *"26A.1 In 2014, the Greek authorities detained the "NOOR 1" on arrival from the United Arab Emirates in what was apparently one of the largest ever intercepted heroin shipments to Europe (the "Heroin Shipment").*
>
> *26A.2. In or about late March 2018, the Piraeus Public Prosecutor's Office brought a criminal prosecution against, among others, Mr Evangelos Bairactaris, a director of the First Claimant, related to the Heroin Shipment (the "Criminal Prosecution").*
>
> *26A.3. The Criminal Prosecution charged Mr Bairactaris with the following in connection with the Heroin Shipment:*
>
> > *26A.3.1. forming and becoming a member of an organised crime group contrary to Article 187 paragraph 1 of the Greek Criminal Code, a felony under Greek law which carries a sentence ranging from five to ten years imprisonment;*
> >
> > *26A.3.2. being involved in the trafficking of narcotic substances contrary to Article 23 paragraph 2(a) in combination with Article 20 paragraph 2 and Article 22 paragraph 2(b) of Law 4139/2013 and Articles 45 and 98 paragraph 2 of the Greek Criminal Code, a felony under Greek law which carries a sentence ranging from ten years to life imprisonment and a fine between €50,000 and €1 million.*
>
> *26A.4. The Criminal Prosecution was still pending as at 29 June 2018."*

190. It was common ground between the parties that these matters had not been disclosed and that accordingly, Insurers have a defence to the claim if they can establish (the burden of proof being on them): (i) materiality; (ii) knowledge; and (iii) inducement.

Knowledge

191. It is convenient to start with the question of knowledge.

Actual knowledge

192. The only individual who had actual knowledge of the criminal charges at the date of the Policy was Mr Bairactaris himself. It is not suggested that anyone else within either NGM or any of the other Claimants knew anything about them (including Mr Tsouris, who was responsible for the Claimants' insurances). The charges do not appear to have been widely publicised so far as Mr Bairactaris was concerned, unlike the allegations against Mr Marinakis which were extensively reported.

193. Section 4(3) of the 2015 Act provides that for the purposes of discharging its duty of fair presentation, a corporate assured knows:

"only what is known to one or more of the individuals who are -
(a) part of the insured's senior management, or
(b) responsible for the insured's insurance."

Insurers submitted that Mr Bairactaris was part of the senior management of Delos and/or of NGM by virtue of section 4(8)(c) of the Act which defines *"senior management"* as *"those individuals who play significant roles in the making of decisions about how the insured's activities are to be managed or organised."*

194. Both parties agreed that it was the substance of the role played by Mr Bairactaris which was important in this context, rather than the label attached to it. That, it seems to me, is entirely consistent with paragraph 54 of the Explanatory Notes accompanying the 2015 Act which states that the definition in section 4(8)(c):

"captures those individuals who play significant roles in the making of decisions about how the insured's activities are to be managed or organised. In a corporate context, this is likely to include members of the board of directors but may extend beyond this, depending on the structure and management of the arrangements of the insured."

195. It was accordingly not disputed that while one would normally expect a director of a company to be part of its senior management, there was no hard and fast rule to this effect and Mr MacDonald Eggers submitted that whatever the position might be regarding the

board of directors of a public company, the same was not necessarily the case for a nominee director of a one-ship SPV such as Delos.

196. Of course, if one looks only at Delos' corporate documents, Mr Bairactaris had very wide-ranging powers indeed. He was the sole director, President, Secretary and Treasurer of the company and was vested with power and authority to carry on a full range of corporate activities on its behalf. However, that would be to look only at the form. The substance and reality were rather different. Thus, Mr Bairactaris was contractually obliged only to act on the instructions of the Moundreas family as acknowledged in a formal letter of indemnity whereby Mr Bairactaris confirmed that he had no beneficial interest in Delos, and the Moundreas family agreed to indemnify and keep him harmless *"from any adverse effect whatsoever [he] may incur from his appointment or from his serving as a director of the Company or from his following the instructions of the Principal with respect to any matter whatsoever involving the Company, including without limitation all actions, claims, court proceedings, damages and other liabilities, and all expenses resulting therefrom."*

197. As explained by both Mr Moundreas and Mr Bairactaris in their oral evidence, the purpose of appointing Mr Bairactaris as a nominee director of the SPVs was for convenience so that he would be available to sign transactional documents quickly as and when required. For the most part, these would be documents that he or his office would have drafted in their capacity as the NGM Group's external lawyers handling its ship sale and purchase transactions and it made obvious sense in terms of speed and efficiency if he had the power in his capacity as nominee director simply to sign them off.

198. Further, the evidence established that Mr Bairactaris had no substantive involvement in anything to do with the NGM Group's insurance, acting only as a postbox when queries

relating to insurance came up in the course of any sale and purchase or financing transactions. The documents before the court disclosed one sole instance of this when he passed on an insurance-related query to NGM and then relayed the answer back.

199. The oral evidence regarding Mr Bairactaris' role was unanimous and credible and I accept that he was effectively discharging an administrative function for the purposes of transactions involving Delos. He did not himself operate any bank accounts or speak to the company's auditors. He exercised no independent judgment in relation to the operation of the company and had no decision-making power. Rather, as Mr MacDonald Eggers submitted, he was a vehicle for the execution of decisions made by NGM and the Moundreas family. I further accept that the use of one-vessel SPVs with nominee directors is commonplace in the shipping industry and that in any transaction involving Delos, the participants would have regarded themselves as dealing with the NGM group rather than focusing on the specific company or its directors. In no way, therefore, could Mr Bairactaris be regarded as the visible or public face of Delos.

200. Mr MacDonald Eggers also laid some stress on the fact that Mr Bairactaris could be asked to resign at any time by NGM. However, I attach less weight to this, since the fact that he could be removed from office does not affect the scope of any power or authority that he exercised while still in office. At most, it underlines his lack of connection with the business operations of the company.

201. In these circumstances, I find that Mr Bairactaris played no role at all (let alone a significant one) in the making of decisions about how the activities of Delos or NGM were to be managed.

202. Miss Hopkins nevertheless argued that he played a significant role in the making of decisions as to how Delos (at least) and NGM's affairs were organised. She submitted

that in the context of an SPV whose only function was to own the Vessel, the activities of the company were purely financial and legal and that Mr Bairactaris' role was to be assessed for its significance in that limited context. She said that he played a pivotal organisational role because he *"made arrangements for things to happen"*.

