Neutral Citation Number: [2022] EWCA Civ 1091

Case No: CA-2022-000558

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT
Sir Andrew Smith (sitting as a Deputy Judge of the High Court)
[2022] EWHC 452 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2022

Before:

LORD JUSTICE UNDERHILL,
VICE PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION
LORD JUSTICE NEWEY
and
LORD JUSTICE MALES

- -

Between:

1) OCM MARITIME NILE LLC **2) OCM MARITIME KAMA LLC**	**Respondents/ Claimants**
- and -	
1) COURAGE SHIPPING CO. **2) AMETHYST VENTURES CO.** **3) ORYX SHIPPING LIMITED**	**Appellants/ Defendants**

"COURAGE" / "AMETHYST"

- -
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David Berkley QC & Claudia Wilmot-Smith (instructed by **AMZ Law**) for the **Appellants**
Robert Bright QC & Charles Holroyd (instructed by **Reed Smith LLP**) for the **Respondents**

Hearing date: 21 July 2022

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Approved Judgment

Remote hand-down: This judgment was handed down remotely at 3.00 p.m. on 29 July 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Males:

1. On 10th June 2021 the United States authorities designated Mr Abdul Jalil Mallah, who was the legal and beneficial owner of the shares in the appellant companies, a "Specially Designated Global Terrorist". That was an Event of Default under the bareboat charterparties of two vessels, the Courage and the Amethyst, concluded between the first and second appellants as charterers and the respondents as owners. The owners gave notice on 18th June 2021 to terminate the charterparties and said that they would re-possess the vessels at their next ports of call, but the charterers disputed their right to do so. In the event the owners succeeded in taking possession of the Amethyst on or about 1st September 2021 at Sharjah in the United Arab Emirates, but the charterers caused the Courage to proceed into Syrian waters and the vessel remains there in the charterers' possession.

2. There is now no dispute that the designation of Mr Mallah resulted in an Event of Default under the charterparties, but there remains a dispute whether the owners were entitled to take possession of the vessels.

3. The judge, Sir Andrew Smith, held that they were. In a careful and comprehensive judgment he held that:

   (1) the owners terminated the charterparties lawfully and effectively by notices dated 18th June 2021;

   (2) the owners were entitled to possession of the vessels;

   (3) they had been so entitled since about 28th July 2021 in the case of Courage, while in the case of Amethyst they had lawfully taken possession of the vessel on or about 1st September 2021;

   (4) the charterers had precluded themselves from seeking relief from forfeiture of the charterparties by their misconduct in and in relation to the proceedings; and

   (5) in any event this would not have been an appropriate case in which to grant such relief.

4. In this appeal the appellant charterers contend that, on the proper construction of the charterparties, the owners are not entitled to possession of the vessels on termination unless they first serve a notice requiring payment of the aggregate amount due to them which the charterers then fail to pay; as no such notice was given, the right to retake possession did not accrue. Alternatively, the charterers say that the judge was wrong to refuse to order relief against forfeiture by way of either (i) restoration of the charters or (ii) restitutionary relief in respect of payments made to the owners (essentially repayment to the charterers of the contributions made by them to the purchase of the vessels).

The facts

5. The owners are special purpose vehicles incorporated in the Marshall Islands. Their ultimate beneficial owners are investment funds managed by Oaktree Capital Management LP, a Delaware limited partnership with headquarters in California. Pursuant to the arrangements described below, OCM Maritime Nile LLC became the

owner of the Courage, while OCM Maritime Kama LLC became the owner of the Amethyst. Both vessels are handysize bulk carriers.

6. The charterers are also incorporated in the Marshall Islands. Before June 2021, their shares were legally and beneficially owned by Mr Mallah, a Syrian national, apparently resident in Greece, who was also their sole director. A major issue at the trial was whether Mr Mallah had divested himself of his ownership of the charterers, but the judge held that he had not and that he remained the beneficial owner of the shares in the charterers at all material times.