203. Ingenious though this submission was, it smacked somewhat of desperation. First, I am by no means persuaded that it is appropriate to confine the activities of Delos quite so tightly. Delos owned the Vessel and to that extent its activities included operating her for profit. Mr Bairactaris played no role at all in organising that aspect of Delos' activities – it was all handled by NGM and FML. But even on the narrower view that its activities were only financial and legal, the truth was the Mr Bairactaris did not *"make arrangements"* for anything to happen. He did not arrange when or how Delos would buy or sell vessels or obtain finance; he simply acted on someone else's instructions as to the arrangements to be made.

204. I regard it as irrelevant that he may have completed the paperwork for vessel acquisitions, disposals and finance, the opening of bank accounts, the declaration of dividends, the grant of powers of attorney and the issue of share certificates. First, section 4(8)(c) is in my judgment directed at the organisation of the *activities* of a company, not the organisation of its paperwork, which is essentially no more than an office management function. In other words, it is looking at the substance of what the company does, not the associated administrative formalities. Were it otherwise, any office manager or senior secretary could be regarded as part of the senior management team. Secondly and in any event, these were tasks he performed as NGM's external lawyer - consistently with his evidence that NGM left *"all the organisational formalities to their in-house legal department and finance department and to their lawyer of fifteen*

years." I do not regard this as an acceptance by him that these were matters left to him in his capacity as nominee director. All he did in his capacity as nominee director was to append his signature to the paperwork prepared by his firm.

205. Again, it is instructive to test Insurers' proposition against the possibility that the relevant nominee director was a nominee director in Panama, or Mr Moundreas' secretary. Either would be fulfilling precisely the same role as Mr Bairactaris but could hardly be described as part of Delos' senior management.

206. With all respect to Miss Hopkins, I see nothing odd in the conclusion that Delos itself did not have any senior management at all. There is nothing that requires a company to have senior management as defined by the 2015 Act and an SPV of this nature may well not have its own management team where it is effectively managed by its beneficial owners or a corporate shareholder.

207. A yet further attempt to attribute knowledge to the Claimants was made on the basis of a submission that, by virtue of the number of sole directorships that Mr Bairactaris held, he was to be regarded as part of the senior management of NGM *"more broadly"*. Whatever *"more broadly"* means (a matter which was left delightfully vague), this was never a promising argument. No matter how many times you multiply zero, the answer is still zero and I remain resolutely unpersuaded that not being part of the senior management of multiple subsidiaries can by some process of alchemy amount to being part of the senior management of the parent.

208. I therefore find that neither Delos nor NGM had actual knowledge of the criminal charges.

Constructive knowledge

209. Irrespective of actual knowledge, section 4(6) of the 2015 Act provides for the purposes of section 3(4)(a) that:

> *"an insured ought to know what should reasonably have been revealed by a reasonable search of information available to the insured (whether the search is conducted by making enquiries or by any other means).*

210. I accept that the express obligation under the Act to make reasonable searches represents an extension to the previous law which referred only to matters which ought to be known to the insured in the ordinary course of business. There is, of course, some overlap but the reference to reasonableness clearly imports an objective standard and it was accepted by Insurers that what is reasonable must depend on the context and the type of business which the insured is conducting, in this case a family-owned and run Greek shipping group. In my judgment, in agreement with Law Commission Report 353 accompanying the draft bill which became the 2015 Act, the test is correctly described as an objective test *"by reference to a reasonable, prudent insured in that class."*[6]

211. Insurers assert that the Claimants should have made two categories of enquiry. The burden lies on them to show both that such enquiries should reasonably have been made and that the criminal charges *"should reasonably have been revealed"* if they had been.

Fit and proper

212. First, Insurers say that the Claimants should have been making regular enquiries of Mr Bairactaris in order to assess that he continued to be a fit and proper person to hold a nominee directorship, including a specific enquiry as to whether he was the subject of any criminal proceedings.

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[6] The Law Commission referred in this regard to paragraph 16-46 of *Arnould's Law of Marine Insurance and Average (18th ed.)*, although this paragraph does not appear in the latest edition of the work.

213. I accept Mr Bairactaris' evidence that if he had been asked directly whether he was the subject of any criminal proceedings, he would have disclosed the charges. However, I have some difficulty in concluding that it would have been reasonable for the Claimants to have conducted such enquiries bearing in mind that:

(a) Mr Bairactaris was a respected, practising lawyer whose clients included a number of international banks and ship management companies. He had a long-standing relationship with NGM dating back to 2006 during which he had earned their trust and confidence. His continued membership of a regulated profession (the Piraeus Bar Association) which depended on its members being deemed fit and proper to practise would in my judgment have given them sufficient confidence that he was also a fit and proper person to hold a nominee directorship – certainly in the absence of anything to suggest the contrary (which nobody has suggested). These were not questions which NGM routinely posed to the NGM Group's other external lawyers.

(b) The position of Delos was very different from that of a public company where the directors have real decision-making powers and are accountable to the company's shareholders. Appeals by Miss Hopkins to the FCA guidance for FCA-regulated companies were therefore wide of the mark. For the same reason, the fact that Mr Bairactaris voluntarily resigned from the board of the only listed company on which he sat is likewise of little weight in this context.

(c) In determining whether it would have been reasonable to make these enquiries, it is relevant to have regard to the role which Mr Bairactaris was in fact performing which was, as discussed above, extremely limited. From NGM's point of view, he could not do anything without their instructions and there was no indication that he had ever failed to do so or had abused his position by acting without authority.

(d) There was no evidence that other similar shipping groups made such enquiries of their nominee directors which, to my mind is a relevant consideration when asking what a reasonable prudent insured in the same class as NGM would be expected to do.

(e) The suggestion put to Mr Moundreas that he should have made these enquiries to forestall the possibility that the shipping community in Piraeus might otherwise be busily gossiping about some skullduggery on the part of Mr Bairactaris behind Mr Moundreas' back and thereby potentially damaging NGM's reputation, I regard as fanciful to the point of being untethered from reality.

214. But even if it would have been reasonable for the Claimants to ask Mr Bairactaris on a regular basis whether he was the subject of any criminal proceedings, there is no basis on which I can conclude that the relevant information would or should have been revealed prior to placement. In their written closing submissions, Insurers suggested that the obvious time to ask would have been on initial appointment with an annual check thereafter. However, Mr Bairactaris was appointed on 16 August 2007 and the insurance was placed in June 2018. On that basis the charges, which were only brought in March 2018, would not have been revealed by any enquiry made in August 2017 and an enquiry in August 2018 would have been too late. The question would therefore have had to be put between March and June 2018 in order even potentially to have elicited the charges and there was no evidence before me on which I could possibly conclude that an enquiry should have been made in that particular time period and no other.

The insurance enquiry

215. Insurers' alternative case was that the senior management of NGM or those responsible for placing the NGM Group's insurance (in effect, Mr Tsouris) should have asked Mr

Bairactaris prior to placement whether he knew of any circumstances which might affect the risk.

216. Again, I find this implausible. Given that Mr Bairactaris had no operational role or function regarding the trading of the Vessel or her insurance, he would not have known anything about the risk to be insured and asking him would have been a somewhat pointless exercise. Indeed, Mr Tsouris' evidence was that he did not even know who all the nominee directors were (although he accepted that he could have found out) and I very much doubt that he asked questions of any nominee directors in Panama.

217. It is true that Mr Bairactaris said that if he had been approached out of the blue with a question as to whether there was anything that the insurers ought to be told, he might have deduced that it was a reference to the criminal charges and disclosed them on that basis. However, on Insurers' case, this would not have been an approach out of the blue. On the contrary, it would have been a question that he would have been asked regularly since his appointment on 16 August 2007. It is therefore plausible that he would not have associated this routine question with the charges or mentioned them given his evidence that he did not think them relevant to the performance of his functions.

218. For these reasons, I find that Insurers have failed to prove that any of the Claimants ought to have known about the criminal charges. Since I have also found that they did not have actual knowledge, it follows that there was no breach of the duty of fair presentation.

219. That is sufficient to dispose of this defence, but in deference to the considerable effort devoted to the submissions on materiality and inducement and because these raise points of some interest, I will go on to indicate briefly what my conclusions would have been on these matters had it been necessary to decide them.

Materiality

220. The test of materiality under the 2015 Act is substantively the same as under the previous law. It was therefore common ground that Insurers did not need to show that the undisclosed circumstances would have had a decisive effect on the judgment of the hypothetical prudent underwriter, or even that he would probably have regarded them as increasing the risk. It is sufficient that he or she would have wanted to take them into account.

221. Mr MacDonald Eggers argued that in order to be considered material, the circumstances must at least have had an objective connection to the risk. Miss Hopkins disagreed and this led to a debate as to whether the circumstances must be material to the risk, or to the inducement of the prudent underwriter. In truth, this seemed to me to be a largely semantic dispute for two reasons:

    (a) It depends on what is meant by "risk" in this context;

    (b) The test of materiality has its own in-built limitation in that a circumstance is only material if it affects the judgment of a *prudent* underwriter, not an ultra-cautious underwriter, nor at the other extreme a reckless underwriter.

222. As to the meaning of "risk", it clearly includes any circumstances which increase the risk being underwritten, for example, if it relates to the risk of loss of or damage to the subject matter of the insurance, the occurrence or effect of an insured peril, or to the insurer's salvage or subrogation rights. However, it is well-established that materiality is not limited to such matters and can extend to matters relevant to the "moral hazard", for example where the circumstances in question could result in a fraudulent or inflated claim.

223. In *The Dora,* [1989] 1 Lloyd's Rep.69 and *The Moonacre,* [1992] 2 Lloyd's Rep. 501, the court favoured an expansive approach to materiality so as to include circumstances even if they were not directly relevant to the assessment of the risk being insured. On the other hand, the decision in *SAIL v Farex Gie,* [1995] L.R.L.R.116 explains the rationale for the duty of disclosure as resting on the asymmetry of information between the parties as regards matters affecting *"the insurers' likely liability under the contract (including arrangements which may affect rights of subrogation)"*.

224. I recognise that this is a question which is not conclusively settled: see *Good Faith and Insurance Contracts,* (4th ed., 2017) paras 14.65ff., where the learned editors prefer the narrower view on the grounds that the test would be unacceptably wide if the insured was obliged to disclose facts which were unrelated to the insurer's likely liability under the contract.

225. It may be that at least part of the answer lies in the fact that the test for materiality is limited to circumstances which would influence the judgment of a prudent underwriter, since it is difficult to conceive of a prudent, as opposed to an excessively cautious, underwriter being influenced by matters which have no objective connection to either the insurer's liability or potential loss under the policy or to the honesty or *bona fides* of the assured. This would make sense because the question is surely whether the underwriter is prepared to write the *risk*, not whether he or she likes the assured personally or wants further business from the assured in the future, or for reasons of personal antipathy will not underwrite vessels associated with anyone born in Ruritania.

226. There is a further interesting and similarly unresolved debate as to whether exculpatory matters can be taken into account as part of the relevant counterfactual when considering whether something is material or not. Mr MacDonald Eggers submits that it can and

relies for this proposition on the judgment of the Court of Appeal in *Drake Insurance plc v Provident insurance plc,* [2003] EWCA Civ. 1834; [2004] 2 WLR 530. That was a case of motor insurance where the assured had disclosed a prior accident which had supposedly been settled on the basis that he was at fault, but failed to disclose a subsequent speeding conviction. The insurers sought to avoid for the latter non-disclosure. In fact, however, the prior accident had been a no fault accident such that the rating would have been significantly reduced and would not have been affected by the speeding conviction. The court was satisfied that if the speeding conviction had been disclosed, the reclassification of the accident would also have emerged.

227. In that case, Rix LJ described the proper analysis of this point as *"elusive"* and expressed the tentative view that both materiality and inducement were to be tested against the true facts in so far as the evidence established that they would have been presented together with the circumstances which were not disclosed:

"[74] ... When account has to be taken of a non-disclosure, the issue moves from the world of actual fact into the world of hypothesis. The non-disclosure is an actual fact, and the hypothesis is what effect disclosure would or might have had on a prudent underwriter (the issue of materiality) and what effect disclosure would have had on the actual insurer (the issue of inducement). I do not at present see why the hypothetical world is one in which the assured is assumed to have made the disclosure but not assumed to have provided true information about the settlement of the earlier accident as a no fault accident. On that basis, the non-disclosure of the speeding conviction could not have been material because it could not have induced a re-rating.

...

[77] Ultimately the issue seems to be: who takes the risk that the true facts as of the time of contract, conclusively established by the time of contract, do not support the right to avoid? I do not see why, subject to estoppel or other such defences, the answer should not be in favour of the insured. However, because there was no citation of authority and I am not sure that there is any event a case on all fours, I emphasise that my opinion is expressed with caution."