7. By an agreement dated 12th July 2019 ("the letter agreement") made between Oaktree Maritime Finance I LLC ("Oaktree Maritime") and Oryx Shipping Limited ("Oryx", another Marshall Islands company owned by Mr Mallah but now dissolved), Oaktree Maritime offered, and Oryx accepted, terms on which Oaktree Maritime would provide finance for the acquisition of bulk carriers to be owned by single purpose companies wholly owned by Oaktree Maritime and to be chartered to companies controlled by Oryx. Oaktree Maritime was to provide up to half of the purchase price of the vessels (or, if lower, 60% of their appraised value at delivery). Each charter was to be "a 'Hell or High Water' bareboat charter incorporating the terms of [the letter agreement], based on Barecon 2001 terms", with a charter period of 25 months from delivery. The letter agreement provided that the charter hire included a fixed element, designed to cover the capital provided by Oaktree Maritime, and a floating element, designed to cover interest at the rate of 7.5% above one-month LIBOR. The charterers were to have an option to purchase the vessels at any time during the charter period, and an obligation to do so on the last day of that period.

8. Mr David Berkley QC for the charterers emphasised that the true nature of the transaction between the parties was that the owners provided what was essentially loan finance for the charterers to acquire the vessels, with the charterers themselves contributing about half of the purchase price.

9. Two vessels were then acquired by the owners which were renamed Courage and Amethyst. The purchase price of Courage was US $8.5 million and of Amethyst was US $10.51 million. The charterers contributed just under half of the purchase price.

10. Bareboat charters were then concluded as envisaged in the letter agreement. The charterparty of the Courage was dated 5th November 2019 and the Amethyst charterparty was dated 8th February 2021.

11. Under the charterparties, the vessels were demised to the charterers, who therefore had possession and control of them and were responsible for their maintenance and repair and for crewing and insurance. As contemplated in the letter agreement, the monthly hire payable consisted of "Fixed Hire" together with "Variable Hire" and the charterers were given an option to buy the vessels during the term of the charterparties and were obliged to do so at the end of the term.

12. On 10th June 2021, the United States authorities designated Mr Mallah a "Specially Designated Global Terrorist" under Executive Order 13224 of 23 September 2001 and he was included on the "Specially Designated Nationals and Blocked Persons List" ("SDN List"). His property and property interests were "blocked", and, as they were owned by Mr Mallah, the charterers' assets were also blocked. According to a US

Treasury press release, Mr Mallah had facilitated transactions for sending US dollars to officials of Iran's Islamic Revolutionary Guard Corps-Qods Force and had facilitated the shipment of Iranian crude oil to Hezbollah. The judge was not in a position to decide whether any of the allegations against Mr Mallah were true and expressed no view about them.

13. The owners' position was that Mr Mallah's designation gave rise to an Event of Default under the charterparties, entitling them to terminate the charterparties, which they did by serving Notices of Events of Default on 18th June 2021, saying that they would take possession of the vessels at their next ports of call. However, the charterers did not accept this position. The judge set out in detail the steps taken by the charterers to prevent the owners from taking possession of the vessels in the narrative section of his judgment at [37] to [89]. In the case of the Courage, the charterers' efforts have so far been successful and the vessel remains in their possession in Syrian waters, in defiance of an order made by the Commercial Court. The owners were able to take possession of the Amethyst on or about 1st September 2021 at Sharjah in the United Arab Emirates, but the vessel is detained there because of claims made by third parties there against Mr Mallah and others.

The issues at the trial

14. By the time of the trial the charterers accepted that Mr Mallah's designation gave rise to an Event of Default under the charterparties, entitling the owners to terminate the charterparties. However, they denied that the owners were entitled to possession of the vessels. There were three issues for the judge to decide. The first was a question of construction, whether the owners were entitled to possession in the absence of a notice served under clause 46 giving the charterers an opportunity to pay the "Outstanding Principal" and the "Indemnity Sum", both of which were defined terms. The second was whether the owners' claim for possession relied on provisions which were penal, and so were void and unenforceable. The third was whether the court should grant the charterers relief from forfeiture by way of (i) restoration of the charters, or (ii) restitutionary relief in respect of payments made to the owners.