228. Clarke LJ at [138] stated that he was inclined to agree with these views, which are also consistent with the decision of the Court of Appeal in *Brotherton v Aseguradora*

Colseguros SA, [2003] EWCA Civ. 705; [2003] Lloyd's Rep. I.R. 746 at [22]. The view of the majority that the assured is entitled to have materiality, as well as inducement, judged against other material that would have been presented along with the undisclosed circumstances was followed by Blair J in *The Nancy,* [2013] EWHC 2116 (Comm); [2014] 1 Lloyd's Rep. 14 at [166] (although in the event he decided the case before him on inducement rather than materiality). It also seems to have been accepted by Tugendhat J in *Norwich Union Ltd v Meisels,* [2006] EWHC 2811; [2007] Lloyd's Rep. I.R. 69 at [25]-[26].

229. On the other hand, Pill LJ at [163] did not agree with the majority in *Drake Insurance plc v Provident insurance plc* and it is fair to say that Waller LJ also expressed doubts in *North Star Shipping Ltd v Sphere Drake Insurance plc,* [2006] EWCA Civ. 378; [2006] Lloyd's Rep. I.R. 519 at [17] although this seems to have been, at least in part, because the law at the time did not allow account to be taken of any increased premium that might have been charged to the assured. *Arnould, (op.cit.)* at paras 15-55 to 15-61 discusses the case law and concludes that while exculpatory material may be taken into account in relation to inducement, it is still an open question whether the same is true for materiality.

230. Were it necessary for me to decide, I would prefer the views of the majority in *Drake Insurance plc v Provident insurance plc*. If it were otherwise then the answer to the question of materiality might depend on the way in which the insurer chose to plead the non-disclosure. The assured would have no control over this and the insurer could accordingly be as selective as it liked in how it defined the circumstances which it alleged should have been disclosed. Furthermore, I agree with Rix LJ that unless account is taken of exculpatory material which it can be proved would have been disclosed, the counterfactual scenario being posited becomes wholly unrealistic. The question is what

the prudent underwriter would have done if the information had been withheld. But, particularly if that information is very narrowly circumscribed, it may be implausible that it would have been disclosed on its own without any further explanatory material being either volunteered or given in response to questions asked. No doubt, it would need to be established to the satisfaction of the court what further material, if any, would have been disclosed but that seems to me to be a sounder basis for measuring the effect on the mind of a prudent underwriter and thus assessing whether the information was in truth material or not.

231. Mr Walsh (who addressed this aspect of the case on behalf of Insurers), submitted in closing that the court should only assume that the pleaded facts were disclosed, i.e., as set out above. However, as I put to him, those facts hardly tell the full story and it would be tying the Claimants' hands behind their backs to prevent them from arguing that – if they had made the disclosure – they would also have explained Mr Bairactaris' role and any other matters which put the charges into context.

232. I do not regard paragraphs 11.79-11.84 of the Law Commission Report as necessarily being contrary to this approach. For one thing, they are directed primarily towards inducement rather than materiality. But even in that context, the concern there expressed is to limit the extent of speculation as to what either party would have done with the information which was presented or as to what terms would have been negotiated. As I read these paragraphs, they do not say anything about the extent of the information which the evidence before the court establishes would have been presented if the relevant circumstances had in fact been disclosed.

233. In the present case, I am satisfied on the evidence that if the charges against Mr Bairactaris had been disclosed, the following matters would also have been presented to

Insurers:

(a) Mr Bairactaris' firm belief that the charges were without foundation;

(b) Mr Bairactaris was a nominee director fulfilling essentially only an administrative function in signing documents which he performed solely on the instructions of NGM and the Moundreas family;

(c) Mr Bairactaris had no role in the running of the NGM Group's business or the operation of the Vessel;

(d) He had a long-standing relationship with NGM as their external lawyer since 2006;

(e) He had been appointed as a nominee director of Delos and numerous other SPVs many years previously and NGM had no cause to doubt his probity or reason to suspect any connection between Mr Bairactaris and the detention of the NOOR 1 four years earlier;

(f) Nominee directorships are common in the maritime and private client/corporate industry and this was a service he provided to other clients as well.

234. The question is then whether, given this context, a prudent underwriter would have dismissed the charges as having no relevance to the assessment of the risk. If he or she would, then they are not material.

235. The particular difficulty in this case is that the circumstances relate to allegations of criminal behaviour against someone with no direct involvement in the subject matter of the insurance, other than a purely formal role as a nominee director, where the charges had not been proved, were not suggested to be true and were strenuously denied. Counsel were unable to point to any previously decided case which cast much illumination on this

fact-pattern. In the other cases relied on by Insurers, the charges related to someone who was obviously connected with the insured risk.

236. Ultimately, this is a question for the court to assess based on the evidence before it, including the expert evidence.

237. In my judgment, objectively speaking:

(a) The charges against Mr Bairactaris in connection with a historic incident concerning a third party vessel unconnected to the Claimants could not plausibly have increased the risk of detention of the Vessel, whether for alleged drug smuggling or otherwise. Mr Bairactaris had no say in the trading or operation of the Vessel and it is difficult to see how he could "go rogue" in that respect without the knowledge of NGM or FML. Mr Wikborg suggested that he might give unauthorised instructions to banks or legal authorities, but apart from his inability to identify what sort of instructions these might be, none of this would have had any objective relevance to the risks insured under a war risks policy.

(b) There would have been no reason for a foreign state to detain the Vessel because of its connection with Mr Bairactaris in the absence of any evidence that it would have had the faintest idea about any such connection. If the Vessel were to be detained on grounds of suspected smuggling, it would not be because of anything to do with Mr Bairactaris and, if the suspicion were well-founded, there would be no cover in any event.

(c) The only conceivable way in which the charges against Mr Bairactaris could affect the position of Insurers under the Policy would be if the Vessel were detained for some other reason and it then subsequently came to light that there were charges

against the director of the owning company with the result that the investigation was prolonged or became more expensive to resolve. This, I accept, is a possibility although it seems a rather remote one.

(d) As regards the moral hazard, it is again difficult to see how the charges against Mr Bairactaris could have increased the risk of a fraudulent or inflated claim, given that he played no part in the placement of insurance or the presentation of claims, or indeed in anything to do with operations.

(e) On this counterfactual hypothesis, the mere fact of a long-standing relationship between NGM and Mr Bairactaris could not have cast any real doubt on the probity or *bona fides* of the Claimants. On the contrary, by disclosing the information, the Claimants would have been demonstrating their openness and transparency. Furthermore, the charges had only been brought a few months previously and there had been no grounds for suspicion in any of Mr Bairactaris' conduct over the years since his appointment so that there would have been no basis for suggesting that the Claimants and Mr Bairactaris were all in some dark conspiracy together.