15. The judge decided all three issues in favour of the owners. The charterers now appeal on the construction issue and the issue of relief against forfeiture. There is no appeal on the penalty issue.

The construction issue

The relevant terms

16. The two charterparties were in generally similar, but not identical terms. The judge set out their terms, so far as relevant to the issues before him, at [16] to [36] of his judgment. For the purpose of this appeal it is sufficient to identify the following clauses as relevant to the construction issue.

17. Clause 28 was headed "Termination". It provided (with the underlined and emboldened words being an amendment of the standard Barecon form):

> "(a) Charterers' Default

> The Owners shall be entitled to withdraw the Vessel from the service of the Charterers and terminate the Charter with immediate effect by written notice to the Charterers if:
>
> (i) The Charterers fail to pay hire in accordance with **the provisions of this Charter** …
>
> (ii) The Charterers fail to comply with the requirements of:
>
> (1) Clause 6 (Trading Restrictions)
>
> (2) Clause 13(a) (Insurance and Repairs)
>
> provided that the Owners shall have the option, by written notice to the Charterers, to give the Charterers a specified number of days grace within which to rectify the failure without prejudice to the Owners' right to withdraw and terminate under this Clause if the Charterers fail to comply with such notice;…".

18. Thus clause 28 provided for a right of termination in certain specified cases (failure to pay hire, breach of trading limits and breach of insurance and repair obligations). In the latter two cases, the owners had the option to give the charterers an opportunity to rectify the breach, but were not obliged to do so.

19. Clause 29 was headed "Repossession". It provided:

> "In the event of the termination of this Charter in accordance with the applicable provisions of **this Charter** ~~Clause 28~~, the Owners shall have the right to repossess the Vessel from the Charterers at her current or next port of call **or at sea**, or at a port or place convenient to them without hindrance or interference by the Charterers, courts or local authorities. Pending physical repossession of the Vessel in accordance with this Clause 29, the Charterers shall hold the Vessel as ~~gratuitous~~ bailee only to the Owners **and continue to maintain, class and insure the vessel as required by the terms of this Charter notwithstanding the termination of the chartering of the Vessel**. …".

20. It can be seen that in the standard form of the Barecon charter this clause only applied to termination in accordance with clause 28 (i.e. termination for failure to pay hire, breach of trading limits and breach of insurance and repair obligations), but the parties in this case extended its scope so that it applied in any case of termination in accordance with any of the applicable provisions of the charterparty.

21. Clause 45, headed "Events of Default", set out a list of events which would constitute an Event of Default. It is unnecessary to set them out.

22. Clause 46 is the critical clause. It provided:

> "(a) At any time after any circumstances described at *Clause 45 (Events of Default)* have occurred and are continuing, the

Owners may, by notice to the Charterers, (aa) in the case of Clause 45(a), 14 days after the occurrence thereof or on such later date as the Owners shall specify and (bb) in all other cases immediately or on such date as the Owners shall specify, terminate the chartering by the Charterers of the Vessel under this Charter, whereupon the Owners may at their option (but with no obligation so to do):

(i) declare by notice given to the Charterers the aggregate amount of (i) the then Outstanding Principal and (ii) the Indemnity Sum to be immediately due and payable whereupon the same shall become immediately due and payable and the Charterers shall be obliged to pay the actual balance of the same to the Owners together with any interest in accordance with Clause 35(d) and the then applicable payment premium payable pursuant to Clause 34(i) as if the Outstanding Principal was being prepaid on the date of the Owners' notice; and/or

(ii) take any action at law and under the Relevant Documents to collect the full amount as mentioned in Clause 46(a)(i) above; and/or

(iii) unless the Charterers have paid to the Owners the full amount as mentioned in Clause 46(a)(i) above, by their agent or otherwise without further legal process, re-take the Vessel (wherever she may be)…

(iv) unless the Charterers have paid to the Owners the full amount as mentioned in Clause 46(a)(i), declare by notice given to the Charterers that the Vessel should be promptly re-delivered by the Charterers to the Owners whereupon the Charterers shall be obliged to cause the Vessel to be re-delivered to the Owners …