238. In so far as objective relevance to the risk is a necessary pre-condition to materiality (which is by no means firmly established), I find that the circumstances relied on by Insurers had no objective relevance to the risk of loss or liability under the Policy or to the probity of the Claimants save for the rather remote possibility identified under paragraph 237.(c) above. Even that risk could, of course, have been obviated by the imposition of a condition by Insurers requiring replacement of Mr Bairactaris as a condition precedent to the inception of cover for any particular vessel.

239. So far as the expert evidence is concerned, I found much of Mr Wikborg's evidence to be unrealistic. He was intransigent and, to my mind, somewhat blinkered in his refusal to

accept that a nominee director fulfilling Mr Bairactaris' role is not the same as a regular employee. His suggestion that there was a risk that the Vessel might have been traded in a way which exposed Insurers to a greater risk seemed to me to be illusory in circumstances where Mr Bairactaris played no part in her trading. It may well be that Mr Wikborg's evidence reflected how he personally may have reacted, but he was giving evidence of how a prudent underwriter would have reacted and I cannot accept his "general proposition" that no prudent underwriter would insure a vessel in so far as the assured had some sort of association, *however remote*, with a person facing criminal charges who had no role in the management of the company or the ship. As a statement, this seemed to me to be far too broad and even Mr Wikborg was ultimately constrained to accept that the criminal charges themselves were not material for the Policy in this case. He also accepted that if in fact NGM had not known about the charges their probity could not be impugned.

240. It is tempting to ask rhetorically what Mr Wikborg's position would have been if the same charges had been brought against one of the Panamanian nominee directors or if the nominee director had been, say, Mr Moundreas' secretary, since he accepted that it would not be material to know that a receptionist was being prosecuted for a traffic offence. However, we do not know as the question was not asked and the court cannot speculate.

241. All that said, I do accept Insurers' submission that there is, from a prudent underwriter's perspective, something undesirable about insuring a vessel which is associated, at least on paper, with someone accused of being a member of an organised crime gang. I therefore equally do not accept Mr Clarkson's evidence that the prudent underwriter would simply have discounted the charges altogether. This seemed to me to be almost equally unrealistic in the opposite direction.

242. Had it been necessary to decide, I would have held that the charges were material on the basis that a prudent underwriter would have wanted to *consider* imposing a condition, for example, that Mr Bairactaris should be replaced as a nominee director. Whether or not the prudent underwriter would actually have done so is, of course, irrelevant; I find that he or she would at least have wanted to consider the matter. Accordingly, had I concluded that the Claimants had the requisite knowledge, I find that they should have disclosed the circumstances relied on by Insurers.

Inducement

243. Even then, however, Insurers would have had to prove that the actual underwriter was induced by the non-disclosure to write the risk before this defence could succeed.

244. To this end, they called M. de Lavergnolle and M. Denèfle. I bear in mind that evidence on inducement given by an underwriter should be subject to careful scrutiny for the reasons given by Colman J at first instance in *North Star Shipping Ltd v Drake Insurance plc,* [2005] 2 Lloyd's Rep. 76 at [254]:

> *"In evaluating the underwriters' evidence it is important to keep firmly in mind that all their evidence is necessarily hypothetical and that hypothetical evidence by its very nature lends itself to exaggeration and embellishment in the interest of the party on whose behalf it is given. It is very easy for an underwriter to convince himself that he would have declined a risk or imposed special terms if given certain information. For this reason, such evidence has to be rigorously tested by reference to logical self-consistency, and to such independent evidence as may be available."*

245. As already remarked (paragraph 42. above), I found the evidence of both underwriters to be illogical and confused even if they genuinely believed what they were telling me. Matters were not assisted by the fact that they were being cross-examined on a wholly hypothetical premise in a language which was not their native tongue. Heeding Mr Justice Colman's warning, I also bear in mind that Insurers had taken a firm position on this point and there would therefore be an entirely natural inclination for M. de

Lavergnolle and M. Denèfle to have convinced themselves after the fact that the risk would have been declined come what may.

246. The actual underwriter was M. de Lavergnolle and it is therefore his evidence which is critical although he said, and I accept, that before making any decision he would have consulted M. Denèfle.

247. For the reasons already discussed, I agree with Mr MacDonald Eggers that it is appropriate for the purposes of examining inducement to posit a counterfactual which includes the exculpatory material set out above. As noted, *Arnould* regards this as a well-established proposition in the context of inducement and it was also the view taken by Christopher Clarke LJ in *Axa Versicherung AG v Arab Insurance Group (BSC),* [2017] EWCA Civ. 96; [2017] Lloyd's Rep. I.R. 216 at [138] which was very fairly drawn to my attention by Mr Walsh. It is true that the latter was a decision made under the pre-2015 Act law, but I am not persuaded that there is anything in the Law Commission Report to suggest that it would be inappropriate under the new dispensation. The concern expressed there was rather the need to set a limit on the extent of permitted speculation as to what either party would have done with the information which was presented. On my reading, it does not say anything about the extent of the information which the evidence establishes would have been provided if the relevant circumstances had in fact been disclosed.

248. As I have already held, the charges against Mr Bairactaris had no objective relevance to the risk of loss or liability under the Policy save possibly in relation to the potential prolongation of a detention which had been effected for other reasons. This was the only way in which M. de Lavergnolle could say that the risk under the Policy was affected and, even then, he was unable to point to any previous instance where this had occurred.

249. He also expressed concern that the charges reflected on the credibility and reliability of NGM. But, this was to ignore the fact that on this hypothetical counterfactual NGM had disclosed the charges which, if anything, could only have served to underline their reliability and transparency.

250. It was wholly unclear to me from his evidence whether he would or would not have renewed the risk either for some or all of the vessels in the fleet if Mr Bairactaris had resigned his directorships. For example, he said that even in those circumstances he would have had other questions about NGM's recruitment policy but he could not say what he would have regarded as satisfactory answers or what his position would have been if such answers had been given.

251. I was also unimpressed by his evidence that he did not know what a nominee director was and that even if he had, it would not have made any difference because he considered the distinction irrelevant. That seems to me to be an unreasonable attitude to adopt and is, moreover, contrary to other evidence he gave in cross-examination that he would have wanted to understand fully the information surrounding the charges and Mr Bairactaris' position as a director.