(v) unless that [*sic*] Charterers have paid to the Owners the full amount as mentioned in clause 46(a)(i), with or without re-taking possession of the Vessel … to sell, lease or otherwise dispose of the Vessel …

(b) If the Owners repossess the Vessel as contemplated by Clauses 29 (Repossession) and 46(a), the Owners shall be entitled to navigate the Vessel to a safe port within permitted insurance limits designated by the Owners …

(d) No remedy referred to in this Clause 46 (*Owners' Rights*) is intended to be exclusive, but each shall be cumulative. Save as expressly stated in this Clause 46 (*Owners' Rights*), the exercise or purported exercise of any one remedy shall not prevent the simultaneous or later exercise of any other remedy nor shall it prevent the later exercise of the same remedy. …

> (f) The Owners and the Charterers each agree that the payment of the Outstanding Principal and the Indemnity Sum as set out at Clause 46(a)(i) above is a reasonable pre-estimate of the damages that will be suffered by the Owners from the termination of the chartering of the Vessel and represent liquidated damages and not a penalty …".

The judge's approach

23. The charterers' counsel submitted in the court below, and Mr Berkley repeated those submissions on appeal, that the owner can only repossess the vessel after termination of the charterparty if it has served a notice under clause 46(a)(i) and the charterer has not paid the amount stated in the notice. The judge did not agree. He held that, upon termination of the charterparty upon an Event of Default, the owner is entitled to possession of the vessel; clause 46(a)(i) gives the owner an option to serve a notice requiring payment, but it is not required to do so and, if it chooses not to, that does not affect its right to possession.

24. The judge's reasoning on this issue is at [131] to [139] of his judgment, which deserve to be read in full. In summary, his reasoning included the following points:

(1) The owners' construction respected the wording of clause 46 itself because the clause made clear that the owner has an option, but not an obligation, to serve a notice under clause 46(a)(i).

(2) The words "unless the Charterers have paid to the Owners the full amount as mentioned in clause 46(a)(i)" in the succeeding paragraphs mean no more than that, if the owner has served a notice and the charterer has paid, the remedies in those paragraphs are not available to the owner.

(3) The owners' construction was harmonious with clause 29, which provides an unqualified right to possession in the event of termination, while the charterers' construction was not.

(4) The underlying purpose of the transaction as a financing arrangement to enable the charterers to acquire the vessels and to provide security for the money advanced by the owners (who were not themselves in the shipowning business) did not affect these conclusions: even on the charterers' construction, they would lose possession of the vessels if a clause 46(a)(i) notice was served and they failed to pay immediately the full amount outstanding.

(5) Even though the purpose of the transaction was to provide finance for the charterers' purchase of the vessels, the parties chose to give effect to that purpose by entering into bareboat charterparties, a standard feature of which is that they include a right for the owner to repossess the vessel in the event of termination; there is, therefore, nothing commercially remarkable about the consequences of the owners' construction.

(6) There could be circumstances in which, acting reasonably, the owners would prefer to take possession of the vessel in response to an Event of Default rather than to serve notice under clause 46(a)(i) and take the outstanding payment, breach of a

sanctions regime being only one example in which the owners might be unable, or might reasonably not wish, to take payment from the charterers.

Decision

25. It is sufficient, in this one-off case, to say that I agree with the judge's reasoning summarised above and that, in my judgment, Mr Berkley had no answer to it. The judge gave effect to the written terms of the charterparties, while having fully in mind their commercial background and the consequences of his decision.

26. I would add three further points. First, Mr Berkley drew attention to the judge's view, at [148] of his judgment, on the penalty issue. Clause 48 of the charterparties gave the charterers a right to purchase the vessel, but only provided that no Event of Default had occurred. The judge held that this clause was not capable of being a penalty because, applying *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67, [2016] AC 1172, it did not give rise to any "secondary obligation". But he went on to say that, if the penalty doctrine had been applicable, the charterers would have had the better of the argument because some of the many and varied Events of Default might cause no significant damage; the detriment to the charterers from losing the purchase option would in all likelihood be significant, not least because of their initial contribution to the purchase price; and the owners could often be largely or entirely compensated by payment of the outstanding amount. Mr Berkley submitted that this view of the consequences for the charterers should have led the judge to adopt a different construction of clause 46. I do not agree. The judge had those consequences well in mind, but they cannot affect the clear language of the charterparty. Moreover, as Lord Justice Newey pointed out in argument, those consequences will occur even on the charterers' construction if a notice is served but the charterers fail to pay in short order.

27. The second point is that the judge went on to hold that these were charterparties where, in principle, the remedy of relief against forfeiture would be available in the event that termination operated with undue harshness. That conclusion is not challenged. It goes a considerable distance to blunt any force in the charterers' complaint that the consequence of the vessels being repossessed by the owners is that the charterers would lose their investment in the vessels and that the owners would obtain a windfall in the event of the vessels having risen in value. The fact that, in this case, the judge held that relief against forfeiture was not appropriate is a separate matter.

28. Finally, the consequence of the charterers' construction is itself surprising and uncommercial. Mr Berkley submitted that if the owners terminate the charterparties for an Event of Default but choose not to serve notices under clause 46(a)(i), the charterers are entitled to retain possession of the vessels indefinitely, free of any obligation to pay hire (because the charters have been terminated); in effect, therefore, although clause 46(a)(i) purports to give the owners a choice whether to serve a notice, in reality they have no choice at all.

29. I would therefore conclude, in agreement with the judge, that on termination as a result of an Event of Default, the owners have a choice. They may, and perhaps often will, choose to serve notices under clause 46(a)(i) in the hope that the outstanding amount will be paid to them. But they are also entitled to take possession of the vessels without serving such a notice. This is what the charterparties say. This may be an advantageous bargain for the owners, but it is not contrary to business common sense.

Relief against forfeiture

The claim for relief

30. The basis on which the charterers sought relief against forfeiture was summarised by the judge at [152] of his judgment. There were essentially four points:

> "(i) Before Mr Mallah's listing, the Defendants had performed the charterparties without complaint from the Claimants and without any issues arising between the parties.
>
> (ii) The Events of Default stem from Mr Mallah being placed on the SDN list, which was 'wrongful', and they involved no fault or culpability on the part of the Defendants; and Mr Mallah has applied for his name to be removed from the list.
>
> (iii) Mr Mallah's listing does not prevent or make it unlawful for the Claimants to perform the charterparties since Mr Mallah is no longer a director or officer of the Defendants, and he does not own them. In any case, an application could be made to OFAC to permit the parties to perform the charterparties.
>
> (iv) The Defendants will suffer irremediable prejudice if the charterparties are terminated and the vessels repossessed. Correspondingly, if the charterparties are terminated and the vessels repossessed, the Claimants will receive unwarranted windfalls."

31. As is apparent from the third of these points, the claim for relief was premised on the fact that it would be lawful to perform the charterparties, either because Mr Mallah had ceased to have anything to do with the charterers or because an application could be made to OFAC to permit such performance. No case was advanced that relief against forfeiture should be granted even if performance of the charterparties would infringe the United States sanctions against Mr Mallah.

Is relief against forfeiture available in principle?

32. The judge began this section of his judgment by addressing two preliminary issues. The first of these was whether the charterers' rights under the charterparties were of a kind that could be protected by relief against forfeiture. The judge held, following the approach of Mr Justice Cooke in *The Jotunheim* [2004] EWHC 671 (Comm), [2005] 1 Lloyd's Rep 181, that they were:

> "156. In this case, the chartering arrangements were a mechanism whereby the Oaktree Group provided finance to the Defendants, and if the arrangements went to plan, the Defendants were to possess the vessels until they bought them from the Claimants. In *More OG Romsdal Fylkesbatar AS v The Demise Charterers of the Ship "Jotunheim"*, [2004] EWHC 671, Cooke J observed that 'in a bareboat charter which is also a hire/purchase agreement, the owners provide the ship in

> anticipation that they will do nothing further after delivery. They receive the charterers' payments and, if all goes well, will transfer the vessel to the charterers on receipt of the final instalment' (at para 50). He decided that he therefore had jurisdiction to grant relief from forfeiture relief [*sic*], although on the facts he decided not to grant it. I agree with Cooke J, and conclude that the Defendants' rights under the charterparties are of a kind that can be protected by relief from forfeiture."