252. M. Denèfle's evidence did not take the matter much further. He too seemed disinclined to recognise any difference between the role of a nominee director and a conventional director on the (manifestly incorrect) assumption that Mr Bairactaris could *"commit the group"*. He likewise referred to the risk of becoming embroiled in a detainment and lengthy investigations but never satisfactorily explained how any association with Mr Bairactaris could be responsible for the initial detention if the relevant state did not know about it.

253. Moreover, even on that basis, his real concern appeared to be the potential effect on the reputation of Insurers and GAREX rather than any effect on the risk being insured. (I confess that I have not come across a case where the reputation of the insurer has been regarded as the touchstone of materiality or inducement.) Although the fault is no doubt mine, I was unable to follow his reasoning that such an investigation and the mere fact that charges had emerged against Mr Bairactaris might give rise to a perception that Insurers were somehow linked with money-laundering. In his witness statement, he also referred to the reputational risk for Insurers of insuring companies managed by people accused of criminal offences. But this was to ignore the fact that Mr Bairactaris did not manage either Delos or NGM. In cross-examination he could only suggest the possibility that Mr Bairactaris might influence people within NGM (something not mentioned in his witness statement) but he was unable to point to any evidence which supported this as a serious suggestion.

254. Finally, M. Denèfle's evidence was that he would have been prepared to insure that part of the fleet which was not associated with Mr Bairactaris. If that is right (and it should in fairness be acknowledged that he subsequently backtracked by saying that it would depend on the relationship between Mr Bairactaris and the rest of the NGM Group), then it must follow that all his concerns would have been met by the imposition of a condition that Mr Bairactaris was replaced. As to this, Mr Walsh complained that positing the resignation or replacement of Mr Bairactaris was impermissible because that would result in Insurers being asked to write a different risk altogether. He referred to the Law Commission Report in this connection. However, I am not convinced that this is necessarily so. The risk remains the same in the sense that Insurers are still being asked to insure Delos and the other SPVs and I would require some persuasion that a mere change of nominee director of an SPV changes the risk.

255. However, Mr Walsh also makes a fair point based on paragraph 11.82 of the Law Commission Report which states that:

"… it should not be open to an insured to say that it would have complied with any term which the insurer would have imposed (for example, an exclusion or warranty) and so the loss should be covered. During consultation, the example was put to us of a business which keeps its vehicles in an area which has suffered a series of thefts of commercial vehicles. The business fails to disclose this and a vehicle is stolen. The insurer responds that had this information been properly disclosed it would have required the vehicles to be parked in a secure location, which the business says it would have done if this term had been imposed. Consultees were rightly concerned about the circularity of such arguments."

256. I accept that it would be going too far if an assured could simply say that it would have complied with any term that the insurer cared to impose, not least because in the example given (compliance with a warranty to keep the vehicle in a secure location) it would have been completely speculative whether the requirement would in fact have been observed on an unknowable occasion which necessarily lay in the future. In the present case, however, the replacement or resignation of Mr Bairactaris is something which Insurers would have required as a pre-condition to cover and on the evidence I am satisfied that it would have been complied with.

257. In my judgment, this meets the difficulty which the Law Commission identified of knowing where to draw the line in determining the counterfactual. Paragraph 5 of Schedule 1 of the 2015 Act states that:

"If the insurer would have entered into the contract, but on different terms (other than terms relating to the premium), the contract is to be treated as if it had been entered into on those different terms if the insurer so requires."

Once that has been established, it seems to me that it is thereafter a question of evidence and that it is for the assured to prove that it could and would have complied with any relevant terms. This is nothing to do with inducement (or materiality). On this analysis, once the insurer has sufficiently established on the evidence that it would only write the

risk on certain terms the Act deems the insurance to have been written on those terms. However, if that is right, then in this counterfactual world, I do not see why sauce for the goose is not equally sauce for the gander and it should in principle be open to the assured likewise to prove that it could and would have complied. That said, I accept that this is a difficult area which is far from resolved and in any event, anything I say on the matter is only *obiter*.

258. Had it been necessary to do so, therefore, I would have concluded that if all the information referred to in paragraph 233. had been disclosed, M. de Lavergnolle (and, so far as relevant, M. Denèfle) would have been prepared to write the risk on the same terms and for the same premium but with the imposition of a condition requiring replacement of Mr Bairactaris as nominee director of those SPVs where he was appointed. Beyond this, Insurers have not satisfied me on a balance of probabilities that they were actually induced to write the Policy by the non-disclosure of the circumstances relied upon. As matters stand, however, the question is academic in the face of my findings that none of the Claimants had the requisite knowledge to trigger a duty of disclosure in the first place.

259. For the sake of completeness and because the point assumed some significance in the pre-trial skirmishes, I should also mention the fact that some of the Defendant insurers subsequently insured vessels in Mr Marinakis' fleet. This was relied upon by the Claimants in cross-examination of both M. de Lavergnolle, M. Denèfle and the expert underwriters. I place no weight on this. Although, on Mr Wikborg's "general principle", no prudent underwriter should have touched these risks with the proverbial bargepole, in circumstances where there was no evidence as to the circumstances in which they were written I did not find that they assisted me in relation to materiality or inducement on the particular facts of the present case.

Affirmation

260. The Claimants' alternative case was that even if Insurers did establish an entitlement in principle to avoid the Policy, they were nonetheless precluded from doing so by affirmation. It is unnecessary for me to decide this point and I do not do so. I would only say that in my view it is distinctly arguable on the evidence that Insurers had sufficient knowledge of the relevant facts and of their right to avoid by the date on which they served their response to the Claimants' Request for Further Information. That response, which was provided on 28 June 2021, amplified Insurers' existing defence but did so without reference to any alleged non-disclosure of the criminal charges and without any specific reservation of rights in relation to that non-disclosure. This was in circumstances where they were already making two separate allegations of non-disclosure which did not involve avoidance of the Policy. That being the case, it seems to me also arguable that this was capable of amounting to an affirmation notwithstanding the general and unspecific reservation of rights which Insurers had made and continued to make in correspondence.

261. It is equally unnecessary to consider Mr MacDonald Eggers' further argument that even if Insurers had been entitled to avoid as against Delos and/or NGM, the claim against FML would have been unaffected as this was a composite policy.

262. For all the reasons given above, the Claimants' claim under the Policy succeeds.

(5) Quantum

263. It was common ground that the Claimants are therefore entitled to recover the agreed value of the Vessel in the sum of US$37.5 million less an allowance for her residual value which is to be quantified hereafter by the court if it cannot be agreed by the parties.

264. The Claimants also had a further claim for US$235,899.92 in respect of sue and labour expenses relating to:

(a) fees of Syam & Syam from February to April 2019 (US$52,506.30);

(b) fees, expenses and disbursements of DEPP from May 2019 to January 2020 (US$163,311.22); and

(c) fees and disbursements of SPICA from February to July 2019 (US$20,082.42).

265. Insurers initially asserted that these sums were irrecoverable because the Claimants had not adequately explained why or in what circumstances they had been incurred. They submitted, correctly, that it was for the Claimants to prove that they were reasonably incurred and that a mere finding that they were not unreasonably incurred was not good enough. Nonetheless, given my findings in relation to sue and labour above, I am satisfied that the expenses of Syam & Syam, DEPP and SPICA were reasonably and properly incurred in principle for the purposes of averting or minimising a loss.

266. It is unclear to what extent, if any, the objection is seriously maintained in relation to the quantum of the expenses. A sufficient breakdown and description of the work is given in Bundle G and no specific challenge has been made to any of the invoices. I can therefore see no basis on which these rather modest amounts should be disallowed subject to one point, namely that on the current state of the authorities, the Claimants are not entitled to recover sue and labour expenses incurred after the date of issue of proceedings: *The B Atlantic,* [2014] EWHC 4133 (Comm); [2015] 1 Lloyd's Rep. 117 at [338]-[343] and *The Brillante Virtuoso,* [2015] EWHC 42 (Comm); [2015] 1 Lloyd's Rep. 651 at [298]-[304] (both decisions of Flaux J (as he then was). That is a proposition which may well have to be revisited one day, as submitted by Miss Healy who argued this point on

behalf of the Claimants. However, this is not a case in which it is appropriate for me to do other than follow where others have led.

267. I will leave it to the parties in the first instance to agree how much of the expenses are to be disallowed on this basis.

(6) Section 13A

268. There remains the Claimants' claim for damages under section 13A of the 2015 Act. Section 13A implies into every contract of insurance a term that if a claim is made, the insurer must pay any sums due in respect of the claim within a reasonable time (including a reasonable time for investigation and assessment). Section 13A(3) makes clear that what constitutes a reasonable time depends on all the relevant circumstances, including but not limited to the type of insurance, the size and complexity of the claim, compliance with any relevant statutory or regulatory rules or guidance and factors outside the insurer's control.

269. It is common ground that the burden of proof is on the assured to demonstrate that the insurer failed to pay within a reasonable time as so determined. If that burden is successfully discharged, it is then open to the insurer to show that there were reasonable grounds for disputing the claim (whether as to liability or quantum). If so, then the mere failure to pay while the dispute is continuing does not constitute a breach of the section 13A term, although the conduct of the insurer in handling the claim may be a relevant factor to take into account in deciding whether there was a breach and, if so, when.

270. I accept that the section 13A claim was not advanced as a mere afterthought in the Reply (as suggested by Insurers). On the contrary, it featured in the original Particulars of Claim albeit not in any very developed form. It is nonetheless fair to say that it was

not placed at the forefront of the Claimants' case. On behalf of the Claimants, Miss Healy submitted that Insurers should reasonably have paid the claim at least by February 2020 around 4-6 weeks after the Vessel had finally been released by the Indonesian authorities.

271. A point of principle canvassed in the course of submissions was whether a claim under section 13A is limited to cases of unreasonable failure to pay prior to the commencement of proceedings. The Claimants say 'no' on the basis that there is nothing to this effect in the Act and that it would be unfair to deny the assured a remedy simply because it commences proceedings before a reasonable time to pay has elapsed – particularly in the context of a CTL claim where it is required to issue a claim at the time of abandonment.

272. Insurers, by contrast, argue that once proceedings have been issued, the rights of the parties crystallise and their conduct thereafter falls to be judged by reference to rules of court. They rely by analogy on the authorities concerning recovery of sue and labour expenses, fraudulent claims and the lapse of contractual rights to examine witnesses and documents: see *The Brillante Virtuoso (supra)* and *The Star Sea,* [2001] UKHL 1; [2003] 1 AC 469.

273. Yet again, this is an interesting point on which there appears to be no authority and there is much to be said on both sides. I can certainly see that once proceedings have been issued, all bets are off so to speak and any recompense for late payment thereafter becomes subsumed into an award of interest while leaving intact any claim to damages under section 13A which might already have accrued. However, I would have wanted to hear more argument on the point than time allowed and since I find that the claim fails on the facts anyway, I do not propose to decide one way or the other. For the purposes of what follows, I shall assume that a claim is available in principle.

274. In relation to breach, the Claimants submitted that the claim did not require any great investigation given that there could be no dispute over the length of the detention or the amount payable because of the Detainment Clause and the Agreed Values Clause. They contrasted the position with a claim under a business interruption policy where calculation of the recoverable loss could be very complex and time-consuming. Further, they argued that there was only limited investigation that Insurers could undertake in Indonesia since almost all the relevant evidence would emanate from the Claimants themselves. Finally, they argued that there were only a limited number of disputed expert issues, none of which was particularly complicated. (I of course ignore for this purpose any expert evidence relevant to the calculation of the claim under section 13A itself.)

275. All these matters were disputed by Insurers. Moreover, Miss Hopkins pointed out with some force that no case had been put to M. Denèfle that Insurers' conduct of the claim was unreasonable or that they should have paid by February 2020, which in any event was only a few weeks after the Vessel was released and when it was still unclear what was going to happen to her. She further argued that no agreement on the residual value of the Vessel was reached until May 2021 and that Insurers accordingly could not reasonably have been expected to pay before then (although I am not sure that this latter point would necessarily have absolved Insurers from at least paying something before then).

276. In relation to reasonable grounds for disputing the claim I accept that the mere fact that a defence fails does not of itself mean that it was unreasonably taken. Nonetheless, I have serious doubts as to whether Insurers' continued reliance on their fortuity, exclusion (e) and sue and labour defences was reasonable. The first two raised what are very much "lawyers' points" and as I have already found, I cannot see that the Claimants' conduct

was anything like sufficiently exceptional to give rise to a breach of the duty to sue and labour. I do nonetheless accept that Insurers were very much at a disadvantage in relation to knowing exactly what went on during the early months of the detention. They were not notified of the incident at all until nearly the end of March and were dependent on disclosure for detailed knowledge of the discussions. This would clearly be relevant to the timescale within which any payment should reasonably have been made.