33. This conclusion is not challenged on appeal.

The charterers' misconduct

34. The second preliminary point considered by the judge was whether the charterers had, by their misconduct in and in relation to these proceedings, precluded themselves from seeking relief from forfeiture. As to this, the judge had set out in the narrative section of his judgment a lengthy history of disobedience to court orders and breach of undertakings in the course of the proceedings, together with the provision of misleading and untruthful information in the course of interlocutory proceedings. He summarised these as follows:

> "158. The criticisms of Defendants' response to Court orders and compliance with undertakings to the Court include these:
>
> (i) The AIS and other tracking systems of the 'Courage' and the 'Amethyst' were switched off on 25 and 26 June 2021 respectively. By her orders of 20 August 2021, Cockerill J ordered that the Defendants 'forthwith' cause the vessels' AIS system and other tracking and communication systems to be switched on to allow the Claimants to track their positions. The orders were emailed that same day to the Defendants. The Defendants did not restore the beacons until 23 August 2021.
>
> (ii) With regard to the 'Courage', on 20 August 2021, Cockerill J prohibited CSC and Oryx from entering or remaining within areas excluded by the charterparty, which included Syrian waters. The 'Courage' entered Syrian waters on 23 September 2021. I reject the explanation that she drifted there without power, and conclude that she was moved there under her own power. CSC and Oryx also failed to comply with the orders or 20 August 2021 and 27 August 2021, that the vessel be taken to Gibraltar or another port to be agreed between the parties.
>
> (iii) CSC and Oryx, in breach of the order of Foxton J of 29 September 2021, have not procured that the 'Courage' be towed to Piraeus, Greece as soon as reasonably practicable. She remains in Lakatia. I cannot accept that the Defendants have attempted to move her to Piraeus, and I reject the explanation that she was not towed there because the Defendants failed in genuine efforts to find a tug or to obtain

permission from the Syrian authorities. Had there been proper efforts, they would have been evidenced by disclosable documents.

(iv) On 20 August 2021, Cockerill J ordered that AVC 'forthwith upon the arrival of [OCM Kama's] duly authorised representatives and/or surveyors, allow such representatives and/or surveyors access to carry out a survey of the Vessel and ascertain the state of the Vessel's maintenance'. When Mr Mangos and Captain Kolosioulis arrived at the vessel on 28 August 2021, they were obstructed by the Master of the 'Rival', who, I infer, was acting on the Defendants' instructions, and were ordered to leave by Mr Mallah, who again was acting for the Defendants. Mr Dunning described the effect of this as 'trivial' because Mr Mangos and Captain Kolosioulis conducted an inspection between 29 and 31 August 2021, but that does not excuse breach of the Court's order.

(v) AVC and Oryx did not discontinue the proceedings for precautionary seizure of the 'Amethyst' in the Courts of Sharjah in breach of their undertaking to Foxton J. On the contrary, on 6 October 2021 they served the Claimants with a court document dated 30 September 2021 by way of an appeal against the refusal of their application by the Court of First Instance.

159. Except with regard to the delay in switching on the AISs, where Mr Chiotelis offered the rather limp excuse of his holiday, the Defendants have not provided any credible explanation for the breaches, or offered any apology for them.

160. Further, the Defendants, as I conclude, provided misleading and untruthful information to the Court in the course of the interlocutory proceedings:

(i) In his witness statement of 24 August 2021, Mr Chiotelis said that the 'Amethyst' was under orders to load cargo at Ruwais or Sohar. I cannot accept that statement in view of Captain Subaan, as he told Mr Mangos, knowing nothing of such orders. I also observe that the evidence of Mr Chiotelis was misleading in that he said that the sub-charterparty of the 'Amethyst' gave the option of a five months extension, without referring to Addendum No 2, but that that might have been an unintended error, and I attach no weight to it.

(ii) The complaint about the evidence that the 'Amethyst' was under orders is aggravated because on 24 September 2021, in response to the Claimants'' criticisms of it, Andrew Baker J gave the opportunity for corrective witness statements to be

> served. The evidence was not corrected, nor were the criticisms answered.
>
> (iii) Andrew Baker J was told on 24 September 2021 that the 'Courage' had drifted into Syrian waters due to weather conditions, and this account was repeated in the affidavit of Mr Chiotelis of 27 September 2021, on the basis of information, he said, that he was given by Captain Khalil. I reject that account as untruthful."

35. The judge next recorded that, as I have already noted, the charterers had presented their case for relief from forfeiture on the basis that Mr Mallah no longer had any proprietary interest in or association with them. As to this, the judge said:

> "161. … I have rejected the Defendants' contention and have concluded that the beneficial interest in the Defendants was not transferred to the four buyers. The Defendants cannot have advanced their case about the beneficial ownership as a result of some misunderstanding: it was a deliberate attempt to mislead the Court."

36. In the light of this lengthy catalogue of defaults on the part of the charterers, taken together with what the judge described as "other justified criticisms" of their conduct, the judge concluded, applying *Royal Bank of Scotland Plc v Highland Financial Partners LP* [2013] EWCA Civ 328 and *Freifeld v West Kensington Court Ltd* [2015] EWCA Civ 806, that the charterers were barred from claiming the equitable remedy of relief against forfeiture.

The judge's approach to relief against forfeiture on the merits

37. That conclusion would have been sufficient to dismiss the charterers' counterclaim for relief, but the judge went on to consider the counterclaim on its merits, addressing in turn each of the four essential points of the charterers' case which I have set out at [30] above. As to these, the judge concluded, in summary, as follows.

38. The judge accepted the charterers' first point, that until Mr Mallah's listing there had been no difficulties in the performance of the charterparties.

39. He did not accept the second point, which was that Mr Mallah's name had been wrongly included on the SDN list. Instead he said that he was not in a position to make a finding about this one way or the other. But even if Mr Mallah's name had been wrongly included, the judge did not accept that the Events of Default involved no fault or culpability on the part of the charterers. On the contrary, the charterers were in breach of the charterparties as a result of (at least) their failure to maintain the insurance of the vessels.

40. The charterers' third point, that Mr Mallah was no longer a director or officer or the owner of the charterers, was rejected by the judge as a matter of fact. As already noted, he found that this case was not merely wrong, but had been advanced in a deliberate attempt to mislead the court.

41. Finally, the judge accepted that the charterers would be prejudiced if the charterparties were terminated and the vessels repossessed. They would lose their initial investments of some US $9.5 million together with the sums which they had paid as hire amounting to US $5.6 million (although this last point needs to be qualified to the extent that the charterers had benefited from the use of the vessels during the charter period up to the termination). But the judge did not accept that the owners would receive an unwarranted windfall as a result of terminating the charterparties and obtaining possession of the vessels.

42. This last point needs some explanation. The charterers relied on desktop valuations of the vessels showing that their value had increased to between US $11.55 million and US $15 million in the case of the Courage and between US $16.74 million and US $21.75 million in the case of the Amethyst. On the basis of these figures, the owners would be far better off with the vessels than with repayment of the outstanding amount of the funds which they had advanced to the charterers. But as the judge pointed out, these were only desktop valuations. There was evidence that the Courage had not been well maintained and had suffered problems with the main engine; and the charterers themselves had impeded access to the vessel to enable inspection to be carried out which would have revealed her true condition. So the true value was likely to be considerably less. Moreover, the vessel was under arrest in Syria, but the charterers had provided little information about those proceedings. In those circumstances the judge was not satisfied that the owners would receive a substantial windfall from taking possession of the Courage and selling her.

43. In the case of the Amethyst, there was evidence that the vessel was in a dangerous condition when inspected in late August 2021, which would have reduced her value to some extent (although the judge could not say by how much). But this vessel too was under arrest in Sharjah, facing a claim for US $12.9 million. This was, in effect, a potential encumbrance on the vessel, substantially reducing any sale value. The judge indicated that if the point had been critical, he would have invited further submissions about the value of the Amethyst.