277. As far as the defence of non-disclosure is concerned, the original two grounds were abandoned before trial. The first concerned the prior detention for a month by Houthi rebels of a different vessel managed by NGM Energy (withdrawn in September 2023) and the second related to an alleged overvaluation of the Vessel (withdrawn in October 2023). Neither was explored before me and there is therefore no basis on which I can assess whether there were reasonable grounds for taking the points. As for the criminal charges, I consider that it was reasonable to defend on this ground. However, since the availability of the defence only emerged in April 2021, it plainly cannot assist Insurers if they should reasonably have paid the claim at an earlier date.

278. In short, this is not a case where I can readily find either that it was reasonable or unreasonable for Insurers to dispute the claim but I find myself happily relieved of the task of making a decision given that in my judgment the Claimants have in any event failed to establish the alleged loss.

279. As to this, the Claimants asserted that if Insurers had paid the claim in February 2020, they would have used the proceeds to fund a substantial part of the purchase price of an Eco Capesize vessel of similar specification to the Vessel called the OLYMPIC HOPE which they would have traded at a profit. This was a purchase opportunity which had been brought to Mr Moundreas' attention in February 2020. The Claimants accordingly

claim lost trading profits and also the increase in the capital value of the replacement vessel between her notional purchase date and the date of eventual payment of the insurance proceeds. The total claim amounts to some US$27.5 million.

280. The broking experts retained by the parties were agreed as to the calculation of the net trading losses that such a vessel would have made dependent only on establishing the date of purchase. Likewise, the valuation experts were agreed as to the increase in capital value.

281. However, the entirety of the claim is premised on the basis that the Claimants could and would have purchased either the OLYMPIC HOPE or another similar vessel and, if so, when. I accept that NGM had a general interest in purchasing an Eco cape vessel. I am also prepared to assume (without deciding) that sufficient funds to cover the balance of the purchase price could have been raised if necessary and that the purchase could have been effected very quickly due to the good relationship between NGM and Onassis who owned the OLYMPIC HOPE.

282. Nonetheless, the available evidence does not satisfy me on a balance of probabilities that either the OLYMPIC HOPE or any other similar Eco cape vessel would have been available to purchase in February 2020 or at any time thereafter. The agreed evidence of the valuation experts was that there was limited availability in February 2020 of vessels meeting this specification. The only vessels to which anyone was able to point were the OLYMPIC HOPE herself and her sister vessel, and there is no evidence that any other Eco cape was either on the market at that time or indeed sold in 2020.

283. But even the OLYMPIC vessels could hardly be said to have been on the market for sale. The only evidence before the court consisted of a very brief email exchange on 26 February 2020 when NGM's broker sent an email referring to the vessels and stating

"Onassis say they will sell these scrubber fitted capes (which will be scrubber fitted in May this year)… we call the mkt price for these in the low 40ies;" This, in my judgment, suggests strongly that the vessels were not actually on the market and probably would not be offered for sale until after the scrubbers had been fitted in May/June. Rather they seem to have been advertised in order to gauge expressions of interest – in Mr Moundreas' own words they represented an "opportunity" rather than a firm offer. Eventually they were sold as a pair to JP Morgan in November 2020 and it is unclear whether Onassis would have been prepared to sell a single vessel. There was certainly no suggestion that NGM would have been prepared to buy both.

284. In any event, there was no evidence to show that this opportunity was taken any further or even discussed within NGM. For example, no documents were produced to show that active consideration was given to purchasing one or both of the vessels or that any business plan was drawn up. Mr Moundreas' evidence was simply that he had a business plan *"in his head"*.

285. I therefore agree with Ms Aboagye who argued this part of the case on behalf of Insurers that the court cannot be satisfied on a balance of probabilities that the Claimants would have purchased the OLYMPIC HOPE either in February 2020 or at any subsequent date. While Mr Moundreas said that they had subsequently purchased an Eco cape, there was no evidence as to her specification or when she was acquired. Moreover, there is some force in Insurers' submission that NGM was a profitable group and could have purchased an Eco cape vessel without the benefit of the insurance proceeds had they wished. I am unable to say that this was not a possibility and, if so, then the failure to purchase was not caused by any breach on the part of Insurers.

286. In the light of these conclusions, it is unnecessary for me to grapple with the date from which any trading losses should be calculated, or with the claim for the increase in the capital value of the replacement vessel. I would merely say in relation to the latter that I am far from convinced that this would in any event have been a legitimate claim for the following reasons:

(a) The replacement vessel was primarily an income-producing asset, even if NGM also actively bought and sold vessels so as to realise a capital gain.

(b) Clearly an inability to purchase the replacement vessel would have deprived the Claimants *in fact* of the capital value of the vessel. However, on the counterfactual hypothesis that the vessel had been purchased, then the Claimants would have had possession of her as a capital asset which they could deploy to earn trading profits.

(c) Once the vessel was acquired, she could have been sold at any time. Her sale price would have depended on when she was sold and the prevailing state of the market. If she had been sold on one date, the Claimants may have realised a profit. The following day, they may have made a loss. But Insurers' failure to pay is legally irrelevant to the state of the market and it is difficult to see how they can be made liable for a notional loss, which has not in fact crystallised, calculated at a purely arbitrary date on which damages fall to be assessed: see, by analogy, the reasoning of Popplewell J (as he then was) approved by the Supreme Court in *The New Flamenco,* [2017] UKSC 43; [2017] 1 WLR 2581.

(d) Conversely, the Claimants were not obliged to sell the vessel and if they chose not to do so, they could have continued to trade her and could not, to my mind, have complained that they had somehow simultaneously lost her value as a capital asset.

287. Ultimately, it seems to me that the Claimants could only have recovered the increase in the capital value of the replacement vessel if they had been able to prove on the evidence that they would have sold her on a particular date for more than her purchase price. However, no attempt was made to do so and, even then, Insurers would have had a powerful argument that such a loss was too remote to be recoverable in any event.

288. It is therefore unnecessary to decide whether a claim under section 13A is available where the indemnity under the Policy would have been payable to the Bank, but only Delos and/or NGM had suffered the alleged loss.

CONCLUSION

289. For the reasons given above, the Claimants' claim under the Policy succeeds but their claim under section 13A fails and is dismissed. The other interesting questions with which this case is replete must sadly remain undecided for the time being.

290. It only remains for me to pay tribute to the excellent oral and written submissions which I received from both sides and the good humour and co-operative spirit in which the trial was conducted. I was also pleased to have been addressed by nearly all of the counsel retained in the case. The importance of giving advocacy opportunities to younger members of the Bar when so much of its work is now conducted on paper cannot be overestimated and this is a practice which is much to be encouraged.