44. As it was, however, the judge did not regard the sale value of the vessels to the owners as a critical point. Rather, the critical point was the effect of the US sanctions regime. The judge heard detailed evidence about the operation of that regime and concluded that it was impossible for the charterparties to be performed lawfully while Mr Mallah was a designated person. If relief from forfeiture were to be granted by restoring the charterparties, that would force the owners into a continuing contractual relationship with (and would require them to transfer the vessels to) a designated person. There would in those circumstances be serious consequences for the owners' "principals", who were "US persons" subject to the sanctions regime, together with a risk that the owners themselves would be designated as terrorists by the US authorities. Equally, if relief against forfeiture were to involve repayment by the owners of the charterers' payments towards acquisition of the vessels, that too would be viewed by the US authorities as a serious breach of sanctions so long as Mr Mallah remained a designated person.

45. That led the judge to consider the prospects of Mr Mallah obtaining a licence from OFAC to permit the parties to continue performance of the charterparties. He concluded that there was little prospect of this:

> "189. I therefore conclude that there is little prospect that the Claimants would be granted licences to permit them to give effect to an order for relief from forfeiture, and that, if I were to grant relief from forfeiture, any order would put the Claimants and US persons associated with them at risk of penalties under the sanctions regime if they complied with it. This is a powerful reason to refuse the Defendants' application for relief. …"

46. In addition, for the owners to continue doing business with Mr Mallah or entities associated with them while he is on the SDN list would be likely to damage their reputation with investors, banks and others with whom they do business.

47. The judge's final conclusion was that the effect of the US sanction regime which I have summarised was in itself sufficient to show that it would not be appropriate to grant relief from forfeiture, but he considered that this conclusion was reinforced by the charterers' conduct, both in their dishonest dealings with the owners before the litigation was brought and their conduct in the course of the litigation.

The charterers' submissions on appeal

48. Mr Berkley confirmed that the charterers did not challenge the judge's conclusions (1) that Mr Mallah continues to be the beneficial owner of the charterers and (2) that there is little prospect of OFAC granting a licence to permit continued performance of the charterparties. He submitted, nevertheless, that this was an overwhelming case for the grant of relief against forfeiture, despite the misconduct of the charterers, because of the "colossal windfall" which would accrue to the owners if they were permitted to retake possession of the vessels and the adverse consequences to the charterers if they lost the funds which they had invested in the vessels. Accordingly the judge's exercise of discretion was flawed.

Decision

49. In my judgment, and as Mr Robert Bright QC for the owners demonstrated in brief but powerful submissions, the judge's rejection of the charterers' dishonest case that Mr Mallah had ceased to be associated with them is fatal to the claim for relief against forfeiture. Mr Berkley simply had no answer to the points which the judge regarded as decisive, which I have summarised at [44] to [46] above. Although he suggested vaguely that "some arrangement" could have been worked out, this was wholly lacking in specifics and, in any event, was not the case presented to the judge.

50. The judge was right in my view to say that this was not a case in which relief against forfeiture was appropriate, for the decisive reasons which he gave. A new case, to the effect that there could be relief against forfeiture on the basis of some vague arrangement enabling performance to continue and payments to be made despite Mr Mallah's continuing designation as a terrorist is not open to the charterers on appeal but, in any event, has not been made good.

51. Moreover, the submission that refusal of relief against forfeiture would provide the owners with a "colossal windfall" runs counter to the judge's finding of fact in the case of the Courage and the considerable doubt as to this point in the case of the Amethyst.

I agree with the judge, however, that it is unnecessary for this question to be definitively resolved.

52. For these short reasons, the appeal on the relief against forfeiture issue must be dismissed. It is therefore unnecessary to say anything further on the question whether the charterers' misconduct in itself debarred them from seeking such relief.

Disposal

53. I would dismiss the appeal.

Lord Justice Newey

54. I agree.

Lord Justice Underhill

55. I also agree.